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Fragmented Lives: Disability Discrimination and the Role of "Environment-Framing"

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Abstract

This Article presents a novel theory that courts undermine the purpose of the Americans with Disabilities Act (ADA) by implicitly embracing environment-frames that disfavor disability protections. Courts employ environment-frames at two stages of judicial analysis under the Act: the disability eligibility and remedy stages. In determining whether a plaintiff is in the statutorily protected class, courts typically use a broad environment-frame to assess limitation of a "major life activity." The larger the environment-frame, the more likely a court will view an individual as able to perform a major life activity in some portion of her environment and deny her protected class status. By contrast, in the remedy context courts use narrow environment-frames. The smaller the environment-frame (e.g., a cubicle workspace rather than an office building), the greater the likelihood a court will perceive an individual as functional and deny her reasonable accommodation or other modification. Environment-frames thus fragment the human experience of disability, by creating a disconnection between the lived and the legally recognized aspects of disability. The ADA Amendments Act of 2008 (AAA), fails to address these problems. The AAA broadens the definition of disability, but

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it does not examine or change the environments in which courts assess an individual's ability to function.

I propose a two-part solution to address the problems of environment-framing. First, courts must adopt broad environment-frames for both eligibility and remedy purposes. To determine eligibility, courts should assess individuals with functional impairments in a broad environment that includes workplace, home, and other environments in the civic and social realms. Similarly, individuals requesting accommodation or other modification should have their claims assessed within a broad environment that captures the nature of what they are trying to access, e.g., a place of employment rather than an office space. Second, courts must interpret an individual's ability to function in a more holistic or complete manner by gaining a better understanding of the effects of impairment throughout a broad environment. To ensure that the ability to function in some portion of a broad environment does not undermine disability status, I suggest a method of assessment similar to the one employed in Social Security disability benefits cases. Despite the Social Security Act's relatively restrictive definition of disability, courts employ a more favorable assessment of a broad environment that does not limit eligibility for benefits in most cases. A holistic view of functioning within a broad environment would also afford more meaningful reasonable accommodation or other modification.

Table of Contents

I. Introduction

The Americans with Disabilities Act of 1990 (ADA)[1] prohibits disability discrimination as a matter of civil right for those who qualify as disabled.[2] For almost two decades after the passage of the ADA, membership in the disability protected class was restricted by U.S. Supreme Court jurisprudence.[3] The Court narrowly interpreted two components of

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1. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 [hereinafter ADA] (providing protection against discrimination for individuals with disabilities).

2. *See id.* § 12101 (mandating the "elimination of discrimination against individuals with disabilities").

3. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 201 (2002) (finding that a factory worker who could not perform "'repetitive work with hands and arms extended at or above shoulder levels for extended periods of time'" but who was able to complete a number of household tasks may not be "substantially limited" in the major life activity of performing manual tasks (quoting Toyota Motor Mfg., Ky., Inc. v. Williams, 224 F.3d 840,

the disability threshold test, namely, whether a physical or mental impairment "substantially limits"[4] a "major life activity."[5] In 2008, Congress passed the ADA Amendments Act (AAA),[6] which seeks to broaden the class of individuals protected under the ADA.[7] The Act lowers the burden for proving a "substantial limitation,"[8] broadens the concept of "major life activities,"[9] and assesses an individual's impairment before the benefits of drugs, assistive devices, or other mitigation.[10]

While the AAA increases protection for individuals with disabilities by broadening eligibility for the protected class, it does not address the relevant environment in which to assess impairments.[11] Judicial construction of an unfavorable environment may undermine protections.[12] For example, if an assembly line employee with a functional limitation affecting her work is assessed for her ability to perform manual tasks at both home and work, she may be able to function in some portion of her

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843 (6th Cir. 2000))); *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 492–93 (1999) (finding that twin sister pilots with severe myopia were not "substantially limited" in any major life activity or "regarded as" so limited in the major life activity of working); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999) (finding that a truck driver with monocular vision was not "substantially limited" in the major life activity of seeing); Murphy v. UPS, 527 U.S. 516, 521 (1999) (finding that a mechanic with severe hypertension was not "substantially limited" in any major life activity or "regarded as" so limited in the major life activity of working).

4. *See Toyota Motor Mfg.*, 534 U.S. at 198 ("[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.").

5. *See id.* at 197 ("'Major life activities' . . . refers to those activities that are of central importance to daily life.").

6. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553 (codified at 42 U.S.C. §§ 12101–12213 (2006)) [hereinafter AAA] (restoring the "intent and protections" of the ADA).

7. *See id.* § 2(b)(1), 122 Stat. at 3554 (describing one of the purposes of the AAA as "reinstating a broad scope of protection" under the ADA).

8. *See id.* § 2(b)(4)–(6), 122 Stat. at 3554 (noting Supreme Court decisions restricting eligibility for disability protections under the ADA).

9. *See id.* § 4(a), 122 Stat. at 3555–56 (providing examples of "major life activities").

10. *See id.* (assessing impairment without considering the effects of mitigating measures). The AAA does not address remedies for disability discrimination or the nature of remedies—areas of disability rights analysis that will likely receive greater attention as a larger number of individuals qualify as disabled under the ADA.

11. *See id.* (amending the definition of "disabled" but not addressing the issue of the environment in which disability is to be assessed).

12. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 201 (2002) (considering a home and work environment for a workplace discrimination claim).

home environment and not be considered disabled.[13] If she is assessed only in her workplace environment, however, she may be viewed as disabled. Broad understanding of "substantially limits" and "major life activities" cannot overcome this issue of environment selection. Thus, no matter how expansive the definition of "disability" is under the AAA,[14] individuals may be assessed in an environment that disfavors or denies them protected class membership.

Courts also use unfavorable environments in the remedy context, which the AAA does not address. At this stage of disability analysis, courts assess individuals in narrow environments, often denying accommodation or other modification.[15] In this situation, an individual who is viewed as able to function in a portion of her environment, such as an office cubicle, may not receive accommodation to access other areas of the workplace, like break or copy rooms.

Thus, the environments in which the effects of impairments are assessed for purposes of disability protections are significant because they determine judicial outcomes. My analysis of federal case law reveals that the environments used by most courts limit disability protections at two discrete stages: the disability threshold (eligibility) and remedy stages. Under the disability threshold test, courts typically assume a broad environment-frame, and an individual who is able to function in some portion of her environment is not considered disabled.[16] When determining whether a plaintiff with a disability is entitled to a remedy, however, courts adopt a narrow environment-frame that limits or denies accommodation or other modification.[17] Thus, at both ends of judicial analysis—eligibility for the protected class and remedy—tacit judicial framing undercuts disability civil rights protections. This fragments the human experience of living with disability, as one's actual experience differs from the legally recognized one.[18] Courts exclude from the protected class individuals with

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13. These are the basic facts of *Toyota*. *Id.* While the AAA rejects several aspects of *Toyota*, it does not directly address the environment-frame to be assessed. *Infra* note 55 and accompanying text. The AAA clarifies that an individual needs to have a substantial limitation in only one major life activity, but does not speak to the environment in which to assess it. AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2006)).

14. *See* AAA § 4(a), 122 Stat. at 3555–56 (noting that the definition of disability should be "construed in favor of broad coverage").

15. *Infra* Part III.

16. *Infra* Part II.

17. *Infra* Part III.

18. I develop my theory of fragmentation and discuss its implications for individuals

impairments who identify as disabled and deny accommodation or other modification to individuals with impairments who request it to function. It is worth emphasizing that courts could choose a large or small environment for disability analysis, but instead they frame environments broadly at one stage and narrowly at the other, resulting in the denial of most claims.

The U.S. Supreme Court and lower federal courts have not addressed directly the relevant environments for assessing disability eligibility or remedy. Since the passage of the ADA, courts have assessed disability and remedy within environments determined on an ad hoc basis.[19] Courts have not discussed why environments are framed in certain ways, and have framed environments inconsistently.[20]

This Article is the first to develop a theory of "environment-framing" in disability law and to discuss the importance of environment-frames for disability protections.[21] I use "environment-frames" to mean the physical spaces in which individuals are assessed for legal protection.[22]

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with impairments in Ani B. Satz, *Overcoming Fragmentation in Disability and Health Law*, 60 EMORY L.J. (forthcoming 2011) [hereinafter *Overcoming Fragmentation*]. "Environment-framing" is discussed as "micro-level fragmentation" in that article, as it occurs at the level of judicial interpretation of statutes—rather than as a result of plain language of laws and regulations—which I argue results in "macro-level fragmentation." *Id.*

19. *See infra* Parts II and III (showing how courts have utilized environment-frames in disability cases).

20. *See infra* Parts II and III (showing the varying ways in which courts have utilized environment-frames).

21. *See infra* Parts II and III (discussing environment-framing in relation to establishing disability and determining remedy).

22. The term "framing" is used by Mark Kelman to discuss temporal boundaries for viewing criminal conduct and by Daryl Levinson to define transactions in constitutional law. *See generally* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002). Levinson argues that frames in constitutional law should not "creat[e] or negat[e] individualized harm, but instead . . . direct judicial attention to the types and patterns of government behavior that are significant for purposes of implementing particular constitutional norms." *Id.* at 1317. My use of "frame" is only loosely related to either Kelman's or Levinson's construction. While I use "frame" to mean a boundary, my concept differs in nature and scope. I am concerned only with physical spaces and individual (though holistic) assessment.

"Frames" are also used in the social sciences—including computer science, environmental science, and behavioral economics—to discuss boundaries. I do not intend to invoke those meanings in this Article, though interesting insights might be gained from interdisciplinary work on frames. As Cass Sunstein and Richard Thaler argue in *Nudge*, for example, studies in behavioral economics indicate our choices are affected by subtle persuasion or "choice architecture" within our environment. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). The effect of this, if any, on lawyering strategy or legal outcomes might

Constructing a frame broadly may allow for a holistic or more complete consideration of an individual's functional capacities, though functioning in any part of a broad environment could be viewed as reason to disallow a disability claim. Conversely, a narrow environment-frame provides a snapshot view of an individual's ability to function and may not capture the degree of a functional impairment or the extent to which accommodation or other modification is needed.

After developing a theory of environment-framing,[23] this Article offers a two-part solution to address the problems of such framing.[24] Both of my proposals entail a change in judicial construction of the ADA, rather than further amendment to the statute.[25] First, I suggest that courts should use broad environment-frames for both eligibility and remedy purposes. Courts should assess an individual with functional impairments in a broad environment that includes workplace, home, and other relevant environments in the civic and social realms. At the eligibility stage, this will entail the continued use of a broad frame, though, as I explain below, a change in judicial interpretation of that frame. At the remedy stage, this will require courts to shift from a narrow to a broad environment-frame.

Second, courts should interpret an individual's ability to function in a more holistic or complete manner by gaining a better understanding of the effects of impairment throughout a broad environment. While most courts currently employ a broad environment-frame for disability eligibility purposes under the ADA, they assess that environment in a manner that results in unwarranted conclusions about an individual's functional impairments. Courts currently view an individual's ability to function in a portion of her life as almost dispositive evidence against disability.[26] Such evidence of functioning is relevant to, but must not be determinative of, eligibility for the protected class.[27] While the AAA broadens the definition of disability and specifies that an individual must have a substantial limitation of only one major life activity, it does not directly address the relevant environment in which to assess the effects of impairment or the method for doing so.[28] To ensure that the ability to function in some

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be an area for future work.

23. *Infra* Parts II and III.
24. *Infra* Part V.
25. *Infra* Part V.
26. *Infra* Part II.
27. *Infra* Part V.
28. *Infra* Part IV.

portion of a broad environment does not undermine disability status, I suggest a method of assessment similar to the one employed in Social Security disability benefits cases.[29] Despite the Social Security Act's relatively restrictive definition of disability, courts employ a more favorable assessment of a broad environment that does not limit eligibility for benefits in most cases.[30] Similarly, at the remedy stage, claims for accommodation or other modification should be considered within an environment broad enough to afford meaningful access.

This Article is divided into five parts following the Introduction. Part II explores the role of environment-framing in federal disability protected class litigation. I argue that the broader the environment-frame used, the less likely an individual will be deemed eligible for disability protections. This Part focuses on litigation addressing "substantial limitation of a major life activity."[31] I explore the cases that pertain to the major life activity of "working" in detail, since they serve as an excellent example of the spectrum of environment-frames adopted by federal courts determining eligibility. Part III discusses environment-framing and remedy. The narrower the environment-frame chosen in this context, the less likely an individual will receive an accommodation or other modification. In this Part, I focus on litigation about prison and jail modification because it provides perhaps the best example of the many ways in which environments may be framed for remedy purposes, even within a finite, clearly defined space. Part IV discusses the ADA Amendments Act of 2008,[32] its potential weaknesses for addressing environment-framing, and the possibility that constructing environment-frames in a certain manner could undermine the Act's purpose to expand protected class membership. Part V explores the holistic, aggregative method of assessing disability in Social Security benefits cases as a means to interpret environment-frames. The Social Security Administration and reviewing courts assess individuals' functioning across the environments in which they move, rather than in discrete situations.[33] Unlike in the ADA context, however,

29. *Infra* Part V.A.

30. *Infra* Part V.A; *see also infra* note 303 (citing *Grizzle v. Macon Cnty.*, in which the individual qualified for Social Security benefits but not for disability benefits under the ADA).

31. *See* ADA, 42 U.S.C. § 12102(1)(A) (2006) (defining a disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual").

32. AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2006)).

33. *Infra* Part V.A.2.

functioning in a portion of a broad environment does not preclude disability status. I argue in this Part that courts should adopt a version of this method of environment-frame assessment for eligibility and remedy purposes under the ADA. Part VI concludes the Article by considering why courts currently frame environments as they do under the ADA, with trends toward broad frames for disability eligibility assessment and small frames for remedy analysis. I suggest that judicial use of these environment-frames may be the result of an unfunded civil rights mandate that provides for reasonable accommodation or other modification.[34]

II. Environment-Framing and Protected Class

Courts frame environments on an ad hoc basis when assessing individuals under established statutory tests for eligibility for disability protections.[35] The relevant tests include whether an individual has a "mental or physical impairment"[36] and also whether that impairment "substantially limits" a "major life activity."[37] Judicial trends indicate that the broader the environment-frame, the more likely an individual will be perceived as functional within it and denied membership in the disability class.[38] Typically this phenomenon is not an issue with respect to the "physical or mental impairment" component of the disability threshold test because most courts turn to perhaps the smallest environment-frame—one's own body—and recognize an impairment.[39] Judicial frames for "major life

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34. *See infra* note 233 (discussing "unfunded mandate").

35. *Infra* Part II.

36. ADA, 42 U.S.C. § 12102(1)(A).

37. *Id.* The ADA also covers individuals with "a record of such an impairment" or who are "regarded as having such an impairment." *Id.* § 12102(1)(B)–(C). Individuals with a record of a disability must prove that the record is for a disability that meets the requirements for actual disability. *Id.* Thus, the arguments about environment-framing in this Part apply to the "record" prong as well. After the AAA, "regarded as" plaintiffs are no longer required to meet the standard for actual disability, so environment-frames are less likely to play a role in "regarded as" cases. AAA § 4(a), 122 Stat. at 3555–56. Plaintiffs are not entitled to accommodation for "regarded as" discrimination under the AAA, however. *Id.*

38. *Infra* Part II.

39. For example, a "physical or mental impairment" has been an issue in only one of the over twenty U.S. Supreme Court cases decided under the ADA. *See* Bragdon v. Abbott, 524 U.S. 624, 637 (1998) (holding that HIV, which affects an individual's CD4+ [white cell] counts, constitutes a "physical impairment"). In *Bragdon*, the Court deemed the relevant environment-frame to be the cells within one's own body, and held that the plaintiff was disabled. *Id.*

activities," however, tend to be broad.[40] In many "major life activity" cases, large environment-frames preclude membership in the protected class.[41]

This Part is divided into two subparts. Subpart A provides a brief overview of trends in litigation about "major life activities."[42] Subpart B provides a detailed discussion of the use of environment-frames for the major life activity of "working."[43] I emphasize "working" because courts employ a spectrum of environments to assess limitation of this major life activity. Further, it is the only major life activity that the Equal Employment Opportunity Commission (EEOC) regulations directly acknowledge requires courts to determine environment-frames or "geographical areas."[44] Statutory and regulatory guidance regarding how to frame environments for "working" is lacking, however, and even in this context courts often do so in an ad hoc manner.[45]

A. "Major Life Activity"

The ADA covers a broad range of "major life activities," including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, [] working," and "major bodily functions."[46] Courts consider a "substantial limitation" of a major life activity by assessing an individual's ability to function within a particular physical space.[47] This space constitutes the "environment-frame"

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40. *Infra* Part II.

41. *Infra* Part II.

42. *See* ADA, 42 U.S.C. § 12102(1)(A) (2006) (requiring "substantial limitation" in "one or more major life activities" to establish disability).

43. AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2006)) (listing "working" as a major life activity).

44. *See* Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(j)(3)(ii)(A) (2010) (listing "geographical area" as a relevant consideration for the major life activity of "working"); *see also* ADA § 12102(1)(A) (defining disability as an impairment that "substantially limits" a major life activity).

45. *Infra* Part II.B.

46. ADA § 12102(2)(A). "Major bodily functions" are defined as "including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* § 12102(2)(B).

47. *See id.* § 12111(9) (discussing reasonable accommodation); §§ 12142, 12143(a), 12144, 12146, 12147, 12182(b)(2)(B)–(C), 12184(a)–(b) (discussing transportation); §§ 12182(a)–(b), 12183 (discussing public accommodation).

in which courts measure an individual's functional abilities. Except for some limited guidance with respect to the major life activity of "working," the ADA and supporting regulations do not address the environment-frames courts should use to assess an individual.[48] Courts also do not explicitly discuss environment-frames outside the major life activity of "working," though they expand or contract the frames implicitly used with respect to other major life activities to recognize or deny protected class status.[49]

Courts employ a spectrum of environment-frames. Cases in which narrow environment-frames are used typically involve frames of a workplace or a specific place of public service or accommodation.[50] Courts adopting broad frames most often consider an environment of both an individual's home and workplace, or society in general.[51] Of course one's home and workplace environments are also subject to interpretation, and these environments may be narrowly or broadly construed as well, which adds another layer of complexity to understanding environment-frames.[52]

An analysis of federal cases reveals two trends. First, typically the larger the environment-frame used by a court, the more likely an individual will be able to perform a major life activity in some portion of her environment and will be denied protected class status.[53] This may seem

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48. *See* 29 C.F.R § 1630.2(j)(3)(ii)(B)–(C) (stating the need to assess the "geographical area").

49. *See infra* Part IV (discussing how, despite the AAA, courts may continue to construct environment-frames to deny eligibility for disability protections).

50. *See, e.g.*, Adams v. Rice, 531 F.3d 936, 949 (D.C. Cir. 2008) (using an environment-frame of the workplace); Gribben v. UPS, 528 F.3d 1166, 1171 (9th Cir. 2008) (same); Chalfant v. Titan Distribution, Inc., 475 F.3d 982, 989 (8th Cir. 2007) (same).

