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AIDS, ASTROLOGY, AND ARLINE: TOWARDS A CAUSAL INTERPRETATION OF SECTION 504

Section 504 of the Rehabilitation Act of 1973 provides that '[n]o otherwise qualified individual with handicaps shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under [any federal or federally funded program].'¹ In *School Board v. Arline*,² the Supreme Court held that a school teacher with a history of infectious tuberculosis was an 'individual with handicaps' protected by **section 504**,³ and that the determination of whether she was 'otherwise qualified' to teach elementary school required a sound medical assessment of the risks of contagion posed by her condition.⁴ Had the case arisen a decade ago, it likely would have attracted little attention *238 or comment. In 1987, however, a spectre haunted *Arline*—the spectre of **AIDS**.⁵ Several of the amicus curiae briefs filed on both sides in *Arline* specifically discussed the case's possible implications for future claims under **section 504** alleging discrimination against persons with **AIDS** or **AIDS-Related Complex (ARC)**,⁶ carriers of the Human Immunodeficiency Virus (HIV) responsible for **AIDS**,⁷ *239 or persons wrongly regarded as having **AIDS** or harboring the virus.⁸ The Solicitor General shared argument time with the petitioning school board, urging a construction of **section 504** first advanced in 1986 by the Justice Department's Office of Legal Counsel (OLC) in an opinion by Assistant Attorney General Charles J. Cooper dealing specifically with **AIDS**-related discrimination.⁹ When Justice Brennan announced the opinion of the Court, he took the unusual step of cautioning those present in the courtroom that the case was *not* about **AIDS**. Nonetheless, the *Washington Post*, no doubt reflecting the prevailing understanding of the case, ran a front-page story on the *Arline* decision with the headline, '**AIDS** Ruled a Protected Handicap.'¹⁰

Justice Brennan's effort to direct attention to the narrow scope of the decision in *Arline* has proved largely unavailing. *Arline* holds, correctly, that persons with contagious disease are not per se excluded *240 from coverage under **section 504**,¹¹ a conclusion with obvious significance for claims of **AIDS**-related discrimination under that statute. The Court's holding, however, does not address the most interesting and important questions concerning the relationship between **section 504** and **AIDS**. For purposes of **section 504**, an individual with handicaps is someone who '(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.'¹² Both the Cooper Opinion and the Justice Department brief submitted in *Arline* maintain that because infection with a communicable bacillus or virus, standing alone, results in neither a 'physical or mental impairment' nor a 'substantial limitation on major life activities,' asymptomatic carriers of tubercule bacilli or the **AIDS** virus are not individuals with handicaps within the meaning of the Rehabilitation Act.¹³ Therefore, discrimination by reason of the real or imagined condition of contagious infection is not necessarily discrimination 'solely by reason of handicap,' as **section 504** requires, even when the fear of contagion is utterly irrational, and even when the victim of discrimination is handicapped by tuberculosis or **AIDS**.¹⁴ In the wake of *Arline*, the Justice Department has abandoned this position, at least as it applies to persons infected with the **AIDS** virus, in a September 27, 1988, opinion by Acting Assistant Attorney General Douglas W. Kmiec.¹⁵ The Kmiec Opinion maintains 'that **section 504** protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity' as long as those individuals are 'otherwise qualified' to participate in the covered program.¹⁶ The

opinion explicitly repudiates the Cooper Opinion's contention that asymptomatic infection with the **AIDS** virus is neither a physical or mental impairment¹⁷ nor a substantial limitation on major life activities, *241¹⁸ finding reconsideration of this view necessary in light of 'subsequent legal developments (the Supreme Court's decision in **Arline** . . .) and subsequent medical clarification,'¹⁹ the latter referring to a July 29, 1988, letter from Surgeon General C. Everett Koop stating that 'from a purely scientific perspective, persons with HIV infection are clearly impaired.'²⁰

The Kmiec Opinion is wrong. While the **Arline** decision contains language that seems to reject the Justice Department's original argument,²¹ that language, as Justice Brennan recognized, is dicta. Indeed, the issue the Justice Department sought to raise in **Arline** was not even properly before the Court.²² Furthermore, the dicta is particularly ill-considered.²³ If one's goal is to construe **section504** correctly, one gains little by parsing the Court's prose in **Arline**.²⁴ Nor does Dr. Koop's 'medical clarification' provide any grounds for reconsidering the Cooper Opinion. Whether asymptomatic infection with the **AIDS** virus is an 'impairment' for purposes of the Rehabilitation Act is a *legal* question, which can only be answered, in light of all relevant medical information, after the meaning of that term is discovered through ordinary tools of statutory **interpretation**. The Surgeon General's letter did provide an opportunity for OLC to remedy the Cooper Opinion's most conspicuous shortcoming—its failure to discuss whether the inhibiting effect of HIV infection on sexual activity or childbearing makes it a handicap²⁵—but the Kmiec Opinion cleanly fumbled that opportunity.