51. *See, e.g.*, Simpson v. Ala. Dep't of Human Res., 311 F. App'x 264, 268 (11th Cir. 2009) (using an environment-frame of society); Fikes v. Wal-Mart, Inc., 322 F. App'x 882, 884 (11th Cir. 2009) (using an environment-frame of home and work); Lord v. Arizona, 286 F. App'x 364, 365–66 (9th Cir. 2008) (same); Gruener v. Ohio Cas. Ins. Co., 510 F.3d 661, 664–65 (6th Cir. 2008) (same); Singh v. George Wash. Univ. Sch. of Med. & Health Sci., 508 F.3d 1097, 1103–04 (D.C. Cir. 2007) (using an environment-frame of society); Rolland v. Potter, 492 F.3d 45, 49 (1st Cir. 2007) (using an environment-frame of home and work); Ashton v. AT&T Co., 225 F. App'x 61, 67 (3d Cir. 2007) (same); Hill v. Steven Motors, Inc., 97 F. App'x 267, 276 (10th Cir. 2004) (using an environment-frame of spaces in which plaintiff learned and moved).

52. *Infra* Part II.B.

53. *Compare* Fikes v. Wal-Mart, Inc., 322 F. App'x 882, 884 (11th Cir. 2009) (using a broad environment-frame and finding that plaintiff was not substantially limited in a major life activity), Lord v. Arizona, 286 F. App'x 364, 365–66 (9th Cir. 2008) (same), Gruener v. Ohio Cas. Ins. Co., 510 F3d 661, 664–65 (6th Cir. 2008) (same), Singh v. George Wash. Univ. Sch. of Med. & Health Sci., 508 F.3d 1097, 1103–04 (D.C. Cir. 2007) (same), Rolland v. Potter, 492 F.3d 45, 49 (1st Cir. 2007) (same), Ashton v. AT&T Co., 225 F. App'x 61, 67 (3d Cir. 2007) (same), *and* Hill v. Steven Motors, Inc., 97 F. App'x 267, 276 (10th Cir.

counter-intuitive, since one might think that the broader the frame, the more likely one could find a substantial limitation of a major life activity somewhere in the environment. However, the cases reveal courts reach the opposite conclusion at the eligibility stage. The second trend is that few courts employ narrow frames at the eligibility stage. This may indicate that courts either view broad frames as better for assessing functional capacities (a proposition rejected in Part III), or that environment-framing plays a role in restricting protected class membership.

The most notable example of a court constructing an environment-frame broadly and finding that the plaintiff was not disabled is *Toyota Motor Manufacturing v. Williams*.[54] While the AAA overturns the test for "substantially limits" developed in *Toyota* and specifies that an individual needs to be substantially limited in only one major life activity, the Act does not speak to the environment-frame used in the case.[55] In *Toyota*, an individual with severe carpal tunnel syndrome who alleged limitation of the major life activity of "performing manual tasks" was assessed in both her home and workplace environments.[56] The U.S. Supreme Court overturned the lower court's partial grant of summary judgment for the plaintiff because the Court found that the plaintiff's ability to complete some vital household manual tasks raised a genuine issue of material fact about her disability status.[57] Numerous other federal decisions deny protected class status using the same environment-frame.[58] While the AAA lowers the

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2004) (same), *with* Adams v. Rice, 531 F.3d 936, 949 (D.C. Cir. 2008) (using a narrow environment-frame and finding that plaintiff was substantially impaired in a major life activity), Gribben v. UPS, 528 F.3d 1166, 1171 (9th Cir. 2008) (same), *and* Chalfant v. Titan Distribution, Inc., 475 F.3d 982, 989 (8th Cir. 2007) (same).

The proposed EEOC regulations seem to recognize the difficulty, though they extend beyond the statute: "In determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment." Regulations to Implement the Equal Employment Provisions of the ADA, 74 Fed. Reg. 48431, 48440 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. § 1630). The example provided involves a student with a learning disability who "has achieved a high level of academic success, such as graduating from college." *Id.* at 48442. The example continues, "[t]he determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment." *Id.*

54. *See* Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 200–02 (2002) (finding that a factory worker who could perform some household manual tasks may not be "substantially limited" in the major life activity of performing manual tasks).

55. AAA, Pub. L. No. 110-325, §§ 2(b)(4)–(5), 4(a), 122 Stat. 3553, 3554, 3555–56 (2008) (codified at 42 U.S.C. §§ 12101, 12102 (2006)).

56. *Toyota Motor Mfg.*, 534 U.S. at 200–02.

57. *Id.* at 200–03.

58. *See generally* Fikes v. Wal-Mart, Inc., No. 97-2897, 2009 U.S. App. LEXIS 7669

threshold for demonstrating a "substantial limitation," an individual may still be assessed in a broad environment and denied disability status if she is able to function in some portion of it. As Part IV discusses, litigation after the AAA indicates that the method for assessing broad environment-frames will not change.

Many disability eligibility cases involve the major life activity of "working." The next subpart provides a detailed examination of environment-framing in this area.

B. "Working" and Geography

The major life activity of "working"[59] is the one area where courts have acknowledged the need to frame an environment for disability analysis, though little agreement exists about how to do so. As of this writing, only one case involving the major life activity of "working" has been decided directly under the AAA, and the court did not discuss the requirements for establishing limitation of the major life activity.[60] Prior to the AAA, EEOC regulations stated that to be "substantially limited" in "working," an individual was required to demonstrate that her impairment prevented her from participating in a "class of jobs or broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."[61] A "class of jobs" was "the number and types

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(11th Cir. Apr. 10, 2009) (using an environment-frame of home and work); Lord v. Arizona, 286 F. App'x 364 (9th Cir. 2008) (same); Lloyd v. Wash. & Jefferson Coll., 288 F. App'x 786 (3d Cir. 2008) (same); Gruener v. Ohio Cas. Ins. Co., 510 F.3d 661 (6th Cir. 2008) (same); Berry v. T-Mobile USA, Inc., 490 F.3d 1211 (10th Cir. 2007) (same); Rolland v. Potter, 492 F.3d 45 (1st Cir. 2007) (same); Ashton v. AT&T Co., 225 F. App'x 61 (3d Cir. 2007) (same); Carruthers v. BSA Adver., Inc., 357 F.3d 1213 (11th Cir. 2004) (same).

59. The AAA lists "working" as a major life activity. AAA § 4(a), 122 Stat. at 3555–56. While the Supreme Court has not recognized "working" as a major life activity, it was widely viewed as a major life activity by the lower federal courts. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 491–92 (1999) ("Because the parties accept that the term 'major life activities' includes working, we do not determine the validity of the cited regulations.").

60. *See* Wurzel v. Whirlpool Corp., No. 3:09CV498, 2010 U.S. Dist. LEXIS 36635, at *20 (N.D. Ohio Apr. 14, 2010) (involving an individual who was "regarded as" disabled). Since after the AAA it is no longer necessary for a "regarded as" plaintiff to show a perception of a substantial limitation of a major life activity, the court in *Wurzel* did not discuss the degree of plaintiff's limitation in "working."

61. Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(j)(3)(i) (2010); *see also* Fournier v. Payco Foods Corp., 611 F. Supp. 2d 120, 131 (D.P.R. 2009) (requiring a "multi-level analysis, starting with the skills of plaintiff, and moving to the nature of the jobs [he] was prevented from performing as well as those [he] was not").

of jobs utilizing similar training, knowledge, skills or abilities, within [the employee's] geographical area."[62] A "broad range of jobs" was "the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within [the employee's] geographical area."[63] The "geographical area" was viewed as that "to which the individual has reasonable access."[64] Lack of further statutory or regulatory guidance about how to frame the relevant geographic environment resulted in courts utilizing a range of environments, from a specific department of a company to any job in the national economy.

Cases indicate that typically the broader the environment-frame, the less likely an individual will be recognized as impaired in the major life activity of "working."[65] This is because one will be perceived as able to work in some portion of the designated environment, and thus as not disabled. Further, a broad environment-frame poses a high evidentiary burden for plaintiffs who may not have documentation of limitations beyond a particular workplace. Exceptions to broad frames limiting eligibility under the major life activity of "working" only arise in cases of egregious employer conduct.[66]

This Subpart discusses the various environments adopted by courts with respect to "class of jobs" and "broad range of jobs." While some courts address geography more directly than others, generally the broader the characterization of employment, the broader the environment-frame, as more areas within the geographic region will offer employment opportunities. For "class of jobs," courts adopt environment-frames encompassing an employment field or profession and jobs containing certain characteristics; the latter category may overlap with more than one employment field or profession. Environment-frames for "broad range of jobs" include jobs of a firm at a particular location or of a firm in all locations. Within each subcategory of "class of jobs" and "broad range of jobs," environment-frames may also vary.

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62. 29 C.F.R. § 1630.2(j)(3)(ii)(B).

63. *Id.* § 1630.2(j)(3)(ii)(C).

64. *Id.* § 1630.2(j)(3)(ii)(A).

65. *See infra* notes 82–103, 109–17, 135–51 and accompanying text (discussing various cases where courts framed work environments broadly and denied individuals disability status).

66. One might also expect exceptions where an employee would be disabled in almost any context, or when the court merges disability and accommodation analysis (see *infra* note 167), but the cases do not demonstrate this.

This Subpart will not address the narrowest possible environment-frame for "class of jobs" or "broad range of jobs," i.e., a particular job at a specific workplace.[67] In *Sutton v. United Air Lines, Inc.*,[68] the U.S. Supreme Court explicitly rejected such a narrow construction, invoking the EEOC regulations prohibiting "working" from being construed as a "single, particular job."[69] I examine the potential impact of the AAA on the major life activity of "working" in Part IV.A.2.

1. "Class of Jobs"

Environment-frames for "class of jobs" may be built around employment fields or professions, or jobs with certain characteristics that may span more than one employment field or profession. So long as an individual demonstrates a substantial limitation in performing more than a particular job at a specific company, the environments assessed may vary in size.[70] This Section demonstrates that the broader the environment considered for "class of jobs," the more difficult it is for plaintiffs to prove limitation in the major life activity of "working." Plaintiffs experience difficulty demonstrating disability, once the environment considered extends beyond the immediate workplace.

Most of the cases in this Section discuss individuals who are "regarded as" (perceived as) disabled in a "class of jobs."[71] Prior to the AAA, the

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67. This environment-frame creates the lowest evidentiary burden for a plaintiff trying to prove a limitation of the major life activity of "working," given the small environment and the employee's demonstrated difficulty functioning within the workplace.

68. *See generally* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

69. Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(j)(3)(i) (2010); *see Sutton*, 527 U.S. at 491–93 (stating it is insufficient to be precluded from "one type of job, a specialized job, or a particular job of choice"); *see also* Dillon v. Mountain Coal Co., 569 F.3d 1215, 1220 (10th Cir. 2009) (holding that an employee is not "regarded as" disabled because his employer may have perceived him as unable to work a job at a particular mine); E.E.O.C. v. Schneider Nat'l, Inc., 481 F.3d 507, 512 (7th Cir. 2007) (holding that an employee was not "regarded as" disabled by an employer that "perceived him as unfit for a particularly dangerous truck-driving position"); Harris v. Proviso Area for Exceptional Children, 581 F. Supp. 2d 942, 955 (N.D. Ill. 2008) (holding that a teacher was not limited in her ability to work because she failed to offer evidence that she was limited in other education positions in Chicago).

70. *Sutton*, 527 U.S. at 491–93; Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(j)(3)(ii)(B)–(C) (2010).

71. *See* ADA, 42 U.S.C. § 12102(2) (2006) ("The term 'disability' [includes], with respect to an individual—being regarded as having . . . an impairment that substantially limits one or more major life activities.").

evidentiary burden for individuals establishing an actual disability and a perceived one was the same: An individual asserting a "regarded as" claim was required to demonstrate that her perceived impairment, if actual, would "substantially limit" her in a major life activity.[72] The AAA eliminates the need for plaintiffs to show a substantial limitation of a major life activity for a perceived impairment; it also restricts reasonable accommodation to actual disability claims.[73] As a result of eliminating accommodation for "regarded as" plaintiffs, in the future most major life activity of "working" claims will likely be brought as actual rather than "regarded as" disability actions. Arguably courts will continue to turn to the pre-AAA "regarded as" cases discussed below for guidance, however, because they comprise the bulk of the "class of jobs" cases and utilize the same standard for "substantial limitation" as actual disability cases.

a. Employment Field or Profession

Courts consider a number of employment fields[74] and professions to be "classes of jobs." Both narrow and broad environment-frames are used to describe these jobs. Generally, the narrower the frame, the easier it is for a plaintiff to establish a limitation in the major life activity of "working."

Narrow environment-frames for employment fields or professions result in plaintiffs being considered part of the protected class. In *Morris v. Mayor of Baltimore*,[75] the court constructed the environment-frame for the "class of jobs" for a firefighter as jobs within a particular fire department.[76] The court held that the plaintiff was "regarded as" being precluded from various jobs within the department because of knee, wrist, and ankle

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72. *Id.* § 12102(2)(C).

73. AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2006)). A plaintiff may still obtain an order to reinstate employment, provide back pay, or cease discriminatory conduct.

74. The U.S. Supreme Court has recognized "mechanics" as a "class of jobs." *See* Murphy v. UPS, 527 U.S. 516, 524–25 (1999) (holding that plaintiff failed to demonstrate he was unable to perform a "class of jobs" because he could perform different mechanic jobs); *see also* EEOC v. Daimler Chrysler Corp., 111 F. App'x 394, 402–03 (6th Cir. 2004) (assuming without deciding "mechanics" constituted a "class of jobs"); Broussard v. Univ. of Cal., at Berkeley, 192 F.3d 1252, 1259 (9th Cir. 1999) (recognizing "animal care" as a "class of jobs"); McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369, 370 (6th Cir. 1997) (recognizing "manufacturing" as a "class of jobs"); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995) (recognizing "welding" as a "class of jobs").

75. *See generally* Morris v. Mayor of Balt., 437 F. Supp. 2d 508 (D. Md. 2006).

76. *Id.* at 515–16.

injuries.[77] In reaching its holding, the court reasoned that the "[p]laintiff's job expectations and training solely revolve around his career with a specific fire department. Were plaintiff to seek a different job at this stage in his career, he would be forced to 'alter his career path and/or to once again start at the bottom of a ladder.'"[78] Similarly, in *Howell v. New Haven Board of Education*,[79] the court denied summary judgment to the school board on a "regarded as" claim, after the district transferred a teacher with diabetes and depression to another school with a twenty-five percent pay reduction.[80] While the court did not frame the relevant environment for the "class of jobs" of teaching as a single school, the court focused on the teacher's abilities to perform his job within his original school, expressing concern over the involuntary nature of the transfer to the less preferable teaching post outside that school.[81]

Broader environment-frames for "class of jobs" within employment fields or professions typically lead to a finding of no substantial limitation in the major life activity of "working." In *Sutton v. United Air Lines, Inc.*, the U.S. Supreme Court found that twin sisters with severe myopia were not "regarded as" substantially limited in working as pilots, once their occupation was viewed as including jobs outside the ones they applied for as "global pilots," such as regional airline pilots and flight instructors.[82] While the court did not discuss geography, the sisters' "class of jobs" was understood to include the locations of major airlines as well as regional airlines and flight schools.

Several other cases involving the aviation industry provide support for the thesis that current assessment of broad environment-frames undermines eligibility for disability protections. The Eleventh Circuit in *Witter v. Delta Airlines*,[83] held that the plaintiff pilot was not "regarded as" disabled after defining the relevant environment-frame as including both piloting and "non-piloting jobs . . . utilizing similar training, knowledge, skills or

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77. *Id.* at 514.

78. *Id.* (citing Huber v. Howard Cnty., 849 F. Supp. 407, 412 (D. Md. 1994), which held that a volunteer firefighter whose asthma prevented him from advancing his career was disabled under the Rehabilitation Act of 1973).

79. *See generally* Howell v. New Haven Bd. of Educ., 309 F. Supp. 2d 286 (D. Conn. 2004).

80. *See id.* at 291–92 (stating that the evidence could show that the school board transferred plaintiff because she was perceived as mentally disabled).

81. *Id.*

82. Sutton v. United Air Lines, Inc., 527 U.S. 471, 493 (1999).

83. *See generally* Witter v. Delta Air Lines, Inc., 138 F.3d 1366 (11th Cir. 1998).

abilities . . . in the Atlanta area."[84] Likewise, in *Carter v. Ridge*,[85] the Fifth Circuit defined the relevant environment-frame for a pilot as the "aviation field," consisting of piloting and non-piloting jobs in the area.[86] The court held that the plaintiff, who suffered from post-traumatic stress disorder (PTSD) when piloting "light piston driven" aircraft, was not disabled "in all jobs within the aviation field or from holding a large number of jobs in other categories of employment."[87] In *Duffett v. Lahood*,[88] the Second Circuit employed a broad environment-frame of all air traffic control jobs within the region and held that the plaintiff air traffic control officer may not have been "regarded as" disabled by his employer, even though his employer viewed him as unable to hold positions involving "live" air traffic.[89] The court did not explain, however, what a "non-live" air traffic control job might entail.

Lower courts have reached similar results with respect to other employment fields or professions. In *Milholland v. Sumner County Board of Education*,[90] the Sixth Circuit held that the plaintiff was not "regarded as" disabled as an education administrator when she was transferred to a teaching post at a high school in another city.[91] The court stated that "a teacher . . . is in the same class of jobs as an administrator," namely "educators."[92] In *Rohan v. Networks Presentations LLC*,[93] the Fourth Circuit held that the plaintiff was not "regarded as" disabled with respect to her ability to perform as an actress regionally and nationally, though she was unable to perform with the defendant touring theater company.[94]

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84. *Id. at* 1370–71 n.2.

85. *See generally* Carter v. Ridge, 255 F. App'x 826 (5th Cir. 2007).

86. *See id.* at 830 (involving a Rehabilitation Act claim decided under the definition of "disability" provided in the ADA).

87. *Id.*

88. *See generally* Duffett v. LaHood, 331 F. App'x 763 (2d Cir. 2009).

89. *See id.* at 765 (involving a Rehabilitation Act claim decided under the definition of "disability" provided in the ADA).

90. *See generally* Millholland v. Sumner Cnty. Bd. of Educ., 569 F.3d 562 (6th Cir. 2009).

91. *Id.* at 568. Millholland was transferred from an assistant principal position in Hendersonville, Tennessee, to a teaching position in Gallatin, Tennessee, over fifteen miles away. *Id.*

92. *Id.*; *see also id.* ("Administrators and teachers are both educators with similar training, knowledge, skills or abilities and thus are in the same class . . . ." (citations omitted)).

93. *See generally* Rohan v. Networks Presentations LLC, 375 F.3d 266 (4th Cir. 2004).

94. *Id.* at 278.