*242 The Justice Department's retreat is unfortunate, because the Cooper Opinion lays the groundwork for a sound construction of the Rehabilitation Act, a statute that has caused more than its fair share of **interpretative** headaches in its relatively brief lifespan. This Article trods the road not taken by the Kmiec Opinion. Part I examines in detail the language and structure of **section504** and its accompanying definition of an 'individual with handicaps' in section 706(8)(8b).²⁶ A proper understanding of these provisions requires recognition of the two distinct ways in which the concept of **causation** is central to the Rehabilitation Act: (1) a person is an individual with handicaps under section 706(8)(B) if he²⁷ has, has a record of, or is regarded as having a physical or mental impairment which *medically causes* his physical or mental capacities to be substantially limited;²⁸ and (2) discrimination occurs by reason of handicap under **section504** when a handicap is a *but-for cause* of exclusion or discriminatory treatment by a recipient of federal funds.²⁹ Part II applies this construction of the Act to **AIDS**-related discrimination,³⁰ after a brief consideration of discrimination based on **astrological** sign.³¹ Part III discusses the **Arline** decision, demonstrating that its holding does not extend to the analysis of Parts I and II and criticizing the dicta that does purport to extend that far.³² Part IV replies to some criticisms of the Cooper Opinion and anticipates a methodological *243 criticism that might be levelled against the arguments made in this Article.³³ Part V contains concluding remarks.³⁴

I. A CAUSAL THEORY OF SECTION504

The Rehabilitation Act, as enacted in 1973³⁵ and extended in 1987,³⁶ authorized federal funding of vocational training programs for persons with handicaps.³⁷ The Act also contains a variety of provisions aimed at preventing discrimination against the handicapped. Section 501 requires each federal department, agency, and instrumentality to submit to the Equal Employment Opportunity Commission (EEOC) 'an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps . . .'³⁸ Section 502 creates an Architectural and Transportation Barriers Compliance Board to address the problem of architectural barriers that may impede individuals with handicaps.³⁹ Section 503 requires certain government contractors to 'take affirmative action to employ and advance in employment qualified individuals with handicaps.'⁴⁰ Finally, **section504**, the only section analyzed by this Article, provides, in relevant part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by *244 the United States Postal Service.⁴¹

A successful **section504** cause of action must prove each of five elements: (1) an otherwise qualified (2) individual with handicaps, (3) solely by reason of his handicap, (4) was excluded from or suffered discrimination under (5) a federal⁴² or federally funded program. In Part I, I assume that elements (1), (4), and (5) are always satisfied, and therefore discuss only the requirements that the plaintiff be an individual with handicaps and suffer discrimination solely by reason of his handicap. In Part II, the discussion is expanded to include element (4).

A. 'Individual with Handicaps'

Section504 prohibits discrimination only against 'individuals with handicaps.'⁴³ It does not itself define that term, but refers to section 706(8), which defines it to include 'any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.'⁴⁴ *245 The statute contains two specific exceptions to these three definitions. In 1978, Congress prescribed that for purposes of sections 503 and 504 as they relate to employment, the definition of an individual with handicaps does not include 'any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others.'⁴⁵ More recently, as part of the Civil Rights Restoration Act of 1987,⁴⁶ Congress similarly specified that, for purposes of those provisions as they relate to employment, the definition of an individual with handicaps 'does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or . . . is unable to perform the duties of the job.'⁴⁷ Both exclusionary amendments were responses to specific administrative or judicial decisions,⁴⁸ and both are meaningless gestures that do not affect the Rehabilitation Act's coverage. Even if an alcoholic, drug addict, or contagious individual who posed a threat to others or who could not perform his job was considered handicapped for purposes of sections 503 and 504, it is inconceivable that he could be 'qualified' or 'otherwise qualified' for a job within the meaning of those provisions. The amendments merely provide an additional basis for excluding such a person from the Act's coverage. They do not deny recovery to any plaintiff who would prevail in their absence.⁴⁹