Rohan suffered from severe and chronic PTSD and depression caused by paternal sexual abuse and incest.[95] Her condition was so severe that she "act[ed] and fe[lt] as if the molestation [was] occurring at the present moment" when she saw someone who resembled her father or someone scolding a child.[96] Such episodes could and did occur during a performance.[97] The court held that Rohan was not "regarded as" substantially limited in the major life activity of "working" because her employer viewed her as capable of acting and singing, even though she was unable to tour with their theater group.[98] Similarly, the Sixth Circuit in *Bryson v. Regis Corp.*,[99] held that a plaintiff hairstylist was not substantially impaired in her ability to work within the cosmetology field, only from serving as a manager of a hair salon.[100]

At least one court has applied an environment-frame to include jobs available in an employment field on an entire island. The court in *Fournier v. Payco Foods Corp.*[101] held that the plaintiff, who was an ice cream delivery truck driver, was not impaired in a "class of jobs" because he failed to demonstrate that he was unable to perform delivery truck jobs in the territory of Puerto Rico.[102] Most courts have held that national environment-frames for jobs in an employment field or profession are too broad.[103]

An exception to a broad frame in an employment field or profession limiting plaintiff protections is the Tenth Circuit case, *Justice v. Crown Cork & Seal Co.*[104] In *Justice*, the plaintiff electrician developed vertigo

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95. *See id.* at 269 (noting Rohan's PTSD manifested itself in chronic "dissociative flashback episodes" accompanied by a variety of physical symptoms).

96. *Id.* at 269 n.1.

97. *See id.* at 269–70 (describing PTSD attacks during one show and multiple rehearsals over the course of several weeks).

98. *Id.* at 278. Rohan had worked for a non-touring company and was experiencing added stress while on the road. *Id.* at 269–70. Without any discussion of whether non-touring jobs were still available or whether they would enable Rohan to function as an actress, however, the Fourth Circuit held that she was not substantially limited in working as an actress. *Id.* at 278.

99. *See generally* Bryson v. Regis Corp., 498 F.3d 561 (6th Cir. 2007).

100. *Id.* at 567.

101. *See generally* Fournier v. Payco Foods Corp., 611 F. Supp. 2d 120 (D.P.R. 2009).

102. *Id.* at 131.

103. Webb v. Garelick Mfg. Co., 94 F.3d 484, 487 (8th Cir. 1996); Babb v. S.F. Newspaper Agency, 1996 U.S. Dist. LEXIS 21932, at *2 (N.D. Cal. Oct. 16, 1996).

104. *See generally* Justice v. Crown Cork & Seal Co., 527 F.3d 1080 (10th Cir. 2008). *Cf.* Contra De Paoli v. Abbott Labs., 140 F.3d 668, 673–74 (7th Cir. 1998) (holding that plaintiff was significantly impaired in her ability to conduct assembly line work in Chicago,

and balance issues after a stroke and was transferred to a janitorial job.[105] The court reversed summary judgment for the employer manufacturer on the ground that plaintiff's transfer could indicate that he was "regarded as" significantly restricted in his ability to perform any job in the electrical field.[106] In reaching a favorable outcome for the plaintiff, the court assumed the relevant environment to be regional or perhaps even national, encompassing any electrical job rather than only those jobs available at Crown.[107] One possible explanation for the different outcome in this case is the employer's discrimination was egregious. The court noted that the record lacked any medical evidence that the plaintiff, who had served the company for about ten years, could no longer perform as an electrician.[108]

b. Jobs with Certain Characteristics

Under the "jobs with certain characteristics" conception of "class of jobs," the work at stake may involve features—such as temperature conditions, social interaction, and heavy lifting—that cut across various employment fields or professions. As with other "classes of jobs," broad conceptions of "jobs with certain characteristics" often imply large environment-frames, even when geography is not specifically discussed. Plaintiff success varies when courts apply a broad environment-frame, though broad frames typically yield negative results for plaintiffs in this context as well. When courts use broad environment-frames, positive outcomes for plaintiffs may occur in cases involving significant employer misconduct.

In *Murphy v. United Parcel Service*,[109] the U.S. Supreme Court broadly defined "class of jobs" involving certain characteristics, holding that a mechanic with severe hypertension was not "regarded as" disabled when he was terminated, even though he was viewed as unable to safely test drive commercial vehicles and obtain Department of Transportation

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though she did not require an accommodation because her tendinitis and tenosynovitis prevented her from fulfilling the essential functions of her position).

105. *Justice*, 527 F.3d at 1088.

106. *See id.* (noting it was dangerous for plaintiff to be around electrical currents). The court also found that the defendant may have perceived the plaintiff as unable to perform a "broad range of jobs across various classes." *Id.* at 1091.

107. *See id.* at 1088, 1091 ("The Worland plant does not, of course, represent a microcosm of all possible jobs.").

108. *Id.* at 1082, 1088.

109. *See generally* Murphy v. UPS, 527 U.S. 516 (1999).

(DOT) certification.[110] Rather, the court argued, Murphy was otherwise "generally employable as a mechanic" and could seek employment elsewhere "as [a] diesel mechanic, automotive mechanic, gas-engine repairer [or] gas-welding equipment mechanic," all of which did not require DOT certification for commercial vehicles.[111]

Similarly, three circuits have implied the use of a broad environment-frame and denied disability protections in a "class of jobs" involving certain characteristics. In *Parker v. Port Authority of Allegheny County*,[112] the Third Circuit held that a plaintiff was not "regarded as" substantially limited in her ability to work because her employer did not feel she "was incapable of performing all jobs that involved any degree of stress, any type or amount of driving, and any type or degree of interaction with the public," only the "particular mix" of those factors involved in driving a bus.[113] The Tenth Circuit in *Nealey v. Water District Number One*,[114] found that an administrative assistant was not "regarded as" disabled when her employer transferred her to a less desirable full-time administrative position for which she received the same level of pay and benefits.[115] In *Boykin v. Honda Manufacturing*,[116] the Eleventh Circuit held that the plaintiff with emphysema was "fully capable of working anywhere that did not expose him to the heat, humidity, dust, and pace of the Honda manufacturing line and, therefore, [was] not disqualified from a class of jobs."[117]

The Eighth and First Circuits, however, have reached positive results for plaintiffs using a broad environment-frame. As in *Justice*, these cases involved egregious employer conduct. In *Chalfant v. Titan Distribution, Inc.*,[118] the Eight Circuit held that there was sufficient evidence to demonstrate that the defendant believed the plaintiff was restricted substantially in his ability to work in a class or range of jobs with medium-

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110. *Id.* at 524–25.

111. *Id.* Presumably after the AAA, Murphy could establish disability based on a substantial limitation of the major bodily function of circulation. AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2006)).

112. *See generally* Parker v. Port Auth. of Alleghany Cnty., 90 F. App'x 600 (3d Cir. 2004).

113. *Id.* at 603–05.

114. *See generally* Nealey v. Water Dist. No. 1., 324 F. App'x 744 (10th Cir. 2009).

115. *Id.* at 749.

116. *See generally* Boykin v. Honda Mfg. of Ala., 288 F. App'x 594 (11th Cir. 2008).

117. *See id.* at 597 (recognizing plaintiff was able to work two other jobs: hauling fertilizer and concrete).

118. *See generally* Chalfant v. Titan Distrib., Inc., 475 F. 3d 982 (8th Cir. 2007).

strength demands.[119] The court adopted a broad environment-frame, including all jobs within the region with those characteristics, which, according to a vocational expert in the case, encompassed more than seventy percent of the jobs in the Dictionary of Occupational Titles.[120] Chalfant had successfully performed the job for which he applied for over five years for a subsidiary of the company.[121] Further, despite employer Titan's statements, the position did not involve heavy lifting.[122] In addition, Chalfant was told he failed his physical examination without medical proof.[123] Similarly, in *Sensing v. Outback Steakhouse of Florida, LLC*,[124] the First Circuit employed a broad environment-frame in holding that a plaintiff was substantially limited in "her ability to work in a broad class of jobs that would have required her to be on her feet."[125] Sensing, who worked in the take-out section of the restaurant and had twice been employee of the month, was demoted to "light duty work" at half the pay and a third of the hours, after taking a day and a half approved leave for complications from multiple sclerosis.[126]

2. "Broad Range of Jobs"

An individual may also demonstrate a substantial limitation of the major life activity of "working" by proving an inability to perform "a broad range of jobs . . . within [the] geographical area."[127] "Broad range of jobs" may include jobs at a particular employer location or within a company with multiple locations. Similar to "class of jobs" cases, as the environment-frame becomes larger, plaintiffs' ability to establish a substantial limitation in "working" decreases.

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119. *Id.* at 989.

120. *Id.*

121. *Id.* at 986.

122. *Id.* at 989.

123. *Id.* at 987.

124. *See generally* Sensing v. Outback Steakhouse of Fla., LLC, 575 F.3d 145 (1st Cir. 2009).

125. *Id.* at 156.

126. *Id.* at 148–50. The court remanded on the issue of whether Sensing was constructively discharged. *Id.* at 159–60.

127. Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(j)(3)(ii)(C) (2010).

a. Jobs at a Particular Employer Location

Employment at a particular geographic location is the smallest environment-frame for "broad range of jobs." As with "class of jobs," plaintiffs are often considered part of the protected class when a court looks to jobs at a particular employer location. Even within the "particular employer location" category of "broad range of jobs," however, courts may construct narrow or broad frames. In cases where plaintiffs are not granted protected class status, courts frequently adopt a broad reading of available jobs within an employer location.

A number of courts have examined whether an employee is "regarded as" incapable of performing any job at a specific location for the defendant employer and thereby substantially limited in a "broad range of jobs." The Sixth and Tenth Circuits have recognized that failing to offer a plaintiff any job at a particular location may be evidence that the employer regards the plaintiff as disabled. In *Beery v. Associated Hygiene Products, LLC*,[128] the Sixth Circuit reversed summary judgment for the employer because a jury could find that the company was "mistaken in its belief that [claimant's] back condition would indefinitely prevent him from doing any available jobs at the warehouse."[129] In *Jones v. United Parcel Service, Inc.*,[130] the Tenth Circuit, finding for the defendant on unrelated grounds, recognized that "when an employer is hiring for a broad range of jobs in the relevant geographical area, its decision not to offer an employee one of a broad range of company jobs may be relevant evidence of its perception of that employee's abilities."[131] In *Jones*, the plaintiff, who was a package vehicle driver, was not offered another job within a particular location of U.P.S. after he injured his shoulder and two doctors assigned him permanent weight lifting restrictions.[132] Similarly, the Sixth Circuit held in *Burns v.*

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128. *See generally* Beery v. Associated Hygiene Prods., LLC, 243 F. App'x 129 (6th Cir. 2007).

129. *See id.* at 134 (analyzing the disability claim under the Ohio Civil Rights Act, which applies the same standards as the ADA). The court took a similar view in *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 443 (6th Cir. 2007), concluding that a reasonable jury could find that the defendant employer regarded the plaintiff as unable to perform any jobs in its facility due to her alleged dependency on pain killers. *Id.* Dow sent the plaintiff a letter stating that she was "unfit to return to work" and did not offer her another position within the facility. *Id.* at 453; *see also* Collins v. Yellow Freight Sys. Inc., 93 F. App'x 854, 861 (6th Cir. 2004) (holding that plaintiff with a back injury was "regarded as" disabled because he was perceived as unable to perform certain manual labor jobs).

130. *See generally* Jones v. UPS, 502 F.3d 1176 (10th Cir. 2007).

131. *Id.* at 1192.

132. *Id.* at 1181.

Coca-Cola Enterprises,[133] that the plaintiff product deliverer was substantially limited in "working" in a "broad range of jobs" because his back injury prevented him from performing at least fifty percent of the jobs available to him at the Knoxville bottling company.[134]

The Fifth and Seventh Circuits, however, have found for defendants after broadly constructing the range of jobs available at a particular location. In *Squibb v. Memorial Medical Center*,[135] the Seventh Circuit held that the plaintiff nurse, who was incapable of performing "patient care" nursing jobs, was not disabled because she failed to demonstrate that she was unable to perform "non-patient care" nursing jobs for her hospital employer.[136] Similarly, in *Moreno v. Brownlee*,[137] the Fifth Circuit held that the plaintiff with carpal tunnel syndrome was not substantially limited in performing jobs at an Army base, only the particular job of "target device servicer."[138] However, the Army then argued that it did not have a position at the base to which to reassign him that would avoid "repetitive, stressful work with his hands and wrists, and . . . lift[ing] objects weighing more than fifteen pounds."[139]

b. Jobs Within a Company

Where a company exists in more than one location, all jobs within the company throughout the various locations may serve as the environment-frame for a "broad range of jobs." The size of this type of environment-frame necessarily depends on the size of the employer and how employers view available jobs within the company, though the frame is usually relatively broad. When courts use this environment-frame, results are typically less favorable for plaintiffs than with a frame including a single location.

A number of circuits have held that plaintiffs are not disabled in the major life activity of "working" with respect to a "broad range of jobs"

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133. *See generally* Burns v. Coca-Cola Enter., 222 F.3d 247 (6th Cir. 2000).

134. *Id.* at 256. The court also held, however, that the plaintiff was not entitled to a remedy because he failed to follow the company's transfer-request policy in seeking his accommodation. *Id.*

135. *See generally* Squibb v. Mem'l Med. Ctr., 497 F.3d 775 (7th Cir. 2007).

136. *Id.* at 783.

137. *See generally* Moreno v. Brownlee, 85 F. App'x 23 (5th Cir. 2004).

138. *Id.* at 27–28.

139. *Id.* at 24.

within a company. For example, in the recent Eighth Circuit decision *McLain v. Anderson Corp.*,[140] the court held that the defendant did not regard the plaintiff truck driver as substantially limited in a broad range of jobs when he was unable to perform jobs regularly requiring unloading but could manage "run off" delivery jobs or obtain further training and qualification and assume an inter-state driving position.[141] The plaintiff could also perform non-driving jobs in the Logistics Department or Renewal Center, though no such jobs were available.[142] Likewise, in *Daugherty v. Sajar Plastics, Inc.*,[143] the Sixth Circuit held that the defendant did not regard the plaintiff, who used narcotics to manage pain, as unable to perform all maintenance jobs within the company, only those involving "dangerous machinery."[144] In *DePrisco v. Delta Air Lines, Inc.*,[145] the same court held that a reservation sales agent, whose vertigo impaired her job performance, could serve as a flight or Crown Room attendant.[146] Delta had openings for both posts within the company but chose not to hire the plaintiff.[147] The Fifth Circuit in *Windly v. Hightower Oil Co.*,[148] held that the plaintiff was not "regarded as" substantially limited in a "broad range of jobs" because her employer only viewed her as incapable of supervising some "particularly demanding" convenience stores, not convenience stores generally.[149] The plaintiff was not, however, offered an alternative work location.[150] Along similar lines, courts have held that while plaintiffs may be substantially limited in performing the duties of "police officer," they are not so limited in the "broad range of jobs" included in "law enforcement" within the police force.[151]

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140. *See generally* McLain v. Anderson Corp., 567 F.3d 956 (8th Cir. 2009).

141. *See id.* at 968 (analyzing the disability claim under the Minnesota Human Rights Act, which applies the same standards as the ADA). "'Run-off' deliveries . . . are unscheduled, smaller deliveries to retail stores of lumberyards." *Id.* at 959. An employee making run-off deliveries is on-call and must respond to jobs as they arise. *Id.* at 963.

142. *Id.* at 968.

143. *See generally* Daugherty v. Sajar Plastics, Inc., 544 F.3d 696 (6th Cir. 2008).

144. *See id.* at 706 (analyzing the disability claim under an Ohio Civil Rights Act, which applies the same standards as the ADA).

145. *See generally* DePrisco v. Delta Air Lines, Inc., 90 F. App'x 790 (6th Cir. 2004).

146. *Id.* at 794–95.

147. *Id.* at 793.

148. *See generally* Windly v. Hightower Oil Co., 91 F. App'x 330 (5th Cir. 2004).

149. *Id.* at 332–33.

150. *Id.* at 331.

151. *See, e.g.*, Epps v. City of Pine Lawn, 353 F.3d 588, 590–92 (8th Cir. 2003) (finding plaintiff could serve as a detective or elsewhere in the police department); Rossbach

Plaintiffs have recovered in only a couple of cases when the environment-frame of "jobs within a company" extended to more than one location. These cases involved plaintiffs with a significant limitation in the ability to perform a "broad range of jobs." In *Eshelman v. Agere Systems, Inc.*,[152] the Third Circuit found that a woman with chemotherapy-induced memory loss was "regarded as" disabled when she was not assigned to a job in another city in the state following corporate restructuring.[153] The Seventh Circuit in *Dalton v. Subaru-Isuzu Automotive, Inc.*,[154] held that a "rational trier of fact could reasonably find that the substantial percentage reductions [thirty-five to eighty-nine percent] in the broad range of jobs available to [the impaired "production associate"] plaintiffs [in Tippecanoe County, Indiana] . . . substantially limited them in the major life activity of working."[155]

3. Conclusion

The "working" cases support the thesis that generally the broader the environment-frame used for assessing "substantial limitation," the less likely a plaintiff will demonstrate the requisite limitation of a major life activity and be considered part of the protected class. Courts will instead view the plaintiff as being able to function in some portion of the broad environment and thus as not disabled.

These cases also indicate that the varying construction of environment-frames leads to inconsistent results for plaintiffs. For example, several courts have held that "police officer" is too narrow a field to constitute a "class of jobs" and have used instead "law enforcement" jobs as the environment for framing the ability to work.[156] However, other courts have held that a plaintiff's ADA claim may succeed by proving that an employer

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v. City of Miami, 371 F.3d 1354, 1360–61 (11th Cir. 2004) ("'[P]olice officer' is too narrow a range of jobs to constitute a 'class of jobs' as that term is defined in the EEOC regulations."); *cf.* Sheehan v. City of Gloucester, 321 F.3d 21, 25–26 (1st Cir. 2003) (noting plaintiff could serve as a security guard).

152. *See generally* Eshelman v. Agere Syst., Inc., 554 F.3d 426 (3d Cir. 2009).

153. *See id.* at 435–36 (analyzing the disability claims under the Pennsylvania Human Relations Act, which applies the same standards as the ADA).

154. *See generally* Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667 (7th Cir. 1998).

155. *Id.* at 676.

156. *See supra* note 151 (listing cases in which plaintiffs' inability to continue serving as police officers did not disqualify them from a "class of jobs" or a "broad range of jobs" within law enforcement).

viewed the claimant as substantially limited in the ability to work as a firefighter.[157] Such inconsistent use of environment-frames makes it difficult for plaintiffs to know what type of evidence they must offer in order to prevail on a major life activity of "working" claim.[158] The environment-frame chosen also significantly alters plaintiffs' evidentiary burden. One can assume that it is easier for plaintiffs to produce evidence that they are substantially limited in the ability to work in a narrow environment, which only considers their capability to perform a select number of jobs, than in a broad environment compassing many employment possibilities.

III. Environment-Framing and Remedy

Like the statutory test for disability eligibility, determining whether an individual is entitled to a remedy implies the need to define and assess the environment in which an individual is functioning. Courts look to workplaces,[159] transportation vehicles and facilities,[160] other places of public service,[161] and places of public accommodation[162] to determine whether alteration of physical spaces, or the activities occurring within these spaces, would improve access for individuals with disabilities. As in the eligibility context, courts define environment-frames for remedy on an ad hoc basis.[163] Unlike environment-frame analysis for eligibility, however, courts typically adopt narrow environment-frames when determining entitlement to remedy.[164] These narrow frames may limit or preclude a

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157. *See* Morris v. Mayor of Balt., 437 F. Supp. 2d 508, 515 (D. Md. 2006) (concluding that a firefighter who had served for thirty years in the same fire department could be impaired in a "class of jobs" due to the difficulty of seeking a job at another fire department at such a late stage in his career); *see also* Huber v. Howard Cnty., 849 F. Supp. 407, 412 (D. Md. 1994) (finding that "because Huber is disqualified from advancing the firefighter career for which he is well trained and in which he has an extensive background, his disability is substantially limiting as to being a career firefighter").

158. *See, e.g.*, Dillon v. Mountain Coal Co., 569 F.3d 1215, 1220 (10th Cir. 2009) (noting that plaintiff's claim failed because he did not describe other jobs in the area that fell within the class of mining jobs).

159. ADA, 42 U.S.C. § 12111(9) (2006).

160. *Id.* §§ 12142, 12143(a), 12144, 12146, 12147, 12182(b)(2)(B)–(C), 12184(a)–(b).

161. *Id.* §§ 12131–32.

162. *Id.* §§ 12182(a)–(b), 12183.

163. *Infra* Part III.A.–B.

164. *Infra* Part III.A.–B.

remedy.[165] Thus, at both ends of disability analysis—eligibility and remedy—courts use different environment-frames to limit protection under the ADA.

This Part addresses the role of environment-framing and remedy, specifically reasonable accommodation or other modification. Subpart A provides a brief overview of judicial trends for such injunctive relief. Cases indicate that narrow frames are often used, and they limit or undermine remedy. When broad frames are used, plaintiffs typically receive accommodation or other modification. Subpart B focuses on Title II and reasonable modification within prisons and jails. I chose to explore this context in detail because it demonstrates that, even within a clearly defined finite space, courts may frame environments in numerous ways and reach disparate outcomes.[166]

A. Reasonable Accommodation and Other Modification

Once an individual is deemed eligible for disability protections, courts must assess whether she is entitled to a remedy.[167] Under Title I, a plaintiff is entitled to reasonable accommodation in the workplace, including that necessary to fulfill the essential functions of her job.[168] Titles II and III require that a plaintiff receive structural or other modification to allow access to transportation, other public services, and places of public accommodation.[169] All requested accommodation or other modification is

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165. *Infra* Part III.A.–B.

166. Other spaces may also be clearly defined and finite, of course—such as some workspaces—though they may be more difficult to compare, as they are likely subject to greater variation.

167. For a discussion of the stages of disability analysis under the ADA, see Ani B. Satz, *A Jurisprudence of Dysfunction: On the Role of "Normal Species Functioning" in Disability Analysis*, 6 YALE J. HEALTH POL'Y L. & ETHICS 221, 248–50 (2006).

168. ADA, 42 U.S.C. § 12111(9) (2006).

> [R]easonable accommodation [includes]: (A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and (B) job restructuring, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations . . . .

Id. Accommodation supports equality of opportunity with respect to job applications, work performance (the ability to fulfill the essential functions of one's job), and the benefits and privileges of employment. Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. §§ 1630.2(o)(1), 1630.9 (2010).

169. ADA §§ 12131–32, 12142, 12143(a), 12144, 12146, 12147 (Title II); *id.*

subject to the affirmative defenses of "undue hardship"[170] and "direct threat."[171]

The case law indicates a couple of trends. Overall, the narrower the environment assessed, the less likely an individual will receive a desired accommodation or other modification.[172] This is because she will be

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§§ 12182(a)–(b), 12183, 12184(a)–(b) (Title III).

170. *See id.* § 12111(10) (defining "undue hardship" under Title I as "requiring significant difficulty or expense," measured by "the nature and cost of the accommodation" and the financial resources and impact of the accommodation on the facility making the accommodation as well as the covered entity, if different). The defense varies slightly for Titles II and III. *Infra* notes 284–86 and accompanying text.

171. *See* ADA § 12113(b) ("[A]n individual shall not pose a direct threat to the health and safety of other individuals in the workplace"); *see also* Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (holding that a "direct threat" is one that poses a "significant risk" to others based on "medical and other objective evidence"). The direct threat defense was extended to harm to self in *Chevron v. Echazabal*, 536 U.S. 73, 80 (2002).

172. *Compare* Shannon v. Postmaster Gen. of U.S. Postal Serv., 335 F. App'x 21, 24–36 (11th Cir. 2009) (considering an environment of a particular workplace and finding that no accommodation was required), Mobley v. Allstate Ins. Co., 531 F.3d 539, 546–57 (7th Cir. 2008) (same), Molski v. Foley Estates Vineyard, 521 F.3d 1043, 1050 (9th Cir. 2008) (considering an environment of the interior of a wine-tasting room but not the space leading to the room and finding that modification of the room, but not a ramp to the room, was required), Tucker v. Tennessee, 539 F.3d 526, 540–42 (6th Cir. 2008) (considering an environment of a single jail and finding that no modification was required), Norman v. Tex. Dep't of Crim. Justice, 293 F. App'x 285, 288 (5th Cir. 2008) (considering an environment of a single prison and finding that no modification was required), Brown v. City of Cleveland, 294 F. App'x 226, 232–34 (6th Cir. 2008) (considering an environment of a particular workplace and finding that no accommodation was required), Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1085–89 (11th Cir. 2007) (considering environments of a specific location of a police stop and a single police station and finding that no modification was required in either location), Ozlek v. Potter, 259 F. App'x 417, 420–21 (3d Cir. 2007) (considering an environment of a particular workplace and finding that no accommodation was required), *and* Garthright-Dietrich v. Atlanta Landmarks, Inc., 452 F.3d 1269, 1275 (11th Cir. 2006) (considering an environment of a particular theater and finding that no modification was required), *with* Simmons v. N.Y. City Transit Auth., 340 F. App'x 24, 27–28 (2d Cir. 2009) (considering an environment of all jobs within a company and finding that an accommodation was required), Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1043 (9th Cir. 2008) (considering an environment of Seven Eleven stores within 550 miles of plaintiff's residence and finding that plaintiff had standing to challenge access barriers), Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1268, 1274 (D.C. Cir. 2008) (considering all users of money, not only sighted individuals, and finding that modification was required), Miller v. Cal. Speedway Corp., 536 F.3d 1020, 1028 (9th Cir. 2008) (considering the spectator "line of sight" throughout the speedway rather than in designated areas and finding that modification was required), Schwarz v. City of Treasure Island, 544 F.3d 1201, 1226–28 (11th Cir. 2008) (considering the city of Treasure Island and finding that modification was required), Woodruff v. Sch. Bd. of Seminole Cnty., 304 F. App'x 795, 800 (11th Cir. 2008) (considering an entire school district and finding that accommodation may be required), Bacon v. City of Richmond, 475 F.3d 633, 639 (4th Cir. 2007) (same), *and* Woodruff v. Peters, 482 F.3d 521, 527–28 (D.C. Cir. 2007) (considering the workplace and home and

viewed as functional within a small, legally-protected area, such as a portion of a workplace or place of public accommodation.[173] In addition, courts often adopt narrow environment-frames for reasonable accommodation and other modification, and, in these cases, plaintiffs are usually denied a remedy.[174] Interestingly, following the adoption of the AAA, courts must use the narrowest frame—actually *no* frame—to assess

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finding that accommodation was required).

173. *See* Shannon v. Postmaster Gen. of the U.S. Postal Serv., 335 F. App'x 21, 24–26 (11th Cir. 2009) (considering a particular workplace); Mobley v. Allstate Ins. Co., 531 F.3d 539, 546–47 (7th Cir. 2008) (same); Molski v. Foley Estates Vineyard & Winery, LLC., 531 F.3d 1043, 1050 (9th Cir. 2008) (considering the interior of a wine-tasting room but not the space leading to the room); Tucker v. Tennessee, 539 F.3d 526, 540–42 (6th Cir. 2008) (considering a single jail); Norman v. Tex. Dep't of Crim. Justice, 293 F. App'x 285, 288 (5th Cir. 2008) (considering a single prison); Brown v. City of Cleveland, 294 F. App'x 226, 232–34 (6th Cir. 2008) (considering a particular workplace); Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1085–89 (11th Cir. 2007) (considering the specific location of a police stop and a single police station); Ozlek v. Potter, 259 F. App'x 417, 420–21 (3rd Cir. 2007) (considering a particular workplace); Garthright-Dietrich v. Atlanta Landmarks, Inc., 452 F.3d 1269, 1275 (11th Cir. 2006) (considering a particular theater).

174. *See* Shannon v. Postmaster Gen. of the U.S. Postal Serv., 335 F. App'x 21, 24–26 (11th Cir. 2009) (considering a particular workplace and finding no accommodation was required); Mobley v. Allstate Ins. Co., 531 F.3d 539, 546–57 (7th Cir. 2008) (same); Molski v. Foley Estates Vineyard & Winery, LLC., 531 F.3d 1043, 1050 (9th Cir. 2008) (considering the interior of a wine-tasting room and finding that modification of the room but not a ramp to the room was required); Tucker v. Tennessee, 539 F.3d 526, 540–42 (6th Cir. 2008) (considering a single jail and finding that no modification was required); Norman v. Tex. Dep't of Criminal Justice, 293 F. App'x 285, 288 (5th Cir. 2008) (considering a single prison and finding that no modification was required); Brown v. City of Cleveland, 294 F. App'x 226, 232–34 (6th Cir. 2008) (considering a particular workplace and finding that no accommodation was required); Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1085–89 (11th Cir. 2007) (considering the specific location of a police stop and a single police station and finding that no modification was required in either location); Ozlek v. Potter, 259 F. App'x 417, 420–21 (3d Cir. 2007) (considering a particular workplace and finding that no accommodation was required); Garthright-Dietrich v. Atlanta Landmarks, Inc., 452 F.3d 1269, 1275 (11th Cir. 2006) (considering a particular theater and finding that no modification was required).

Even in instances where a remedy is provided, the ADA does not require that a plaintiff receive an accommodation that facilitates a preferred mode of functioning, which arguably exacerbates the problem of obtaining a meaningful remedy. *See* ADA, 42 U.S.C. § 12111(10) (2006) (discussing "the" or "an," meaning "one" accommodation); *see also* Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630 app., 1630.9 (2010) ("[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations.").

individuals who are "regarded as" disabled[175] because they are no longer entitled to accommodation.[176]

The next Subpart explores in detail the effects of narrow environment-framing in the remedy context, using prisons and jails as examples.

B. Incarceration and the Finite Environment

Prisons and jails, covered under Title II of the ADA, provide a particularly good example of the effects of environment-framing on requested modification.[177] Such facilities constitute finite environments with substantial similarities, limiting the ways environment-frames may be drawn.[178] Even within the confined environments of prisons or jails, judicial construction of environment-frames for remedy purposes varies significantly.

This Part will examine the structural and non-structural modification required to access prison services, programs, and activities under Title II.[179]

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175. AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2006)).

176. *Id.* Prior to the AAA, courts determined the relevant environment-frame for "regarded as" plaintiffs, and it was usually narrow. *Supra* Part II.B.

177. Title II of the ADA applies to public services. ADA, 42 U.S.C. § 12131–32 (2006). The U.S. Supreme Court has held that Title II covers prisoners in state correctional institutions. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998). Thus, if a prisoner is both disabled and an otherwise qualified individual, a state prison may not deny services, programs, or activities merely because the prisoner has a disability. ADA § 12132; *see also* Mason v. Corr. Med. Servs., Inc., 559 F.3d 880, 886 (8th Cir. 2009) (noting that prisoners who are qualified individuals with a disability are entitled to meaningful access to prison benefits).

178. A prisoner's ability to function is examined within the confines and conditions of prison. *See, e.g.*, Shedlock v. Dep't of Corr., 818 N.E.2d 1022, 1030 (Mass. 2004) (examining a prisoner's ability to move to different areas of the prison to determine whether he is substantially limited in his ability to walk); Purcell v. Pa. Dep't of Corr., 1998 WL 10236, at *8 (E.D. Pa. Jan. 9, 1998) (examining an inmate's ability to interact with fellow prisoners and prison staff to determine whether he is substantially limited in the major life activity of communicating). Prisoners are necessarily limited in the ability to walk, work, and communicate with others. For this reason, courts often place great weight on a prisoner's medical reports. *See, e.g.*, *id.* (relying on several doctors' reports to determine how seriously plaintiff prisoner's Tourette's Syndrome limited his ability to communicate).

179. Title II states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." ADA § 12132. The regulations supporting Title II require that "[a] public entity, in providing any aid, benefit, or service, may not . . . on the basis of disability . . . [a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid,

Federal cases pertaining to structural modification may be divided into those involving environment-frames that consist of: cells, areas of a prison or jail extending beyond a cell, and an entire prison or jail. Cases pertaining to access that do not require structural modification rely on environments constructed relative to people: a single disabled inmate (a proxy for one prison or jail), disabled and non-disabled inmates within a prison or jail (one prison or jail), and disabled and non-disabled inmates within regional prisons (prisons or jails within a region). As with other modification cases, the broader the environment-frame courts use, the larger the accessible space required and the less interrupted disability protections become.

1. Requests for Structural Modification

Under Title II, inmates may request modification to access certain physical spaces of a prison or jail for services, programs, and activities.[180] Three groups of environment-frames emerge in ADA jurisprudence involving requests for structural modification: a prison or jail cell, particular areas beyond a cell, and an entire facility. Courts most often interpret Title II to require modification in the first two (narrower) contexts. As a result, disability protections attach only to certain prison or jail areas.

Some courts view the relevant environment for assessment as a cell, and deny requests for access outside that area. For example, in *Baribeau v. City of Minneapolis*,[181] plaintiff inmate's prosthetic leg was confiscated while he was in jail.[182] Without the leg, the plaintiff could not access some parts of the jail, including the basketball court, where he stated he "might have played [basketball]."[183] The court held that providing plaintiff with a wheelchair and an ADA-compliant cell was sufficient.[184] Similarly, in *Purcell v. Pennsylvania Department of Corrections*,[185] the court found that

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benefit, or service that is not equal to that afforded others." Nondiscrimination on the Basis of Disability in State & Local Gov't Servs., 28 C.F.R. § 35.130(b)(1)(ii) (2010).

180. *See* United States v. Georgia (*Goodman*), 546 U.S. 151, 160 n.* (2006) (Stevens, J., concurring) (finding it is unclear "whether certain of [plaintiff's] claims are even covered by Title II . . . [such as] lack of access to . . . 'television, phone calls, [and] entertainment'").

181. *See generally* Baribeau v. City of Minneapolis, 596 F.3d 465 (8th Cir. 2010).

182. *Id.* at 472.

183. *Id.* at 485.

184. *Id.* at 484.

185. *See generally* Purcell v. Pa. Dep't of Corr., No. Civ. A. 95-6720, 1998 WL 10236, at *1 (E.D. Pa. Jan. 9, 1998).

the appropriate modification for a prisoner with joint disease and Tourette's Syndrome was to "allow[] him to remain in a handicapped-accessible cell."[186]

Other courts frame the environment for prison access as extending beyond a prison cell but not to a complete prison. When the relevant prison environment is more broadly construed, prisoners have greater success with modification claims. A number of cases deal with shower facilities located outside prison cells. In *Outlaw v. City of Dothan*,[187] the court held that the shower in the city jail must be both accessible and available to an inmate who wears an artificial leg and has burns on his body that require him to shower frequently.[188] Several other cases recognize similar claims with respect to accessing or using shower facilities.[189] In *United States v. Georgia* (Goodman),[190] the U.S. Supreme Court assumed without deciding that lack of disability accessible shower and toilet facilities were among the Eighth Amendment violations experienced by the plaintiff.[191] The Petitioner's brief in the case indicates that the plaintiff was unable to shower for over two years.[192]

Plaintiffs also receive injunctive relief in cases when courts draw environment-frames to include other areas of a prison outside a cell. In

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186. *Id.* at *9. This was, however, the modification the plaintiff sought with respect to his verbal and motor tics. *Id.*

187. *See generally* Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL 735802 (M.D. Ala. Apr. 27, 1993).

188. *Id.* at *4.

189. *See, e.g.*, Kiman v. N.H. Dep't of Corr., 451 F.3d 274, 288 (1st Cir. 2006) (holding that plaintiff presented admissible evidence regarding his access to a shower chair and facilities, making summary judgment inappropriate); Schmidt v. Odell, 64 F. Supp. 2d 1014, 1032–33 (D. Kan. 1999) ("[T]here is a genuine issue of fact as to whether the defendants failed to make reasonable accommodation for plaintiff's disability, including by . . . failing to timely provide a shower chair."); Kaufman v. Carter, 952 F. Supp. 520, 532–33 (D. Mich. 1996) (denying defendant's motion for summary judgment based on evidence that the prison failed to provide plaintiff with a shower chair or accessible shower facilities); Saunders v. Horn, 959 F. Supp. 689, 698 (E.D. Pa. 1996) (allowing inmate to proceed on claim that the prison did not provide readily accessible bathroom and shower facilities).

190. *See generally* United States v. Georgia (*Goodman*), 546 U.S. 151 (2006).

191. *Id.* at 159. The Court did not declare which of the plaintiff's claims violated Title II. *Id.*

192. Brief for Petitioner Goodman at 3, *Goodman*, 546 U.S. at 151 (No. 04-1236), http://works.bepress.com/samuel_bagenstos/19/ (last visited Feb. 2, 2011) (on file with the Washington and Lee Law Review). The Court takes note that Goodman "had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste." *Goodman*, 546 U.S. at 155.

Owens v. Chester County,[193] plaintiff prisoner was allowed to use his crutches only in certain areas of the prison.[194] The court held that the prison must make crutches available to the plaintiff "when appropriate," implying some areas of the prison need not be accessed.[195] The court identified the dining area as an appropriate place of access.[196] Prisoner access to a dining hall was also upheld in *Crawford v. Indiana Department of Corrections*.[197] In addition, courts may view Title II as requiring access to recreation areas.[198]

Only the Seventh and Ninth Circuits have adopted an environment-frame of most, if not an entire, prison. Within this broad environment-frame, both circuits held that plaintiffs were entitled to the modification they sought. In *Love v. Westville Correctional Center*,[199] a quadriplegic prisoner plaintiff housed in an infirmary claimed "he was unable to use the prison's recreational facilities, its dining hall, the visitation facilities that were open to the general inmate population, and that he was unable to participate in [programs]" that were available in the main prison area.[200] The court upheld a decision for the plaintiff, finding that he was illegally denied access to a number of programs that were available in the main quarters of the prison but not the infirmary unit.[201] *Pierce v. County of Orange*[202] takes perhaps the broadest view of any prison access case. The county housed mobility and dexterity-impaired detainees in a separate jail and denied them access to various features of their cells and numerous areas of the jail, including common spaces such as showers, dining halls, and recreation areas.[203] The court ordered that the jail remove barriers to cells, bathrooms, showers, exercise areas, day rooms, dining rooms, and other

193. *See generally* Owens v. Chester Cnty., CIV. A. 97-1344, 2000 WL 116069 (E.D. Pa. Jan. 31, 2000).

194. *Id.* at *9.

195. *Id.* at *12.

196. *Id.* at *12 n.8.