*246 Section 706(8)(B)'s three definitions of an individual with handicaps are distinct, but not independent; the word 'such' in the second and third definitions incorporates by reference the elements of the first. Since it is awkward constantly to repeat the terms of that first definition in full, the phrase 'is disabled' is often employed in this Article as shorthand for 'has a physical or mental impairment which substantially limits one or more of such person's major life activities.' Similarly, the term 'disability' is used as shorthand for the requisite substantially limiting physical or mental impairment. These terms simply provide convenient modes of expression (though they are carefully chosen),⁵⁰ and they should not divert attention from the need to answer all **interpretative** questions by referring to the specific words of the Rehabilitation Act.

1. 'Has a Physical or Mental Impairment which Substantially Limits One or More of Such Person's Major Life Activities.'—The first of the three definitions in section 706(8)(B) states that a person is an individual with handicaps if he 'has a physical or mental impairment which substantially limits one or more of such person's major life activities . . .'⁵¹ The principal terms of this definition—'physical or mental impairment,' 'which,' 'substantially limits,' 'major life activities'—are not defined in the Rehabilitation Act. Implementing regulations seek to define some of these terms.⁵² Reliance on those regulations, however, can be treacherous. Some of them constitute serious, and even blatant, misreadings of the statute. Accordingly, it is important to test the regulations at each step for consistency with the language and structure of the Rehabilitation Act itself.⁵³

*247 a. 'Physical or Mental Impairment.'—The statutory term 'physical or mental impairment' is defined by the regulations as:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin, and endocrine; or (B)

any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁵⁴

An analysis accompanying the regulations suggests some examples of conditions and diseases that constitute covered impairments,⁵⁵ but disclaims any attempt to provide an exhaustive list.⁵⁶

The regulation as written is far outsize the scope of section 706(8)(B)(i). First, the physical 'impairments' encompassed by the regulation include all physiological disorders or conditions 'affecting' a relevant body system. Plainly, *any* physiological condition will affect one or more body systems. For example, one's array of rods and cones affects one's eyesight, the product of 'special sense organs,' even when the effect is to produce 20/20 vision. The regulation therefore reads the impairment requirement completely out of the statute. A proper definition must include only conditions *adversely* affecting an individual's physical or mental well-being,⁵⁷ thus *248 preserving the statute's implicit distinction between physical or mental conditions and impairments.⁵⁸

Second, the regulation declares that a 'cosmetic disfigurement' can constitute a physical impairment.⁵⁹ This poses no difficulty as long as it is acknowledged that any such disfigurement, just like any 'physiological disorder or condition' or 'anatomical loss,' must *adversely affect* a body system in order to satisfy and statute. If that is the regulation's meaning, however, it is difficult to imagine why it uses the adjective 'cosmetic,' which strongly suggests aesthetic rather than medical considerations. A person with a truly cosmetic disfigurement—that is, a disfigurement with no actual adverse physical consequences—is clearly handicapped if other persons wrongly regard his condition as a debilitating impairment,⁶⁰ but the term 'physical . . . impairment' cannot possibly be read to include the physically harmless disfigurement itself. Accordingly, the term 'cosmetic' must give way to the implied requirement that only disfigurements that adversely affect body systems are the impairments contemplated by the statute.⁶¹

*249 6. 'Which.'—The regulations pass over one of the most important terms in section 706(8)(B)(i): 'which.' A person is not handicapped under the statute merely because he has a physical or mental impairment *and* is substantially limited in one or more of his major life activities. The statute plainly requires that the individual have an 'impairment *which* substantially limits' a major life activity.⁶² This means that in order for a person to be actually disabled, he must have a physical or mental impairment that itself *causes*, in some medical sense, a substantial limitation on a major life activity. Untold confusion has resulted from overlooking this feature of the statute, and it is discussed in considerable detail below.⁶³

c. 'Substantially Limits.'—The regulations do not attempt to define the term 'substantially limits.' The Secretary of Health, Education and Welfare stated in 1977 that he did not believe that a definition of the term was possible at that time,⁶⁴ and evidently nothing has changed since then.⁶⁵ However, the term's present tense means that impairments which are not presently disabling cannot be handicaps simply because they may or will be substantial limitations on major life activities in the future. Thus, a high cholesterol level, even if it were properly viewed as an impairment (which is doubtful), and even if it were a reliable indicator of a future handicapping heart condition, is not itself a handicap because it does not presently substantially limit major life activities.