197. Crawford v. Ind. Dep't of Corr., 115 F.3d 481, 483 (7th Cir. 1997), *abrogated on other grounds by* Erickson v. Bd. of Gov. of State Coll. & Univ. for N. Ill. Univ., 207 F.3d 945 (7th Cir. 2000).

198. *See, e.g.*, Schmidt v. Odell, 64 F. Supp. 2d 1014, 1033 (D. Kan. 1999) (holding that plaintiff was entitled to access prison recreation areas).

199. *See generally* Love v. Westville Corr. Ctr., 103 F.3d 558 (7th Cir. 1996).

200. *Id.* at 558–59.

201. *Id.* at 560 (providing examples of church services, substance abuse programs, and college classes).

202. Pierce v. Cnty. of Orange, 526 F.3d 1190 (9th Cir. 2008).

203. *Id.* at 1214–20.

areas.[204] Courts adopt a similar range of environment-frames when considering access to prison or jail services, programs, or activities that do not require modification of spaces.

2. Requests for Other Modification

When disabled inmates request modification that does not alter the physical environment of a prison or jail, courts apply a range of environment-frames measured relative to other inmates to determine access to services, programs, and activities. The DOJ regulations state that disabled inmates must have access "equal to that afforded other[] [inmates]."[205] Environments are measured relative to an individual disabled inmate (a single facility), a particular facility's inmate population (a single facility), or the inmate population of a region (prisons or jails in a region). Environment-frames within a single facility may vary in scope. When an inmate's access to services is considered in isolation, the frame often does not extend much beyond that individual's prison cell, whereas when a comparison is made to the services received by other prisoners, the environment considered usually includes more, if not all, of the prison. As with requests for structural modification, the smaller the environment-frame, the more likely an inmate will be denied her requested modification. As the environment-frame becomes larger, so do an inmate's chances for greater prison or jail access.

Some courts consider an inmate's access to services in isolation, rather than compared to other inmates. These courts employ the narrowest version of a single prison environment-frame for remedy purposes, and plaintiffs are denied injunctive relief. In *Mason v. Correctional Medical Services, Inc.*,[206] the court held that a prisoner who went blind as an inmate had sufficient access to reading and other benefits when the prison provided him an inmate reader as well as access to a tape recorder.[207] The plaintiff had requested professional instruction about how to complete daily tasks throughout the prison with his impairment and tools to enable him to use the library, including training in Braille or computer software that makes

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204. *Id.* at 1226.

205. Nondiscrimination on the Basis of Disability in State & Local Gov't Servs., 28 C.F.R. § 35.130(b)(1)(ii) (2010).

206. *See generally* Mason v. Corr. Med. Servs., Inc., 559 F.3d 880 (8th Cir. 2009).

207. *Id.* at 887.

written work audible.[208] The court in *Douglas v. Gusman*[209] held that a prison's failure to provide a telephone typewriter device or closed captioning television to a deaf prisoner, while providing unlimited access to phones as well as television privileges to other prisoners, did not violate Title II of the ADA.[210] Allowing the prisoner to make "one call in the daytime and one call in the evening, seven days a week for about six weeks, provided him with meaningful access to the telephone as a matter of law."[211]

Several courts compare a plaintiff inmate's situation with that of non-disabled inmates in the same prison. Plaintiffs are granted requested modification under this broader construction of the single prison environment-frame. The Third Circuit held with respect to a deaf prisoner that "public entities [must] take 'appropriate steps' to ensure that communication with a disabled person is as effective as communication with others."[212] A number of lower federal courts adopt a similar view. In *Clarkson v. Coughlin*,[213] the court granted summary judgment to plaintiff prisoners who were hearing impaired because the prison did not provide them the same opportunity as non-disabled prisoners to participate in educational, vocational, and rehabilitative classes.[214] The court noted that the prison excluded disabled inmates from twenty-six academic and vocational programs that were available to non-disabled inmates.[215] In *Garcia v. Taylor*,[216] the court held that summary judgment was not appropriate when the prison denied the plaintiff, who was hearing impaired,

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208. *Id.* at 887–88.

209. *See generally* Douglas v. Gusman, 567 F. Supp. 2d 877 (E.D. La. 2008).

210. *Id.* at 890.

211. *Id.*

212. Chisolm v. McManimon, 275 F.3d 315, 325 (3d Cir. 2001) (citing Nondiscrimination on the Basis of Disability in State & Local Gov't Servs., 28 C.F.R. § 35.160(a) (1991)). The regulations were recently amended to state, "[a] public entity shall take appropriate steps to ensure that communication with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others." Nondiscrimination on the Basis of Disability in State & Local Gov't Servs., 28 C.F.R. § 35.160(a) (2010).

213. *See generally* Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995).

214. *Id.* at 1038, 1047.

215. *Id.* at 1047.

216. *See generally* Garcia v. Taylor, No. 4:07-cv-474-SPM/WCS, 2009 WL 2496521 (N.D. Fla. Aug. 11, 2009).

access to the purchase and use of a personal radio device to listen to television like non-disabled inmates.[217]

The court in *Pierce*, which involved structural as well as other modification requests, adopted an even broader environment-frame of the jails within that county.[218] The court held that the county jail illegally denied inmates the benefit of educational, rehabilitative, and recreational programs; services; and activities available at other county jails to able-bodied inmates.[219] Other courts have rejected this broad environment-frame of prisons or jails in the region, however, by arguing that there is no right "for a [disabled] inmate to demand that the prison . . . implement a specific type of [service, program, or activity] which is not already available [nor does the ADA] create any right for an inmate to be housed at a specific prison [where such opportunities are available]."[220]

The *Pierce* and *Baribeau* cases stand in stark contrast and demonstrate the significant role of environment-framing in determining access to prison environments, services, and programs for disabled inmates. In *Baribeau* (discussed in Part III.A.1), providing a mobility-impaired inmate with an ADA compliant cell was deemed a sufficient modification.[221] In *Pierce*, the court provided plaintiffs with access to a broad range of services and programs available to non-disabled inmates within the county.[222] As with other reasonable accommodation or modification cases, the breadth of the environment-frame chosen by courts in the prison and jail cases determines judicial outcomes, with favorable plaintiff decisions resulting from use of broad environment-frames.

C. Harms of Current Approach to Assessing Environment: Remedy and Possible Constitutional Implications

As the prison and jail cases indicate, when courts frame environments for modification purposes narrowly, plaintiffs are often unable to obtain a remedy. This suggests that lowering the threshold for disability eligibility alone will not address lack of protections for individuals with disabilities.

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217. *Id.* at *11.

218. Pierce v. Cnty. of Orange, 526 F.3d 1190, 1221 (9th Cir. 2008).

219. *Id.* at 1220–21, 1226.

220. Garrett v. Angelone, 940 F. Supp. 933, 942 (W.D. Va. 1996), *aff'd*, 107 F.3d 865 (4th Cir. 1997).

221. Baribeau v. City of Minneapolis, 596 F.3d 465, 484 (8th Cir. 2010).

222. *Pierce*, 526 F.3d at 1220–21, 1247.

Interestingly, existing law and the DOJ regulations do not appear to support some narrow environment-frames for remedy. The DOJ regulations for Title II, for example, indicate that a qualified individual with a disability must have "an opportunity to participate in or benefit from the aid, benefit, or service that is . . . equal to that afforded others."[223] This standard is not met in instances where an individual is provided access only to her prison cell, due to structural or other barriers. Further, an argument could be made under the U.S. Supreme Court's decision in *Olmstead v. Zimrig*,[224] that a prisoner who is unable to leave her cell is "unjustifiably isolated."[225] In fact in *Garcia*, the court held that while every television must not be closed captioned and accessible to a deaf prisoner, the accessible televisions cannot place the plaintiff in "unjustified isolation."[226]

Narrow environment-frames in the remedy context may also have constitutional implications. Briefly stated, clarification of environment-frames could help determine the limits of the ADA's (Title II) abrogation of state sovereign immunity. Currently, the boundaries of this abrogation are unclear under U.S. Supreme Court jurisprudence. Under the ADA, failure to provide reasonable accommodation or other modification constitutes discrimination.[227] ADA discrimination on the basis of disability entails a "broader swath of conduct" than the conduct prohibited by the Constitution.[228] Determining the relevant environment-frame for injunctive relief would help establish how much conduct lies outside Constitutional mandates and does not warrant the abrogation of state sovereign immunity. This might be significant, as it is possible that the uncertain breadth of injunctive relief under the ADA has limited the Court's willingness to interpret more broadly the overlap of the ADA with Constitutional mandates. The Court has abrogated state sovereign immunity only in

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223. Nondiscrimination on the Basis of Disability in State & Local Gov't Servs., 28 C.F.R. § 35.130(b)(1)(ii) (2010).

224. *See generally* Olmstead v. Zimring, 527 U.S. 581 (1999).

225. *Id.* at 600–01.

226. *See* Garcia v. Taylor, No. 4:07-cv-474-SPM/WCS, 2009 WL 2496521 at *11 (N.D. Fla. Aug. 11, 2009) (considering "whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions" (citing *Olmstead*, 527 U.S. at 600–01)).

227. ADA, 42 U.S.C. §§ 12112, 12132, 12182 (2006).

228. United States v. Georgia (*Goodman*), 546 U.S. 151, 160 (2006) (Stevens, J., concurring); *see also* Tennessee v. Lane, 541 U.S. 509, 533 n.24 (2004) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000)).

limited contexts including courthouse[229] and prison inaccessibility, the latter rising to the level of Eighth Amendment violations.[230]

Thus, courts should clarify the size of environment-frames in the remedy context for several reasons. First, clarification will promote legal consistency. Second, narrower environment-frames undermine disability remedies and should not be used without deliberate selection. Third, a better understanding of the injunctive relief available under the ADA will inform courts and litigants about the overlap between the ADA and Constitutional protections.

The next Part addresses the impact of the ADA Amendments Act of 2008 on issues of environment-framing.[231] The AAA seeks to expand disability protections by lowering the threshold for protected class membership.[232] While the AAA does not address remedy, it may indirectly affect it. Enlarging the protected class may alter the remedies courts are willing to provide under an unfunded mandate.[233] Thus, depending on the implications of the AAA for class eligibility purposes, environment-framing may continue to limit disability protections at both the eligibility and remedy stages of disability analysis after the AAA.

IV. Limitations of ADA Amendments Act of 2008

The ADA Amendments Act of 2008 (AAA) became effective January 1, 2009.[234] In general terms, the Act seeks to expand the class of individuals eligible for disability protections.[235] A rule of construction within the Act states that "disability . . . shall be construed in favor of broad coverage of

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229. *Lane*, 541 U.S. at 533.

230. *Goodman*, 546 U.S. at 159.

231. *See generally* AAA, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–12213 (2006)).

232. *Id.* § 2(b), 122 Stat. at 3554.

233. I use "unfunded mandate" only in a descriptive manner to indicate that, as the ADA is currently structured, covered entities are responsible for making most accommodation and other modification. As I argue in other work, however, disability is part of the human condition, and responding to it should be both a governmental and a social obligation. *See generally* Satz, *Overcoming Fragmentation*, *supra* note 18, at 513; Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513 (2008) [hereinafter Satz, *Disability*]. Laws routinely impose costs to benefit the public welfare in other contexts, including everything from building codes to vehicle emissions inspections.

234. AAA § 8, 122 Stat. at 3559.

235. *Id.* § 2(b), 122 Stat. at 3554.

individuals . . . to the maximum extent permitted [under the AAA]."[236] The AAA, like the original ADA, does not directly address environment-frames.

To date, few courts have decided cases under the AAA.[237] Most cases occurring after the AAA's enactment involve actions that took place prior to the effective date of the amendments.[238] Courts deciding these cases have held that the AAA does not apply retroactively[239] under *Landgraf v. USI Film Products*,[240] or they have argued that the AAA and the original

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236. *Id.* § 4(a), 122 Stat. at 3555–56.

237. Jenkins v. Nat'l Bd. Med. Exam'rs, No. 08-5371, 2009 U.S. App. LEXIS 2660, at *1–2 (6th Cir. Feb. 11, 2009); Koenig v. Maryland, No. CCB-09-3288, 2010 WL 148706, at *1 (D. Md. Jan. 13, 2010); Pridgen v. Dep't of Pub. Works, No. WDQ-08-2826, 2009 WL 4726619, at *4–5 (D. Md. Dec. 1, 2009); Chiesa v. N.Y. Dep't of Labor, 638 F. Supp. 2d 316, 321 (N.D.N.Y. 2009); Green v. Am. Univ., 647 F. Supp. 2d 21, 29 (D.D.C. 2009); Kemppaninen v. Aransas Cnty. Det. Ctr., No. C-08-194, 2009 U.S. Dist. LEXIS 52914, at *3–4 (S.D. Tex. June 23, 2009); Collier v. Austin Peay State Univ., NO. 3:08-0400, 2009 U.S. Dist. LEXIS 67363, at *21–25 (M.D. Tenn. Feb. 20, 2009); Menchaca v. Maricopa Cmty. Coll. Dist., 595 F. Supp. 2d 1063, 1068 (D. Ariz. 2009).

238. Fikes v. Wal-Mart, Inc., 322 F. App'x 882, 883 n.1 (11th Cir. 2009); Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 853 (9th Cir. 2009); Verhoff v. Time Warner Cable, Inc., 299 F. App'x 488, 492 (6th Cir. 2009); EEOC v. Agro Dist., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009); Moore v. Wal-Mart Stores East L.P., No. 7:07-CV-193(HL), 2009 WL 3109823, at *7 n.6 (M.D. Ga. Sept. 23, 2009); Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 258–59 (D.N.H. 2009); Hammond v. Dep't. Veteran Affairs, No. 08-10922, 2009 U.S. Dist. LEXIS 66296, at *23 (E.D. Mich. July 30, 2009); Young v. Precision Metal Prods., Inc., 599 F. Supp. 2d 216, 223–24 (D. Conn. 2009); Wisbey v. City of Lincoln, No. 4:09CV3093, 2009 U.S. Dist. LEXIS 30819, at *22 n.4 (D. Neb. 2009), *aff'd*, 2010 U.S. App. LEXIS 13684 (8th Cir. 2010); Pacenza v. IBM Corp., No. 04 Civ. 5831 (PGG), 2009 U.S. Dist. LEXIS 29778, at *26–27 n.10 (S.D.N.Y. Apr. 2, 2009); Bennett v. Nissan N. Am., Inc., 315 S.W.3d 832, 842 n.8 (Ct. App. Tenn. 2009); Brown v. Bd. of Regents Okla. Agric. & Mech. Coll. for Langston Univ., No. CIV-07-1240-C, 2009 WL 467754, at *2 n.2 (W.D. Okla. Feb. 24, 2009); Menchaca v. Maricopa Cmty. Coll. Dist., 595 F. Supp. 2d 1063, 1071 (D. Ariz. 2009); Braun v. Securitas Sec. Serv. USA, Inc., No. 07 CV 02198(SJF)(WDW), 2009 WL 150937, at *4 n.3 (E.D.N.Y. Jan. 20, 2009).

239. Fikes v. Wal-Mart, Inc., 322 F. App'x 882, 883 n.1 (11th Cir. 2009); Milholland v. Sumner Cnty. Bd. of Ed., 569 F.3d 562, 563 (6th Cir. 2009); EEOC v. Agro Dist., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009); Lytes v. D.C. Water & Sewer Auth., 572 F.3d 936, 939–42 (D.C. Cir. 2009); Young v. Precision Metal Prods., Inc., 599 F. Supp. 2d 216, 223–24 (D. Conn. 2009); Grizzle v. Macon Cnty., No. 5:08-CV-164(CAR), 2009 U.S. Dist. LEXIS 73769, at *13 (M.D. Ga. Aug. 20, 2009); Bennett v. Nissan N. Am., Inc., 315 S.W.3d 832, 842 n.8 (Ct. App. Tenn. 2009). *But see generally* Jenkins v. Nat'l Bd. Med. Exam'rs, No. 08-5371, 2009 U.S. App. LEXIS 2660, at *1–2 (6th Cir. Feb. 11, 2009); Menchaca v. Maricopa Cmty. Coll. Dist., 595 F. Supp. 2d 1063, 1068 (D. Ariz. 2009).

240. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265, 270, 273 (1994) (holding that courts should not apply new law to previous events absent clear Congressional intent, unless the action at stake pertains to prospective relief).

ADA would produce the same result, avoiding the need to decide whether the AAA could be applied.[241]

This Part examines the potential impact of the AAA on environment-framing. I argue that the plain language of the Act, the proposed EEOC regulations, and the cases applying the AAA to date, indicate that it is unlikely that the AAA will affect the environments in which courts choose to evaluate an individual for disability. This is significant because environment-framing may prove the easiest way to undermine the purpose of the AAA.

A. Broadening the Protected Class Without Regard to Environment

The AAA and proposed EEOC regulations do not address environment-frames directly. The AAA seeks to increase eligibility for the protected class for actual disability[242] by assessing an individual for disability prior to mitigating measures,[243] expanding the types of major life activities that may qualify an individual as disabled,[244] and lowering the

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241. Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 853 (9th Cir. 2009); George v. TJX Co., Inc., No. 08 CV 275(ARR)(LB), 2009 WL 4718840, at *9 (E.D.N.Y. Dec. 9, 2009); Moore v. Wal-Mart Stores East L.P., No. 7:07-CV-193(HL), 2009 WL 3109823, at *7 n.6 (M.D. Ga. Sept. 23, 2009); Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 259 (D.N.H. 2009); Hammond v. Dep't. Veteran Affairs, No. 08-10922, 2009 U.S. Dist. LEXIS 66296, at *23 (E.D. Mich. July 30, 2009); Brodsky v. New England Sch. of Law, 617 F. Supp. 2d 1, 4 (D. Mass. 2009); Wisbey v. City of Lincoln, No. 4:09CV3093, 2009 U.S. Dist. LEXIS 30819, at *22 n.4 (D. Neb. 2009); Pacenza v. IBM Corp., No. 04 Civ. 5831 (PGG), 2009 U.S. Dist. LEXIS 29778, at *26–27 n. 10 (S.D.N.Y. Apr. 2, 2009); Brown v. Bd. of Regents Okla. Agric. & Mech. Coll. for Langston Univ., No. CIV-07-1240-C, 2009 WL 467754, at *2 n.2 (W.D. Okla. Feb. 24, 2009); Braun v. Securitas Sec. Serv. USA, Inc., No. 07 CV 02198(SJF)(WDW), 2009 WL 150937, at *4 n.3 (E.D.N.Y. Jan. 20, 2009).

242. The Act applies the same standard to "record" of disability. AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2006)). Individuals "regarded as" disabled no longer need to demonstrate limitation of a major life activity for real or perceived impairments. *Id.*

243. *See id.* § 2(b)(2), 122 Stat. at 3554 (stating a purpose of the amendments as: "to reject the [standard] . . . that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures").

244. *See id.* § 4(a), 122 Stat. at 3555–56 (discussing major life activities). The AAA provides a broad, non-exhaustive list of major life activities. *Id.* Functional impairments affecting major life activities may now be episodic, or an individual may be in remission. *Id.* The AAA codifies that certain activities, such as "communicating" and "major bodily functions," are major life activities. *Id.* The AAA also makes clear that in order to qualify for the protected class, an individual does not need to demonstrate that an impairment affects more than one major life activity. *Id.*

standard for demonstrating a "substantial limitation" of a major life activity.[245] The first two changes on their face do not affect environment-framing. Examining an individual prior to mitigating measures does not speak to the environment in which her impairment is assessed. Similarly, expanding the range of major life activities that qualify under the ADA does not address the environment in which to assess their impact on functioning.[246] This Part will focus on the third change: loosening the standard for what constitutes an impairment that "substantially limits" a major life activity. I argue that this alteration affects environment-framing only under an interpretation of the AAA that federal courts have already failed to adopt.

1. Lowering the Threshold for "Substantially Limits"

The AAA lowers the burden articulated in *Toyota v. Williams*[247] and the EEOC regulations for showing a "substantial limitation" of a major life activity.[248] The potential impact of this change on environment-framing is not immediately clear, given certain ambiguities in the statute. This Section examines these ambiguities and argues that under each possible reading of the AAA, the Act is unlikely to influence environment-framing. Further, recent jurisprudence construing the statute indicates that the lower threshold for "substantially limits" is unlikely to affect environment-frames employed by courts.

The AAA lowers the threshold for "substantially limits" by abandoning the test articulated in *Toyota* that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[249] The language is ambiguous as to whether Congress is rejecting only that individuals must be "severely restrict[ed]" with respect to tasks

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245. *Id.* § 2(b)(4)–(6), 122 Stat. at 3554.

246. The AAA expands the major life activities to be assessed within any environment. *Id.* § 4(a), 122 Stat. at 3555–56.

247. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) ("We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.").

248. *See* AAA, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554 (2008) (codified at 42 U.S.C. § 12101 (2010)) (rejecting the Supreme Court's *Toyota* standard for finding a disability under the ADA).

249. *Toyota Motor Mfg.*, 534 U.S. at 198; AAA § 2(b)(4), 122 Stat. at 3554.

that are central to most people's daily lives, or whether it is also rejecting consideration of the tasks themselves as major life activities.[250]

It seems unlikely that the AAA seeks to eliminate consideration of tasks that are of "central importance to most people's daily lives" as major life activities. The thrust of the Act is to expand coverage for individuals with impairments.[251] Further, the Act codifies many tasks as major life activities that pertain to daily living, including caring for oneself, performing manual tasks, eating, and sleeping.[252] In addition, Congressional testimony on the subject focuses entirely on the difficulties imposed by a strict standard for "substantial limitation." To the extent that Congressional testimony mentions the tasks themselves, the concern is either narrow construction of "major" in "major life activity"—i.e., focusing on a limited rather than a broad set of activities that are "major life activities"[253]—or that individuals who are able to

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250. The AAA states that:

> The purposes of this Act are . . . (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) . . . that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

AAA § 2(b)(4), 122 Stat. at 3554. The AAA then states that Congress intends:

> (5) to convey Congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and (6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

Id. § 2 (b)(5)–(6), 122 Stat. at 3554.

251. *Id.* § 4(a), 122 Stat. at 3555–56.

252. *Id.*

253. *The ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Subcomm. on Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 71 (2007) [hereinafter *ADA Hearing 2007*] (statement of Ms. Chai R. Feldblum, Professor, Georgetown University Law Center and current Commissioner of the EEOC) ("The Supreme Court, in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, ruled that the words 'substantially limits' and 'major life activities' in the definition disability 'need to be interpreted strictly to create a demanding standard for qualifying as disabled.'"). "This was

fulfill certain daily tasks should not automatically be disqualified as disabled in performing other tasks.[254]

Regardless of whether the AAA is interpreted to mean a rejection of a strict standard for "substantially limits" alone, or a rejection of that standard combined with a rejection of certain daily tasks as major life activities, the Act will likely not affect environment-framing under the disability threshold test. If Congress intended only to alter the interpretation of "substantially limits" as "preventing or severely restricting" a major life activity,[255] the AAA does not relate to environment-framing but rather to the degree to which impairment impacts a major life activity. Under the

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contrary to the various statements in the legislative history indicating an assumption that the definition of disability would be interpreted broadly." *Id.* "As a result of this ruling, people alleging discrimination must now show that their impairments prevent or severely restrict them from doing activities that are of central importance to most people's daily lives." *Id.*; *The ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the H. Comm. on Educ. & Labor*, 110th Cong. 64 (2008) [hereinafter *ADA Hearing 2008*] (statement of Mr. Andrew J. Imparato, President and Chief Executive officer of the American Association of People with Disabilities) ("It was the Toyota v. Williams decision that really severely restricted what constitutes a substantial limitation and a major life activity. The court said that they had to be activities that were of central importance to most people's daily lives."); *ADA Hearing 2007*, *supra*, at 38 (statement of Mr. Michael C. Collins, Executive Director of the National Council on Disability) ("The phrase 'of central importance to most people's daily lives' has led to extensive questioning by courts about each individual's ability to brush his or her teeth, bathe, dress, stand, sit, lift, eat, sleep and interact with others."). "It has led to contrary rulings by federal courts about whether activities such as communicating, driving, gardening, crawling, jumping, learning, shopping in the mall, performing house work, and even working and living are 'major life activities.'" *Id.*

254. *See, e.g.*, *ADA Hearing 2008*, *supra* note 253, at 12 (statement of Mr. Andrew J. Imparato, President and Chief Executive Officer of the American Association of People with Disabilities) ("Citing the Williams case, the 11th Circuit . . . use[d] evidence about Mr. Littleton's ability to drive and be interviewed for a job against him on the issue of disability . . . . Do we want to send . . . the message that you should be careful not to achieve your full potential, be careful not to live as independently as possible, or you may lose your federal civil rights protections[?]").

While performing daily living tasks may be indicia of functioning relevant to a major life activity, an ability to complete such tasks does not preclude a substantial limitation of a major life activity. The AAA in fact clarifies that an individual needs to demonstrate limitation of only one major life activity. *See* AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2006)) ("An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.").

255. *See* ADA, 42 U.S.C. § 2(a)(8) (2006) (finding the "severely restricts" language of *Toyota* inconsistent with Congressional intent); *supra* notes 247–49 (discussing *Toyota*); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) ("That ['substantially limits' and 'major' in 'major life activities'] need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA.").

AAA, plaintiffs will now face a less burdensome threshold for showing a substantial limitation of a major life activity, whatever the environment chosen for assessment. This is the view taken by the Sixth Circuit in the first Court of Appeals decision applying the AAA: "Congress overturned the definition of 'substantially limits' put forward in *Toyota* . . . . The district court [wrongfully] concluded that Jenkins would only qualify for protection under the ADA if his disability '*precluded*' him from performing reading tasks of that were 'central to most people's daily lives.'"[256]

The view that the AAA lessens the "substantial limitation" threshold without regard to environment is also supported by the proposed EEOC regulations. Previously, the regulations considered the "condition, manner, or duration" of a major life activity in assessing its severity.[257] "Condition" could have been interpreted by courts to pertain to environment. While courts did not interpret "condition" in this manner, the AAA provided an opportunity for Congress (and subsequently the EEOC) to do so. Instead, the EEOC struck the language from the regulations so as "not to be misconstrued to require the 'level of limitation, and the intensity of focus,' applied [to "substantially limits"]."[258]

If Congress is also rejecting consideration of major life activities that are of "central importance to most people's daily lives," it is still unlikely that the AAA speaks to environment-framing. Under this view, courts would no longer be concerned with functioning pertaining to a particular set of daily activities. Congress clearly rejected the holding in *Toyota* that major life activities *must* be activities of "central importance" to daily living.[259] This fails, however, to address the broader role of daily activities in disability analysis. Either the activities are not required but may be considered, or Congress intended to exclude a certain set of daily activities

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256. Jenkins v. Nat'l Bd. Med. Exam'rs, No. 08-5371, 2009 U.S. App. LEXIS 2660, at *2 (6th Cir. Feb. 11, 2009) (emphasis added).

257. *See* Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(j)(1) (2010) ("The term substantially limits means . . . [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity."). This language does not appear in the DOJ regulations interpreting Titles II and III.

258. Regulations to Implement the Equal Employment Provisions of the ADA, 74 Fed. Reg. 48444, 48446 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. § 1630).

259. *See* AAA § 2(b)(4), 122 Stat. at 3554 ("[This Act's purpose is] to reject the [Supreme Court's standard] . . . that to be substantially limited in performing a major life activity . . . 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'").

from disability analysis altogether. Under either reading, the activities could be assessed in any environment. Daily living tasks like teeth brushing, showering, dressing, etc., need not take place in the home environment.

The only interpretation of the AAA that would speak directly to environment-framing would be that the rejection of the *Toyota* standard means that major life activities must not be measured in every environment in which they occur—e.g., a broad environment that includes both a person's home and work environment. This interpretation seems possible under the proposed EEOC regulations: "An individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of central importance to daily life."[260] One of the examples states, "[s]omeone with a 20-pound lifting restriction that is not of short-term duration is substantially limited in lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting."[261] Under this construction of the AAA, courts could asses an individual with respect to the major life activity of "lifting" in a narrow environment, i.e., at work, rather than in an environment that includes both home and work.

These regulations arguably extend beyond the AAA, however, which seeks to expand the definition of disability, not contract the environment in which people are assessed for disability.[262] Further, cases decided after the AAA indicate that a broad environment-frame will remain for assessing major life activities. In *Rohr v. Salt River Project*,[263] the Ninth Circuit

260. Regulations to Implement the Equal Employment Provisions of the ADA, 74 Fed. Reg. at 48440.

261. *Id.* (Ex. 1). A second example is also provided: "Someone with monocular vision whose depth perception or field of vision would be substantially limited . . . need not also show that he is unable to perform activities of central importance to daily life that require seeing in order to be substantially limited in seeing." *Id.* (Ex. 2). This narrow interpretation of environment is further illustrated in the proposed regulations discussing the major life activity of "working." *Id.* at 48442. An individual's impairment may substantially limit her in the major life activity of "working," even if the same impairment does not limit her activities as compared to most people outside the workplace. *Id.*

262. Other scholars note that the proposed EEOC regulations extend beyond the statute. Laura Rothstein, Address at the SEALS Annual Meeting: Higher Education and the Americans with Disabilities Act—A Review and Preview (July 31, 2010) (unpublished lecture); *see also* Laura Rothstein, *Strategic Advocacy in Fulfilling the Goals of Disability Policy: Is the Only Question How Full the Glass Is?*, 13 TEX. J. C.L. & C.R. 403, 403–12 (2008) (presenting similar arguments with respect to proposals to amend the ADA).

263. *See* Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 864 (9th Cir. 2009) (discussing but not applying AAA, which became law while the case

indicated in dicta that: "The Supreme Court has made clear that the substantial limitation inquiry is not limited to the effects of the impairment in the workplace . . . . Rather, the proper inquiry is whether the physical impairment substantially limits the claimed major life activity *in daily life*."[264] The court goes on to address the AAA's effect on the *Toyota* test in terms of lowering the threshold for what constitutes a "substantial" limitation, with no discussion of the Act altering the "daily life," or broad environment component.[265] The "daily lives" language is also embraced by other courts that discuss (but do not apply) the AAA.[266] Some cases decided after the AAA assume but do not discuss a broad environment-frame that would be consistent with the "daily lives" component of the *Toyota* test.[267]

In addition, while the narrow environment-frames for major life activities proposed by the EEOC may solve the problem with current (broad) environment-framing limiting eligibility for the protected class, they perpetuate a view of disability that is fragmented and artificial. Fragmentation occurs because the actual experience of living with a disability differs from the legally recognized one. An individual's impairment is treated as if it exists only within certain contexts, such as the workplace or particular places of public accommodation. In reality, however, an impairment may impact an individual's ability to function in other situations, and those limitations may in turn impact her ability to maintain employment or to participate within the civic or social realms. For example, an individual's ability to perform manual tasks in a timely manner at home, such as meal preparation, laundry, and dependent care, may affect whether she is able to work.[268] Similarly, an individual who

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was pending).

264. *Id.* at 858 n.5 (emphasis added) (citations omitted).

265. *Id.* at 861.

266. *See* Grizzle v. Macon Cnty., Ga., No. 5:08-CV-164, 2009 U.S. Dist. LEXIS 73769, at *19 (M.D. Ga. Aug. 20, 2009) ("[M]ajor life activities are broadly defined as those that are of central importance to daily life and 'that the average person in the general population can perform with little or no difficulty.'").

267. *See* Moen v. Genesee Cnty. Friend of the Ct., No. 2:08-cv-12824, 2009 U.S. Dist. LEXIS 57177, at *16 (E.D. Mich. July 6, 2009) (referring to an "active lifestyle" with respect to a question about substantial limitation in the major life activity of walking); Menchaca v. Maricopa Cmty. Coll. Dist, 2595 F. Supp. 2d 1063, 1069 (D. Ariz. 2009) (describing various major life activities including "interacting with others" as affecting personal and work relationships); Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 255 (D.N.H. 2009) (discussing an eating disorder as affecting life inside and outside boarding school).

268. Sam Bagenstos has authored an important body of work discussing the need for

does not have reliable transportation to otherwise physically accessible buildings may not have access to the services or opportunities available within those facilities. As I argue in Part V, it is important to adopt a holistic view of disability to determine eligibility and remedy; otherwise, protections will be sporadic. Thus, I will argue that in the eligibility context the problem is not with a broad environment-frame per se, but with the manner in which courts currently interpret that frame. Further, as discussed below, for some major life activities, such as "working," an environment-frame that is too narrow may further confound disability eligibility analysis by failing to provide guidance to courts about whom to exclude from the protected class.

2. "Substantially Limits" and the Major Life Activity of "Working"

Not only does the AAA fail to clarify the relevant environment for assessing the major life activity of "working," the proposed EEOC regulations supporting the Act arguably exacerbate existing problems of environment-framing. As discussed in Part II.B, the major life activity of "working" is the only area where the EEOC and courts interpreting the regulations previously sought to define the relevant environment for assessing individuals' functional impairments. When assessing whether an individual was "substantially limited," courts considered "the geographical area to which the individual has reasonable access . . . and the number and types of jobs utilizing similar training, knowledge, skills, or abilities within that geographical area from which the individual is also disqualified because of the impairment."[269] While the AAA does not alter this approach,[270] the EEOC has interpreted the Act's general mandate to

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material supports to address disability discrimination. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT chs. 7–8 (2009); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 59–70 (2004) [hereinafter Bagenstos, *Future*]. Bagenstos discusses what he terms the "access/content" distinction in disability law, namely, individuals with disabilities have access to the same benefits as individuals who are not disabled, though the content of the benefits is not altered to meet the needs of individuals with disabilities. Bagenstos, *Future*, *supra*, at 35. In an insightful article, Michael Waterstone explores the benefits of material supports provided to disabled veterans under the Uniformed Services Employment and Reemployment Rights Act. Michael E. Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1109–10 (2010).

269. Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(j)(3)(ii)(B)–(C) (2010).

270. *See* AAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified

construe the definition of disability "broad[ly] . . . to the maximum extent permitted"[271] as requiring the elimination of the geographic (environment) requirement.[272]

Under the proposed EEOC regulations, individuals need not show substantial limitation in a "class of jobs" or a "broad range of jobs in various classes" within a certain region, but only that they are limited in a "type of work" based on the ability of an individual to perform a job as compared to most people with similar skills and training.[273] The underlying though unstated assumption is that the broad environment embraced by courts undermined eligibility for protected class membership. One way around this problem would be to interpret the availability of other jobs in the geographic region as probative, rather than dispositive, of functionality. The EEOC instead eliminated the geographic requirement. The proposed regulations also imply that a particular place of employment is not the legally-relevant environment.[274] As a result, the regulations provide no guidance to courts about the environment in which to assess "type of work." In fact one could argue that if the environment is not a particular workplace or a group of workplaces in the region, no environment exists in which to assess the major life activity of "working."

Thus, the AAA is unlikely to affect environment-framing, unless courts defer to the EEOC regulations with respect to workplace analysis (and exclude consideration of the effect of major life activities at home) or the major life activity of "working" specifically (and eliminate the geographic requirement). Courts have already indicated an unwillingness

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at 42 U.S.C. § 12102 (2006)) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.").

271. *Id.*

272. *See* Regulations to Implement the Equal Employment Provisions of the ADA, 74 Fed. Reg. 48431, 48448 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. § 1630) ("[T]he specific factors in the prior regulation . . . have been eliminated, including the geographical area to which the individual has reasonable access . . . or abilities within that geographical area from which the individual is also disqualified because of the impairment.").

273. *See id.* at 48447 ("The terms 'class of jobs' and 'broad range of jobs in various classes' . . . have been eliminated, and replaced with 'type of work' . . . [in] which the individual is substantially limited when compared to most people having similar training, skills, and abilities . . . .").

274. *See id.* ("A type of work includes the job the individual has been performing or for which he is applying, *and* jobs that have qualifications or job-related requirements which the individual would be substantially limited in performing as a result of the impairment." (emphasis added)).

to adopt the former view.[275] Adopting the latter position would confuse judicial analysis by effectively removing all possible environment-frames from consideration for the major life activity of "working." As the next Subpart discusses, Congress's failure to address environment-framing directly in the AAA could undermine the Act's purpose to expand disability protections. Courts may continue to manipulate environment-frames to reach desired judicial outcomes with respect to disability eligibility and remedy.

B. The Environment-Frame Loophole and the Potential to Undermine the AAA

The AAA's failure to address environment-frames may prove significant, as courts struggle to implement the new, broader definition of disability under the auspices of unfunded mandates for reasonable accommodation and other modification.[276] In this Subpart, I briefly discuss three possible judicial responses to this problem—constricting remedy, strictly interpreting "essential functions,"[277] and manipulating the environment-frame. While all three would allow an end-run around the AAA, I argue that the environment-frame limitation may be the most concerning.

One possibility for courts to control expenditures for disability accommodation or other modification is to construe even more narrowly remedies under Titles I–III.[278] Most notably, the "undue hardship"[279] defense could play a significant role in remedy reduction. A disabled individual does not suffer illegal discrimination when an employer or other entity fails to make a modification that imposes an "undue hardship."[280] Under Title I, an accommodation that causes "undue hardship" is one that "requir[es] significant difficulty or expense" measured relative to other employees and the financial resources of relevant facilities.[281] "Undue hardship" is an amorphous concept, with the EEOC regulations simply

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275. *Supra* Part IV.A.2.

276. *See supra* note 233 (discussing the use of "unfunded mandate").

277. ADA, 42 U.S.C. § 12111(8) (2006).

278. Remedy provisions include: *Id.* § 12117(a) (Title I); § 12133 (Title II); § 12188(a) (Title III). The AAA does not alter the ADA with respect to remedies.

279. *Id.* § 12111(10)(A)–(B).