The same present tense requirement must govern any inquiry into the existence *vel non* of an impairment. An impairment is a condition that adversely affects or diminishes an individual's capacities. While it is perhaps linguistically possible to read the term 'physical or mental impairment' (as it is not linguistically possible to read the term 'substantially limits') to include conditions that constitute only potential or future health risks,⁶⁶ that is a strained and unnatural reading. Section 706(8)(B)(i) requires a disability here and now, and there is no warrant in the statute's language or structure for attaching different tenses to its different terms.⁶⁷

*250 d. ‘Major Life Activities.’—The regulations define ‘major life activities’ to be ‘such functions as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.’⁶⁸ The list is illustrative rather than exhaustive, but it is significant that it consists principally of physical or cognitive, not purely social, activities. The only possible exception is ‘working.’ Viewing the regulation in isolation, and given the other terms in the series, the best conclusion would be that ‘working’ refers to the basic physical or mental tasks required by that activity—in other words, carrying out the physical and mental operations necessary to work. Viewing the regulations as a whole, however, it seems clear that ‘working’ is meant to refer to the social act of having and holding a job.⁶⁹ Nonetheless, while it is a close question, the former, task-based reading appears to be commanded by the statute. There are many things that common discourse would regard as major life activities that are not within the scope of section 706(8)(B). For example, a social activity such as maintaining friendships is surely, in many linguistic contexts, a major life activity. However, it does not appear to be the sort of activity whose limitation is encompassed by the Rehabilitation Act, a statute that deals exclusively with physical and mental *disabilities*, whether past, present, or perceived.⁷⁰ In that context, ‘major life activities’ must mean something like ‘major activities associated with the biological *251 phenomenon of human life (including its mental and/or cognitive aspects),’ rather than ‘activities frequently engaged in by living humans’—even though a meaning that encompassed social as well as physical or cognitive activities might well fit the term in other contexts.

2. ‘Has a Record of Such an Impairment.’—Even if a person does not presently have a physical or mental impairment which substantially limits one or more of his major life activities, he can still qualify as an individual with handicaps if he ‘has a record of such an impairment,’⁷¹ or, as the regulations put it, ‘has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.’⁷² Thus, a person who was once disabled because of cancer or a heart condition, but has since recovered, remains throughout his life an individual with handicaps under the statute. Similarly, a person who was never truly disabled, but was at one time misclassified as having mental illness, is handicapped in the contemplation of the statute for the rest of his life.⁷³

3. ‘Is Regarded as Having Such an Impairment.’—Someone who has neither a physical or mental impairment which substantially limits one or more major life activities nor a record of such an impairment is nonetheless an individual with handicaps if he ‘is regarded as having such an impairment.’⁷⁴ The regulations have considerable trouble with this portion of the statute. They define it to include any person who:

(A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.⁷⁵

The first and third definitions are straightforward and unproblematic. The first describes a situation where the individual actually has a physical or mental impairment that does not in medical *252 fact substantially limit the individual’s major life activities, but is incorrectly treated as doing so by a recipient of federal funds. Hence, the recipient regards the individual as being disabled within the meaning of section 706(8)(B)(i). Similarly, in a case covered by the third regulatory definition, the individual has no impairment, substantially limiting or otherwise, but is nonetheless wrongly regarded by the recipient as being disabled. For example, an individual with a genuinely cosmetic disfigurement or limp that does not itself constitute a physical or mental impairment may nonetheless be handicapped if an administrator of a federal funded program wrongly believes that the disfigurement or limp is a physical impairment which substantially limits a major life activity.