280. *Id.*

281. *Id.*

restating the scant statutory requirements,[282] and the EEOC Interpretive Guidance offering only that an accommodation need not be "unduly costly."[283] This financial-based understanding of "undue hardship" is imported into Titles II and III with respect to injunctive relief. Under Title II, public services need not be altered if they impose an "undue hardship" or require a "fundamental alteration" of a "service, program, or activity."[284] Similarly, under Title III, alterations to existing structures must be "readily achievable"[285] and not require "much difficulty or expense."[286] These hardship-related defenses could, under current law, be construed broadly to preclude remedies for new members of the protected class. One could consider such injunctive relief and undue hardship as "two sides of the same coin": Expansion of what constitutes undue hardship will limit reasonable accommodation or other modification and vice versa.[287]

Another option for reducing expenditures is to restrict the protected class by focusing on the "qualified individual" component of who is a "qualified individual with a disability."[288] After an individual demonstrates a statutorily protected disability, she must identify an accommodation or other modification to promote access.[289] To be a "qualified individual" under Title I, one must be capable of performing the essential functions of her job "with or without reasonable accommodation."[290] Under Titles II and III, an individual must be able to access services and buildings, respectively, once reasonable modification is made.[291] Restricting who is considered a "qualified individual" may be done in a number of ways.

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282. *See* Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(p) (2010) ("Undue hardship—(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity.").

283. *Id.* § 1630 app.

284. ADA, 42 U.S.C. § 12182(b)(2)(ii)–(iii) (2006).

285. *Id.* § 12182(b)(2)(A)(iv).

286. *See id.* § 12181(9) ("The term 'readily achievable' means easily accomplishable and able to be carried out without much difficulty or expense."). The factors that a court considers include "the nature and cost of the action . . . the overall financial resources of the facility . . . the overall financial resources of the covered entity . . . and the [nature] of [the] operation . . . ." *Id.*

287. *See, e.g.*, Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1148 (2010) ("The legislative sources make clear that reasonable accommodation and undue hardship are a single concept.").

288. ADA § 12111(8).

289. *Id.* §§ 12113(a), 12131, 12182(b)(2)(v).

290. *Id.* § 12111(8).

291. *Id.* §§ 12131, 12182(b)(2)(v).

Under Title I, courts could construe the "essential functions"[292] requirement more narrowly. Courts could give greater deference to informal or evolving employer descriptions about what are the essential functions of a particular job. Employers could construct job descriptions in a manner that precludes an individual with a disability from performing necessary tasks effectively, with or without a reasonable accommodation. Under all three titles, courts could lower the standard for a defendant to demonstrate lack of an effective reasonable modification for a disability to the point where no modification would be viewed as improving access. A defendant who fails to make an alteration when it would not improve employment eligibility[293] or access to services[294] or public spaces is acting legally.[295]

Alternatively, courts may restrict the protected class by continuing to use broad environment-frames and subjecting them to traditional analysis. Environment-framing is perhaps the most troubling hurdle to the AAA for several reasons. First, unlike the "undue hardship,"[296] "qualified individual,"[297] and "essential functions" requirements,[298] no judicial test exists for determining the relevant environment in which to assess the impact of an individual's impairment. The only regulatory guidance is for the major life activity of "working," and the proposed EEOC regulations remove it.[299] Second, historically courts have, without explanation or analysis, assumed environments that disfavor disability protections.[300] Third, AAA jurisprudence indicates environment-framing under the ADA will not change.[301] As a result, the success of the AAA may rest in part on the whim of courts. To close this loophole, courts must actively address and define the relevant environment-frames for disability eligibility and remedy under the ADA. In the following Part, I propose a method for defining and interpreting these frames.

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292. *Id.* § 12111(8).
293. *Id.* § 12113(a).
294. *Id.* § 12131.
295. *Id.* § 12182(b)(2)(v).
296. *Id.* § 12111(10)(A)–(B).
297. *Id.* §§ 12113(a), 12131, 12182(b)(2)(v).
298. *Id.* § 12111(8).
299. *Supra* Part IV.A.2.
300. *Supra* Parts II–III.
301. *Supra* Part IV.A.1.

V. Overcoming Fragmentation

I propose a two-part solution to transcend the problems caused by environment-framing. The problems include legal inconsistency in the construction of environments in which individuals' impairments are assessed; the undermining of disability claims; and fragmentation, the disjunction between the human experience of disability and the legally recognized one. First, courts should adopt broad frames for both the eligibility and remedy stages of disability analysis. Courts should assess individuals in a broad environment that includes workplace, home, and other daily environments. Second, courts should interpret an individual's ability to function in a holistic manner by considering her ability to function across various civic and social environments. This approach will expose barriers to accessibility and allow more meaningful accommodation or other modification. The ability to function in some portion of a broad environment must not undermine disability status, however, as it does currently in ADA jurisprudence.[302]

Ironically, Social Security disability benefits cases, which are maligned for the restrictive definition of disability they impose, provide insight into a mechanism for defining and assessing environment-frames for disability status.[303] Eligibility for Social Security disability benefits is determined according to a holistic view of an individual's ability to function across all relevant environments.[304] The aggregate effect of impairments is viewed across these environments.[305] Social Security cases emphasize the importance of adopting a broad environment-frame to gain a complete picture of an individual's ability to function in society. To view the environment-frame in any other way, as the ADA eligibility and remedy

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302. *Supra* Part II.

303. The Social Security Act employs a more restrictive definition of disability than the ADA, yet individuals may be viewed as disabled under the Social Security Act and not the ADA. *See* Grizzle v. Macon Cnty., Ga., No. 5:08-CV-164, 2009 U.S. Dist. LEXIS 73769, at *27 (M.D. Ga. Aug. 20, 2009) (holding that an individual with bi-polar disorder receiving Social Security benefits for impairments that included that disorder did not qualify as disabled under the ADA). In some jurisdictions, receipt of Social Security benefits is evidence of disability for purposes of the ADA, though not dispositive. Moore v. Wal-Mart Stores E., L.P., No. 7:07-CV-193 (HL), 2009 WL 3109823, at *8 (M.D. Ga. Sept. 23, 2009). In *Moore*, the Social Security Administration recognized the claimant as disabled, even employing an extremely broad view of class of jobs including the "national economy," "because she is unable to sustain an eight hour work day on a regular and continuing basis." *Id.* at *5.

304. *Infra* Part V.A.2.

305. *Infra* Part V.A.

cases indicate, would distort the human experience of disability by treating disability as if it arises in discrete contexts.[306] In addition, the Social Security cases highlight a method of assessing a broad frame that does not punish an individual for functioning, perhaps out of desperation or other necessity, in some portion of her daily environment.

It is important to emphasize that I am concerned with the possibilities of the mechanism for defining and assessing environment-frames offered by the Social Security Act and supporting regulations and cases. I do not intend to overstate the positive results for claimants with respect to this approach. The decisions of the Social Security Administration and courts do not always honor the spirit of a holistic, aggregative assessment. Lawyers who litigate Social Security cases recount times when claimants who admitted they could lift a gallon milk jug (8.7 pounds) were deemed ineligible for benefits because they were viewed as being able to lift more than five pounds repetitively at work.[307] My intention is simply to emphasize the promise of a method that considers functionality more completely for avoiding fragmentation and promoting disability protections.

A. Social Security Litigation and the "Holistic, Aggregate Look"

An individual is assessed holistically for disability Social Security program eligibility in several ways.[308] First, an individual's functioning is

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306. *See* Satz, *Disability*, *supra* note 233, at 541–50 (introducing my concept of macro-level fragmentation); Satz, *Overcoming Fragmentation*, *supra* note 18 (developing my theory of fragmentation and distinguishing between macro- and micro-level fragmentation).

307. I am grateful to Mark Weber for reminding me of this point.

308. Social Security Disability Insurance (SSDI) is paid to individuals with previous sufficient payroll contributions. Soc. Sec. Admin., *2010 Red Book*, at 13 (2010), *available at* http://www.socialsecurity.gov/redbook/eng/2010%20Red%20Bookpdf.pdf [hereinafter *Red Book*] (noting that to be qualified, individuals must "be 'insured' due to contributions made to FICA based on" payroll earnings). Monthly support increases with previous earnings, though the average estimate for 2009 was $1,064 to each individual per month. Soc. Sec. Admin, *Fact Sheet Social Security: 2009 Social Security Changes* (2008), *available at* http://www.socialsecurity.gov/pressoffice/factsheets/colafacts2009.pdf. Recipients of SSDI are eligible for Medicare. *Red Book*, *supra*, at 13. Supplemental Security Income (SSI) is a means-tested program paying $674 per month for an individual in 2010. *Id.* Individuals receiving SSI are eligible for Medicaid. *Id.* Individuals with disabilities may receive both SSDI and SSI benefits, though SSDI benefits are included in SSI eligibility calculations. *Id.* Both SSDI and SSI benefits are predicated on an inability to work. *Id.* at 14. Under the Ticket to Work and Work Incentives Improvement Act of 1999, individuals who return to work may be able to maintain limited health coverage and cash payments. Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (codified at 42 U.S.C. § 1320b-19 (2006)). Medicare beneficiaries may

assessed overall, rather than with respect to individual impairments. Second, an individual's level of impairment is determined by considering evidence of functioning at work and in other environments. Third, the Social Security Administration employs the "treating-physician rule," which requires an Administrative Law Judge (ALJ) to give greater deference to the opinions of treating physicians than to the opinions of non-treating physicians.[309] Treating physicians are considered "likely to be the medical professionals most able to provide a detailed, longitudinal picture of [the claimant's] medical impairment(s)."[310] This Part will focus on the first two aspects of Social Security assessment and the broad environment-frames they entail. The "treating-physician rule" is the product of adopting such frames and does not warrant further consideration here.

1. Assessing Impairments in the Aggregate

The Social Security Administration uses a five-step sequential evaluation process to determine whether an individual is disabled.[311] The

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keep their insurance for eight and a half years. *Id.* § 202. Medicaid coverage may be extended or available for purchase. *Id.* § 201. Generally speaking, cash payments are phased out, given sufficient wages. *Red Book*, *supra*, at 30.

309. *See* Determining Disability & Blindness, 20 C.F.R. § 416.927(d)(2) (2010) ("Generally, we give more weight to opinions from [claimant's] treating sources . . . ."); *see also* Blakley v. Comm'r of Soc. Sec., 581 F.3d 399, 406 (6th Cir. 2009) ("[T]he treating physician rule, requires the ALJ to generally give greater deference to the opinions of treating physicians than to the opinions of non-treating physicians . . . .").

310. *Blakley*, 581 F.3d at 406 (citing Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, 544 (6th Cir. 2004) (quoting Determining Disability & Blindness, 20 C.F.R. § 404.1527(d)(2) (2004))).

311. Determining Disability & Blindness, 20 C.F.R. § 404.1520(a)(4)(i)–(v) (2010). Federal appeals courts review whether the ALJ made findings supported by substantial evidence and employed proper legal standards in reaching a conclusion. *See* 42 U.S.C. § 405(g) (2006) ("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action . . . ."); Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9th Cir. 2001) ("We will uphold the ALJ's decision if it is free of legal error and supported by substantial evidence."); Plummer v. Apfel, 186 F.3d 422, 227 (3d Cir. 1999) ("The role of this Court is identical to that of the District Court, namely to determine whether there is substantial evidence to support the Commissioner's decision."); Andrade v. Sec'y of Health & Human Servs., 985 F.2d 1045, 1047 (10th Cir. 1993) ("Our review of the Secretary's decision is limited to whether his findings are supported by substantial evidence in the record and whether he applied the correct legal standards." (citations omitted)); Brainard v. Sec'y of Health & Human Servs., 889 F.2d 679, 681 (6th Cir. 1989) ("Judicial review of the Secretary's decision is limited to determining whether the Secretary's findings are supported by substantial evidence and whether the Secretary employed the proper legal standards in

Social Security Administration assesses impairments in the aggregate to provide a more holistic view of a person's functioning across environments.[312] An ALJ first determines: (1) whether the claimant is engaged in substantial gainful employment activity,[313] (2) has a medically severe impairment or combination of impairments that significantly limits her ability to perform basic work activities,[314] and (3) has an impairment that is the same as, or equivalent to, a listed impairment.[315] The ALJ assesses "severe impairment" by considering an individual's overall ability to function or "the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity."[316] If these three criteria are met, the individual is considered disabled.

When the impairment at stake is not a listed one, an individual must prove (4) an inability to perform past relevant work.[317] If such impairment is established, the burden shifts to the Agency to establish that the claimant retains sufficient (5) residual functional capacity to permit her to engage in other substantial gainful employment.[318] Residual functional capacity measures a claimant's highest sustainable level of functioning in a work setting.[319]

When determining disability eligibility, the Social Security Administration and courts broadly assess an individual's functioning within relevant environments. The Administration considers the extent to which one's capability to work is diminished because of environmental

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reaching her conclusion."); Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981) ("The Social Security Act specifically mandates that '[t]he findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive.'" (quoting 42 U.S.C. § 405(g) (1970))).

312. Determining Disability & Blindness, 20 C.F.R. § 404.1520(a)(4)(i)–(v) (2010).

313. *Id.* § 404.1520(a)(4)(i).

314. *Id.* § 404.1520(a)(4)(ii). The "ability to do basic work activities" is defined as "the abilities and aptitudes necessary to do most jobs." *Id.* § 404.1521(b).

315. *Id.* § 404.1520(a)(4)(iii).

316. Social Security Act, 42 U.S.C. § 423(d)(2)(B) (2006); *see also* Webb v. Barnhart, 433 F.3d 683, 688 (9th Cir. 2005) (discussing this method of assessment).

317. 20 C.F.R. § 404.1520(a)(4)(iv).

318. *Id.* § 404.1520(a)(4)(v).

319. *See id.* § 404.1545 ("Your residual functional capacity is the most you can still do despite your limitations."). RFC is also measured at step (4), though if an individual is unable to perform past relevant work her claim will proceed to step (5). *See id.* § 404.1520(a)(4)(ii) ("At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled.").

limitations.[320] Both a claimant's "subjective symptoms" and "objective medical evidence" are considered.[321] Courts have almost uniformly agreed that the ability to work within the Social Security context means "the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world."[322] Being able to work requires physical labor as well as "substantial capacity, steady attendance, and psychological stability."[323]

In assessing an individual's residual functional capacity, the Agency or reviewing courts consider the aggregate effect of all impairments by examining the claimant in different environments and over an extended period of time.[324] Factors include: (1) daily activities; (2) location, duration, frequency, and intensity of pain and other symptoms, (3) factors that precipitate or aggravate symptoms, (4) effects of medication, (5) effects of treatments other than medication, and (6) any other factors concerning an individual's functional limitations and restrictions.[325] Biological as well as socially-constructed impairments may be considered.[326] Exertion levels at work may also be relevant.[327]

The regulations regarding mental functional capacity are even more specific in noting the need to obtain an aggregate view of an individual's disability. Federal regulations state that the "assessment of [mental] functional limitation . . . requires us to consider . . . all relevant evidence to obtain a longitudinal picture of [a claimant's] overall degree of functional limitation."[328] The regulations further provide that the degree of functional limitation is based on "the extent to which . . . impairment(s) interfere[]

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320. Wingo v. Bowen, 852 F.2d 827, 830 (5th Cir. 1988).

321. *Id.*

322. McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir. 1982), *abrogated on other grounds by* Forney v. Apfel, 524 U.S. 266 (1998).

323. Silk v. Astrue, 509 F. Supp. 2d 779, 785 (S.D. Iowa 2007) (citing Rhines v. Harris, 634 F.3d 1076, 1079 (8th Cir. 1980)).

324. *See* Gentle v. Barnhart, 430 F.3d 865, 868 (7th Cir. 2005) (reversing the judgment because "the administrative law judge failed to consider [claimant's] disabilities in combination, as the cases require"); *see also* Gaylor v. Astrue, 292 F. App'x 506, 515–516 (7th Cir. 2008) (holding that "the ALJ was required to consider [claimant's] back problems and mental impairments together and evaluate their aggregate effect on his ability to work"); *Wingo*, 852 F.2d at 830 ("[T]he ALJ's mechanical application of the guidelines failed to consider the aggregate impact of [plaintiff's] ailments.").

325. Glomski v. Massanari, 172 F. Supp. 2d 1079, 1083–84 (E.D. Wis. 2001).

326. Kelly v. Sec'y of Health & Human Servs., 871 F. Supp. 586, 592 (W.D.N.Y. 1994).

327. SSR 96-8p, 1996 WL 374184 (July 2, 1996).

328. Determining Disability & Blindness, 20 C.F.R. § 404.1520a(c)(1) (2010).

with [a claimant's] ability to function independently, appropriately, effectively, and on a sustained basis."[329] This determination is made based on such factors as overall functional performance, episodic limitations, the amount of supervision or assistance required, and the settings in which the claimant is able to function.[330] The four broad areas in which mental functional limitations are measured are: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, and pace; and (4) episodes of decompensation (i.e., temporary increases in symptoms followed by loss of functioning).[331]

2. *Considering Multiple Environments*

The focus on "daily activities" with respect to residual functional capacity and the "longitudinal look" for mental disabilities requires that the Social Security Administration assess individuals at work as well as in other environments to determine whether they are employable.[332] An ALJ's decision may in fact be overturned, if a claimant's functionality is only assessed in her work environment.[333] Unlike ADA jurisprudence, however, courts assessing Social Security claims have cautioned against ALJs "giving undue evidentiary weight to a claimant's ability to carry out activities incident to day-to-day living when evaluating [that individual's] ability to perform full-time work."[334] Judges considering Social Security claims must consider the frequency and independence of activities performed by the claimant, and her ability to sustain these activities over a period of time.[335] As the Ninth Circuit has held, "daily activities may discredit a claimant only where they constitute a 'substantial part' of her day and are transferable to a work setting, and the mere performance of

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329. *Id.* § 404.1520a(c)(2).

330. *Id.*

331. *Id.* § 404.1520a(c)(3).

332. *See id.* § 404.1520a(c)(3)–(4) (noting that the assessment of functional limitation is a "complex and highly individualized process," which includes evaluation of "the settings in which [claimant is] able to function").

333. *See, e.g.*, Carpenter v. Astrue, 537 F.3d 1264, 1269 (10th Cir. 2008) (holding that the failure of the ALJ to consider claimant's assertion that she could not drive, read, do math, cook, or prepare meals resulted in an evaluation that did not consider "*all* relevant evidence to obtain a longitudinal picture of the [claimant's overall] degree of functional limitation" (citations omitted)).

334. Reed v. Barnhart, 399 F.3d 917, 923 (8th Cir. 2005).

335. *Id.*

certain daily activities does not in any way detract from her credibility as to her overall disability."[336]

Courts have held in a number of contexts that the ability of a claimant to function in some part of a broad environment does not render her ineligible for Social Security disability benefits.[337] Claimants who are able to function at home,[338] at medical facilities,[339] at schools,[340] or in the broader social realm[341] may be viewed as disabled for Social Security purposes. Numerous courts have recognized undertaking tasks at home does not necessarily transfer to a work environment.[342] Time and other

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336. Woolsey-Crandall v. Astrue, 258 F. App'x 147, 148–49 (9th Cir. 2007).

337. *See* Hennen v. Astrue, 257 F. App'x 21, 22 (9th Cir. 2007) (finding that the ALJ failed to establish a relationship between claimant's activity at a local bar and his alleged disabilities).

338. *See* Smolen v. Chater, 80 F.3d 1273, 1284 n.7 (9th Cir. 1996) (noting that the ALJ may "reject a claimant's symptom testimony if the claimant is able to spend a substantial part of her day performing household chores," but further noting that this line of reasoning has its limits); *see also* Ford v. Astrue, 518 F.3d 979, 983 (8th Cir. 2008) (finding that claimant's activities of "washing a few dishes, ironing one or two pieces of clothing, making three or four meals each week, and reading" were not inconsistent with her disability claim); Gaylor v. Astrue, 292 F. App'x 506, 513 (7th Cir. 2008) ("[I]t is a deficient analysis to assume that a claimant's ability to care for personal needs and the needs of his or her children is synonymous with an ability to be gainfully employed."); Murphy v. Sec'y of Health & Human Servs., 872 F. Supp. 1153, 1159 (E.D.N.Y. 1994) ("The fact that plaintiff could read and watch television and movies also does not necessarily support the ALJ's conclusion that plaintiff was capable of sedentary work.").

339. *See* Genier v. Astrue, 298 F. App'x 105, 106, 108 (2d Cir. 2008) (vacating the ALJ's finding that claimant's functional assessment by a "consultative doctor" revealed that she was only "moderately limited"); Cox v. Barnhart, 345 F.3d 606, 610 (8th Cir. 2003) (noting that a single medical evaluation does "not constitute substantial evidence on which the ALJ can permissibly base his decision"); Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (finding that claimant's ability to participate in physical therapy and exercise did not support a finding that she could perform past relevant work) .

340. *See* Cohen v. Sec'y of Health & Human Servs., 964 F.2d 524, 530 (6th Cir. 1992) (noting that attending school is not as demanding as full-time remunerative work because classroom hours are less strenuous, and a student can miss class without penalty as well as complete homework on her own schedule); *see also* Parish v. Califano, 642 F.2d 188, 192 (6th Cir. 1981) ("[The] ability to attend school on such part-time basis . . . does not establish an ability to be engaged in substantial gainful activity.").

341. *See* Haulot v. Astrue, 290 F. App'x 53, 55 (9th Cir. 2008) ("The fact that [claimant] drove short distances every four or five weeks [and engaged in other daily tasks] does not support the conclusion that he can work eight hours a day, five days a week, on a consistent basis."); Wilson v. Comm'r of Soc. Sec., 303 F. App'x 565, 566 (9th Cir. 2008) ("Evidence that [claimant] occasionally drove to Phoenix, took a vacation to Hawaii, and sometimes found the energy to go grocery shopping are not clear and convincing evidence that the claimant led a life that is not compatible with disabling pain and limitations.").

342. *See, e.g.*, *Smolen*, 80 F.3d at 1284 n.7 ("[M]any home activities may not be easily transferable to a work environment where it might be impossible to rest periodically or take

pressures differ at home and in the workplace.[343] Further, the ability to complete light housework does not mean that an individual possesses the functional capacity to work.[344] Caring for one's children, for example, may be the product of desperation to retain custody, not actual functionality: "A person can be totally disabled for purposes of entitlement to social security [sic] benefits even if, because of . . . circumstances of desperation, he is in fact working."[345] In addition, courts have held that evidence of the ability to perform ordinary life activities is relevant to disability assessment only if it is inconsistent with a claimed disability.[346]

Courts are also hesitant to equate performing tasks under the supervision of a health care professional with the ability to work full-time.

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medication."); *Ford*, 518 F.3d at 983 ("We . . . believe that the ALJ erred in concluding that Ms. Ford's description of her daily activities worked against her. . . . [D]o[ing] such things as washing a few dishes, ironing one or two pieces of clothing, making three or four meals each week, and reading . . . are [not] inconsistent with her . . . contention that she is unable to hold a full time job."); *Gaylor*, 292 F. App'x at 513 ("[I]t is a deficient analysis to assume that a claimant's ability to care for personal needs and the needs of his or her children is synonymous with an ability to be gainfully employed."); *Murphy*, 872 F. Supp. at 1159 (finding that claimant's ability to read and watch television and movies did "not necessarily support the ALJ's conclusion that plaintiff was capable of sedentary work," which involves activities for a sustained period).

343. *See* Mendez v. Barnhart, 439 F.3d 360, 362 (7th Cir. 2006) ("The pressures, the nature of the work, flexibility in the use of time, and other aspects of the working environment as well, often differ dramatically between home and office or factory or other place of paid work.").

344. *See, e.g.*, Gaylor v. Astrue, 292 F. App'x 506, 513 (7th Cir. 2008) (holding that claimant's ability to care for her own needs and those of her children did not demonstrate the capability for gainful employment); Ford v. Astrue, 518 F.3d 979, 981 (8th Cir. 2008) (holding that claimant's ability to wash dishes, iron clothes, and make several meals a week did not show that she could work); Wagner v. Astrue, 499 F.3d 842, 851 (8th Cir. 2007) (holding that claimant's ability to cook, clean, and enjoy a hobby at home did not constitute substantial evidence of the capacity for gainful employment); Swope v. Barnhart, 436 F.3d 1023, 1026 n.4 (8th Cir. 2006) (noting that claimant's ability to perform light housework and visit friends did not indicate the capacity for work); Murphy v. Sec'y of Health & Human Servs., 872 F. Supp. 1153, 1159 (E.D.N.Y. 1994) (holding that claimant's ability to read and watch television did not prove that he can perform sedentary work); Gentle v. Barnhart, 430 F.3d 865, 867 (7th Cir. 2005) (holding that claimant's ability to perform housework and take care of an infant was not the same as the ability to work in the labor market); Salts v. Sullivan, 958 F.2d 840, 846 (8th Cir. 1992) (finding that claimant's ability to take care of a garden, mow a lawn, build model cars, play cards, and drive did not disprove disability).

345. Gentle v. Barnhart, 430 F.3d 865, 867 (7th Cir. 2005).

346. *See* Burrow v. Barnhart, 224 F. App'x 613, 616 (9th Cir. 2007) (holding that claimant's ability to attend church and perform some housework with assistance was not relevant to demonstrating severe fatigue and chronic pain); *see also, e.g.*, Castillo v. Astrue, 310 F. App'x 94, 97 (9th Cir. 2009) (holding that the ability to prepare meals, shop, and ride a bike was not relevant to assessing a psychological disability).

A number of courts have held that a claimant's ability to perform an isolated task while being examined by a doctor does not indicate the ability to be hired and to retain a job that involves performing that task.[347] Similarly, a single medical evaluation does not provide sufficient evidence of disability.[348] Further, the fact that a claimant performs certain physical activities as part of medical treatment does not mean that she could engage in similar activities outside that context.[349]

At least one court has held that "'attending college on a part-time basis is not the equivalent of being able to engage in substantial gainful activity'" because school is often less demanding than working.[350] Student absences do not have the same implications as employee absences, since employees must often perform work on a more rigid schedule.[351]

The ability to access the broader social realm through driving may not be evidence of the capability to work either.[352] One court noted that

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347. *See* Genier v. Astrue, 298 F. App'x 105, 106 (2d Cir. 2008) (holding that claimant who had the physical ability to watch a surveillance monitor was disabled because he had difficulty concentrating, making quick judgments, and understanding emergency situations); *see also* Ingram v. Chater, 107 F.3d 598, 604 (8th Cir. 1997) (holding that "the ability merely to lift weights occasionally in a doctor's office" is not the same as residual functional capacity); Wingo v. Bowen, 852 F.2d 827, 831 (5th Cir. 1988) ("[T]he fact that [claimant] may be able to inspect a pencil or lace a football does not necessarily mean that she can function as a pencil inspector or hand-lacer. The Secretary's determination that she can perform these jobs is mere speculation." (citations omitted)); McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir. 1982) (holding that an individual should be assessed according to her "ability to perform the requisite physical acts day in and day out"), *abrogated on other grounds by* Forney v. Apfel, 524 U.S. 266 (1998).

348. *See, e.g.*, Cox v. Barnhart, 345 F.3d 606, 610 (8th Cir. 2003) ("We have stated many times that the results of a one-time medical evaluation do not constitute substantial evidence on which the ALJ can permissibly base his decision.").

349. *See* Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) ("A patient may do [physical] activities *despite* pain for therapeutic reasons, but that does not mean she could concentrate on work despite the pain or could engage in similar activity for a longer period given the pain involved.").

350. Cohen v. Sec'y of Health & Human Servs., 964 F.2d 524, 530 (6th Cir. 1992) (quoting Parish v. Califano, 642 F.2d 188, 191 (6th Cir. 1981)).

351. *See Parish*, 642 F.2d at 192 ("[O]ne may miss occasional classes without penalty, and homework may be scheduled for those times when the student feels his or her best."). *But see* Long v. Chater, 108 F.3d 185, 188 (8th Cir. 1997) (finding that plaintiff's claim of impairment in reading and writing was contradicted by her making the dean's list at her community college).

352. *See* Haulot v. Astrue, 290 F. App'x 53, 55 (9th Cir. 2008) (finding that claimant's ability to drive short distances every four or five weeks did not indicate claimant was able to work full time); *see also* Wilson v. Comm'r of Soc. Sec., 303 F. App'x 565, 566 (9th Cir. 2008) (referring to claimant's activities, including driving occasionally, as "sporadic and punctuated" and finding that such activities could be consistent with disability).

the fact that a claimant drove short distances every few weeks and sporadically performed household chores did not "support the ALJ's conclusion that he could work eight hours a day, five days a week, on a consistent basis."[353] Similarly, evidence that a claimant occasionally drove to another city, resting along the way, did not discredit her testimony that she had disabling pain.[354]

Courts may even question the functionality of individuals who are employed.[355] Some courts have held that actual employment is not concrete evidence of an ability to work. According to these courts, disabled individuals may hold jobs out of necessity that tax their capacities.[356] Additionally, individuals working under "special conditions"—such as employment based on "a family relationship, past association with [their] employer, or [due to their] employer's concern for [their] welfare"—may not be considered gainfully employed under the regulations supporting the Social Security Act.[357]

Individuals may not be viewed as disabled, however, if they are able to perform work-related tasks in a number of situations within their daily environments.[358] For example, the Eighth Circuit in *Qualls v.*

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353. *Haulot*, 290 F. App'x at 55.

354. *Wilson*, 303 F. App'x at 566. *But see* Morton v. Shalala, 943 F. Supp. 1170, 1174 (W.D. Mo. 1996) (finding that claimant who drove 475 miles without stopping or taking medication did not have a credible complaint of disabling back pain).

355. *See* Miller v. Chater, 99 F.3d 972, 977–78 (10th Cir. 1996) (finding that claimant's brief employment did not undermine his disability status).

356. *See* Barnett v. Barnhart, 381 F.3d 664, 669 (7th Cir. 2004) ("Having a job is not necessarily inconsistent with a claim of disability; the claimant 'may have a careless or indulgent employer or be working beyond his capacity out of desperation.'" (quoting Henderson v. Barnhart, 349 F.3d 434, 435 (7th Cir. 2003)); *see also* Gentle v. Barnhart, 430 F.3d 865, 867 (7th Cir. 2005) ("A person can be totally disabled for purposes of entitlement to social security benefits even if . . . he is in fact working."); Wilcox v. Sullivan, 917 F.2d 272, 277 (6th Cir.1990) ("[Claimant] should not be penalized because he had the courage and determination to continue working despite his disabling condition."); Simms v. Weinberger, 377 F. Supp. 321, 327 (M.D. Fla.1974) ("[Plaintiff] should not be penalized for her perseverance and courage in seeking to overcome her disability.").

357. Determining Disability & Blindness, 20 C.F.R. § 404.1573(c)(6) (2010).

358. *See, e.g.*, Heston v. Comm'r of Soc. Sec., 245 F.3d 528, 536 (6th Cir. 2001) (holding that claimant who walked around her yard for exercise, rode an exercise bicycle, attended church, vacationed, cooked, vacuumed, and made beds was not disabled); Cruze v. Chater, 85 F.3d 1320, 1325 (8th Cir. 1996) (holding that claimant who cared for a number of farm animals, drove three hours to town weekly, and exercised on a treadmill was not disabled); Smith v. Shalala, 987 F.2d 1371, 1374–75 (8th Cir. 1993) (holding that claimant who drove his children to school, visited relatives and friends, picked up mail from the post office, attended church, sang for two hours at a time, and delivered sermons each week was not disabled).

Apfel,[359] held that the plaintiff who claimed to suffer from disabling pain and fatigue could perform work as a real estate agent because she "read, watch[ed] television, [made] crafts, rais[ed] flowers, visit[ed] her parents regularly, attend[ed] church twice a week, [drove], attend[ed] to personal business, [laundered clothes, shopped for groceries, and took] care of her grandchildren."[360] In a more recent case, the same court upheld an ALJ's finding that an individual was not disabled because of her ability to perform "an array" of work-related activities in a number of environments.[361]

The absence of medical restrictions may allow an inference of the capacity for gainful employment as well. One court found that an ALJ correctly determined that a claimant was not disabled because his doctors failed to limit his physical activities and encouraged him to return to work, and he "care[d] for his three daughters, perform[ed] household chores, cut the grass . . . and walk[ed] up to six blocks at a time."[362] Additionally, when a claimant's daily life activities contradict her view of her own impairment, courts may use lack of medical findings to establish functionality at work.[363] The same is true if a claimant does not seek regular treatment or take medication, yet complains of a medical condition.[364]

Thus, under the Social Security Act, an individual's impairments are assessed holistically and in the aggregate across daily environments. However, courts consider a claimant gainfully employable and ineligible for disability benefits only when she is able to function in a number of different environments and to perform frequent tasks that are transferrable to the workplace. Claimants are not penalized for being able to function in one portion of a broad environment.

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359. *See generally* Qualls v. Apfel, 158 F.3d 425 (8th Cir. 1998).

360. *Id.* at 427.

361. *See* Clevenger v. Soc. Sec. Admin., 567 F.3d 971, 976 (8th Cir. 2009) ("[Claimant who alleged "disabling pain" could] do[] laundry, wash[] dishes, chang[e] sheets, iron[], prepar[e] meals, driv[e], attend[] church, and visit[] friends and relatives.").

362. Leggett v. Chater, 67 F.3d 558, 565 (5th Cir. 1995).

363. *See* Mastro v. Apfel, 270 F.3d 171, 179–80 (4th Cir. 2001) (holding that plaintiff with no clinical or laboratory reports could not substantiate his claim of disabling pain).

364. *See* Novotny v. Chater, 72 F.3d 669, 671 (8th Cir. 1995) (finding that plaintiff who did not seek medical attention but who carried out garbage and drove his wife to and from work failed to establish he was suffering from disabling pain).

B. Environment-Framing for Protected Class and Remedy

Social Security disability cases highlight the importance of environment-framing for judicial outcomes. The environment in which disability is assessed may be as, if not more, important than how disability is defined. Despite a restrictive definition of "disability," broad frames often result in courts granting plaintiffs disability status in Social Security cases. By contrast, broad frames and a more inclusive definition of "disability" result in courts denying plaintiffs disability eligibility under the ADA. In order to give force to the ADA and to address fragmentation, courts must alter the way in which environments are framed and assessed.

Social Security cases should inform environment-framing under the ADA, in terms of scope and method of assessment. The first step is for courts to consistently use broad environment-frames for disability eligibility and remedy purposes. A broad environment-frame enables a more meaningful and realistic assessment of an individual's functional capacities. Individuals function across numerous environments in a given day; disability does not begin and end based on statutorily-protected contexts. Assessing functional impairment under a narrow environment-frame fragments the human experience of disability by creating a disjunction between the lived and legally recognized aspects of disability. It also undermines injunctive relief. Drawing environment-frames broadly allows for more meaningful access to statutorily protected environments, i.e., workplaces, transportation, and places of public service and accommodation.

The second step entails a different method of assessment of broad environment-frames. Under the ADA, many courts currently apply broad frames to the disability threshold test and deny class eligibility when an individual is perceived as functioning in some portion of the large environment.[365] The concept of aggregate impairments from Social Security litigation is useful at this juncture. While the ADA does not consider impairments unless they relate to a particular major life activity, a litigant could be assessed more holistically with respect to a given major life activity.[366] This would entail considering impairments that relate to a

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365. *Supra* Part II.

366. Under the ADA, plaintiffs are not allowed to demonstrate disability by showing they are partially limited in multiple major life activities. Rather, they must prove "substantial limitation" in one major life activity. *See* ADA, 42 U.S.C. § 12102(1)(A) (2006) (defining disability as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual"). By assessing disability in distinct spheres, the ADA

major life activity in the aggregate, or across environments, to gain a more complete view of the extent of functionality. Disability status would be granted, however, unless an individual is able to function throughout many or "an array" of her daily environments in a manner relevant to her claimed limitation.[367] The same holistic assessment would be used to consider functionality for purposes of making accommodation or other modification.

The proposed solution requires judicial rather than legislative change. With respect to eligibility, courts would continue to use the same broad environment but employ a different method of assessing functioning for major life activities. Courts would consider limitations of major life activities in the aggregate across daily environments and would not deny disability status, unless an individual was able to perform the major life activity at stake across a significant number of environments. In the remedy context, courts would adopt a different, broader environment-frame. This would involve an assessment of functioning in a larger physical space to allow more meaningful access to the environments protected under the ADA.

VI. Conclusion

"Environment-framing" may determine judicial outcomes for individuals with disabilities. While the ADA does not speak to defining environments, it implicitly requires that courts assess environments to determine disability eligibility and remedy. This is because measuring functioning in these contexts requires an assessment of impairment within physical spaces. Typically, courts frame environments broadly for disability eligibility purposes. Courts usually analyze these broad environment-frames in a manner that views individuals who are able to function in some part of their environment as without limitation in a major life activity and therefore as not legally disabled. At the remedy stage of disability analysis, courts often adopt narrow environment-frames. Generally, the narrower the environment selected for remedy, the more limited the accommodation or other modification. As a result, courts use

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does not account for the fact that different major life activities, e.g., "working" and "performing manual tasks," often overlap. *Id.* Thus, one could argue that the individual activity assessment itself provides a fragmented view of an individual's functional capacities, though assessing an individual in a broad environment mitigates that fragmentation to some extent.

367. Clevenger v. Soc. Sec. Admin., 567 F.3d 971, 976 (8th Cir. 2009).

environment-frames inconsistently for assessing impairment, and the frames they choose undermine disability protections at both stages of disability analysis. Environment-framing thus results in fragmentation, or a disconnection between the lived and legal experience of disability. An individual may experience disability as continuous, but the law affords only sporadic (or no) protection. The AAA, which expands the definition of "disability," does not resolve these problems. Drawing from the method of assessing environments within Social Security disability benefits cases, this Article proposes a two-part solution: First, courts should adopt a broad environment-frame throughout disability analysis, and, second, individuals should be assessed in a more complete or holistic manner that requires functioning in a number of environments to deny disability status.

It is worth pausing at this juncture to consider why courts frame environments as they do under the ADA, with trends towards broad frames for the disability threshold test and narrow frames for remedy. One explanation is that it is simply random, since defining the environment is an implied rather than explicit part of established statutory tests. Proof of this may be that a minority of federal courts do not frame environments broadly for relief purposes. In these and other cases, courts may be guided by intuition about whether someone is disabled or should be entitled to a remedy. A second explanation, and the one I am inclined to believe, is that consciously or subconsciously, courts select environments guided by the desire to shield firms from the effects of an unfunded mandate. Given the broad definition of disability under the AAA, this highlights the potential significance of environment-framing in the decades to come.