The regulation’s second definition, however, is flatly inconsistent with section 706(8)(B). The regulation defines a handicapped individual as one who ‘has a physical or mental impairment that substantially limits major life activities only as a result of the *attitudes of others* toward such impairment . . .’⁷⁶ It is clear what kinds of discrimination this ‘attitudinal regulation’ is meant to address. The regulations consider working to be a major life activity.⁷⁷ The drafters of the regulations obviously had in mind a person with an impairment that is neither in medical fact disabling nor wrongly regarded by others as in medical fact

disabling, but which is so widely viewed as an undesirable attribute that the individual is substantially limited in his ability to find employment. The classic illustration would be an individual with a cosmetic disfigurement or disfiguring scar. Assume *arguendo* that the regulations are correct that a cosmetic disfigurement can be a physical impairment and that working, understood as the social act of having and holding a job, is a major life activity. If the disfigurement is genuinely cosmetic, then it does not, in a *medical* sense, substantially limit any major life activities—the individual is physically and mentally capable of performing all tasks that he could perform without the disfigurement. Assume further that prospective employers do not wrongly believe that the disfigured individual is medically limited in any relevant way. Nonetheless, because of their deep-seated prejudices, employers dislike people with disfiguring scars to such an extent that a particular disfigured individual finds it impossible to get a job. This individual is not disabled and has no record of being disabled. Nor does he have an impairment *253 that is wrongly regarded by others as disabling. Nor do others wrongly regard the individual as having a disabling impairment when in truth he has no impairment at all. However, the individual's disfigurement constitutes (by stipulation) an impairment, and his ability to engage in the major life activity of working (in the expansive sense of that term assumed here) has been substantially limited.

Even if some of the individual legislative supporters of section 504 subjectively believed that such a person was within the statute's coverage, the unambiguous language and structure of section 706(8)(B) cannot be stretched far enough to include him as an individual with handicaps. The point is important enough, and widely enough misunderstood, to merit extended discussion.

Three types of individuals satisfy section 706(8)(B)'s definition of individuals with handicaps: persons who have a physical or mental impairment which substantially limits one or more major life activities, who have a record of such an impairment, or who are regarded as having such an impairment. It seems clear that the attitudinal regulation is meant to be an administrative construction of the third statutory definition, which speaks of persons who are 'regarded as having such an impairment.' Before examining whether this statutory language supports the regulation, however, consider the possibility that the regulation is justified by section 706(8)(B)(i)—that is, consider the possibility that a person with an impairment which does not medically limit, and which is not regarded by others as medically limiting, life activities may nonetheless be *disabled in fact*, simply by virtue of a severe limitation on his employment options because of the negative reactions of others. The argument would be that the impairment is a *but-for cause* of his inability to work, and is therefore an 'impairment which substantially limits one or more of such persons major life activities' (giving 'working' a sociological rather than physical **interpretation**).

This argument fails because it is plain as a matter of both text and structure that the **causal** relationship between an impairment and a substantial limitation on major life activities represented by the word 'which' in section 706(8)(B)(i) is one of *physical or medical causation*, not of *but-for causation*. Textually, while it is possible to use the words 'physical or mental impairment which substantially limits one or more . . . major life activities' to include intervening causes such as attitudes towards impairments, it would be very odd as a matter of ordinary language to do so. An *impairment* under section 706(8)(B)(i), whether physical or mental, must in all events *254 be medically real; the natural reading of the subsection as a whole is that the corresponding *limitation on activities* must be medically real as well.

The structure of section 706(8)(B) is even more compelling. If section 706(8)(B)(i) requires only but-for **causation**, then that subsection is satisfied by an impairment that is wrongly regarded by others as *medically* constituting a substantial limitation on major life activities; such an impairment would then be a but-for cause of the limitation on life activities that results from the false perception. That situation, however, is clearly at the core of section 706(8)(B)(iii), which defines a handicapped person as one who 'is regarded as having such an impairment.' Accordingly, a reading of the term 'which' in section 706(8)(B)(i) based on but-for **causation** rather than physical or medical **causation** unravels the tripartite structure of section 706(8)(B), which distinguishes among disabilities in fact, disabilities in record, and disabilities in perception.⁷⁸ Thus, to return to the original example, since a person excluded from work by reason of negative reactions to an impairment is not physically or medically limited by this impairment, he is not disabled in fact under section 706(8)(B)(i). If the attitudinal regulation is to provide him with succor, that regulation must be supported by the language of section 706(8)(B)(iii).

Section 706(8)(B)(iii), however, provides no more support for the attitudinal regulation than does section 706(8)(B)(i). By virtue of the word 'such' ('is regarded as having *such* an impairment'), the former subsection incorporates by reference the terms of the latter, and thus incorporates by reference section 706(8)(B)(i)'s requirement of medical **causation**. Thus, a condition wrongly perceived by others to exist is handicapping under section 706(8)(B)(iii) *if and only if it would in medical fact constitute a disability under section 706(8)(B)(i) if it truly existed*. Any other **interpretation** either misconstrues the word 'which' in section

706(8)(B)(iii) or reads the word ‘such’ out of section 706(8)(B)(iii). Indeed, the point is obvious upon careful examination of the statute, although a surprising *255 number of courts,⁷⁹ agencies,⁸⁰ and commentators⁸¹ have nonetheless assumed that mere exclusion from employment because of negative attitudes can constitute the substantial limitation on major life activities necessary under the statute.⁸²

Of course, in determining whether a person ‘is regarded as having such an impairment,’ the physical or mental impairment, the substantial limitation on major life activities, and the medical connection between them can all be imaginary; it is only the formal structure of those elements that must, in some sense, actually exist. For example, suppose that a recipient of federal funds believes, incorrectly, that the condition of being hearing-impaired medically causes a person so impaired to be unable to lift more than twenty pounds. She further believes, incorrectly, that a job applicant for a warehousing position is hearing-impaired. If the applicant were truly hearing-impaired, it is not true that he would therefore be substantially limited in his ability to lift. However, in the fantasy world of the recipient, a hearing-impaired applicant would indeed be physically limited in his lifting ability as a result of his impairment. Thus, even if the recipient does not regard the applicant’s imaginary hearing impairment as a substantial limitation on the activity of *hearing*, *256 she does regard it as a substantial limitation on the activity of *lifting*, and [section 504](#) is implicated. As this example illustrates, one must examine the world as it appears to the recipient of federal funds in order to determine whether she regards the applicant as having a qualifying physical or mental impairment. But in either the real world or the recipient’s fantasy world, the connection between the real or imaginary impairment and a substantial limitation on major life activities must be medical, not attitudinal.

The Cooper Opinion accused the attitudinal regulation of ‘bootstrapping’ because it reasons backwards *from* the fact of employment discrimination *to* the fact of handicap.⁸³ At oral argument in *School Board v. Arline*,⁸⁴ the Solicitor General similarly described the regulation’s reasoning as ‘a totally circular argument which lifts itself by its bootstraps’ by seeking to establish the facts of impairment and limitation from the fact of exclusion.⁸⁵ In dicta, the majority in *Arline* disagreed and endorsed the regulation.⁸⁶ However, the Court so thoroughly misunderstood the challenge to the regulation that it would be foolish to take this dicta seriously as a guide to construing [section 504](#).⁸⁷ The Court responded to the Solicitor General as follows:

The argument [in favor of recognizing exclusion from employment to be a substantial limitation on major life activities] is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (wheth actual, past, or perceived) that substantially limited one’s ability to work. ‘[T]he primary goal of the Act is to increase employment of the handicapped.’ *Consolidated Rail Corporation v. Darrone*, 465 U.S., at 633 n.13; see also *id.*, at 632 (‘Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether [\[section\] 504](#) was intended to prohibit *257 other types of discrimination as well’).⁸⁸

The second sentence of this passage accurately paraphrases the statutory definition of an individual with handicaps, substituting ‘ability to work’ for ‘major life activities’ and ‘that’ for ‘which.’ The two concluding sentences correctly observe that [section 504](#) seeks to enhance the employment opportunities of individuals with handicaps. None of this discussion, however, even remotely bears on the issue raised by the challenged regulation: *who is an individual with handicaps under the statute?* To *assume* that the Solicitor General was discussing persons who meet the statutory definition of an individual with handicaps, as this passage unmistakably does, is an error that is as difficult to explain as it is to commit.⁸⁹

Some other possible defenses-by-default of the attitudinal regulation can be readily disposed of. In 1978, Congress amended the Rehabilitation Act to add section 505, which makes the ‘remedies, procedures, and rights set forth Title VI of the Civil Rights Act of 1964 . . . available to any person aggrieved by any act or failure to act by any recipient of Federal assistance [which violates [section 504](#)].’⁹⁰ This amendment codified the preexisting remedial practices and procedures under the Department of Health and Human Services (HHS) regulations.⁹¹ Plainly, this does not mean that the 1978 amendments codified *all* of the then-existing regulations, including *258 those construing the substantive terms of the statute.⁹² The substantive terms of

section504 and section 706(8)(B) were not amended in 1978 in any respect relevant to this discussion, and Congress cannot codify regulations—or do anything else—by failing to enact legislation.

In *Consolidated Rail Corp. v. Darrone*,⁹³ the Supreme Court Title VI's requirement that only federal financial assistance with the Title VI's requirement that only federal financial assistance with the 'primary objective' of promoting employment triggers the statute's nondiscrimination mandate.⁹⁴ That holding is correct. The meaning of the term 'Federal assistance' in section 505 is not a question of 'remedies' or 'procedures;' it is a question of the substantive scope of the Rehabilitation Act, and thus was not affected by the 1978 addition of section 505.⁹⁵ After properly noting this fact,⁹⁶ the *Darrone* Court went on to say that section 505's legislative history shows that it 'was intended to codify the HHS regulations governing enforcement of **section504** that prohibited employment discrimination regardless of the purpose of federal financial assistance.'⁹⁷ Precisely because the meaning of 'Federal assistance' is a substantive rather than procedural question, this seems to indicate that the Court in *Darrone* viewed section 505 as codifying even substantive regulations. If so, the statement is careless dictum, and it would be frivolous to argue that it constitutes a wholesale judicial enactment of the HHS regulations. This argument is mentioned only because it was advanced—twice—by the Justice Department in 1986.⁹⁸

B. 'Solely by Reason of His Handicap'

Not every act of discrimination by a recipient of federal funds against an otherwise qualified individual with handicaps violates **section504**. The statute only prohibits discrimination against such a person that occurs 'solely by reason of his handicap.'⁹⁹ There are no *259 regulations explaining this portion of the statute, and few decisions construing it. This is odd, given its ambiguity and enormous importance. At a minimum, the phrase requires that a claimant's handicap play some role in the discrimination he suffers. More substantively, one can say that his handicap must play a *but-for* role in his exclusion or discriminatory treatment before **section504** is implicated. If the claimant would have been treated in precisely the same fashion even if he was not handicapped, it is difficult to see in what sense he has suffered discrimination 'by reason of his handicap,' much less 'solely by reason of his handicap.'¹⁰⁰

In *Bowen v. American Hospital Association*,¹⁰¹ a plurality of the Court, in dicta, advocated a standard of liability under **section504** narrower than a but-for test.¹⁰² According to the plurality, *American Hospital Association* concerned the evidentiary basis for *260 regulations promulgated by the Secretary of HHS to ensure that handicapped infants were not discriminatorily denied nourishment or treatment in federally funded hospitals.¹⁰³ The plurality upheld a judgment invalidating the regulations principally on the ground that the Secretary had not adduced any evidence that federal intervention was needed to prevent such discrimination when the infants' parents had not consented to treatment.¹⁰⁴ The Court reasoned that when the parents had not given their consent, then even if a hospital's denial of nourishment or treatment constituted discrimination against otherwise qualified handicapped infants, it would be discrimination by reason of the withheld consent, not discrimination 'solely by reason of the infants' handicaps.'¹⁰⁵ Such discrimination, said the plurality, would be outside **section504** 'even if it were assumed that the parents based *their decision* to refuse consent to treatment entirely on a mistaken assumption that the handicap or in the case of Title VI the race of the child made the operation inappropriate.'¹⁰⁶ On this reasoning, even when handicap or race is a but-for cause of discrimination (because absent the handicap or race, the parents would have consented to treatment), the protected characteristic is not the reason for the *hospital's* discrimination within the meaning of either **section504** or Title VI.¹⁰⁷

The plurality's skepticism about two-tiered theories of discrimination may well be justified with respect to Titles VI and VII.¹⁰⁸ In *261 ordinary language, terms like 'because of' and 'by reason of,' in addition to implying a but-for standard of **causation**, tend to denote a particular state of mind on the part of the actor—either a malevolent discriminatory intent or a non-malevolent but stereotypical or paternalistic judgment about certain classes or individuals. In either case, liability can result only when the protected characteristic is the reason for the action taken by the alleged offender. A discriminatory motive on the part of a third party, which the actor innocently incorporates into her decision-making process, or a mere discriminatory effect, is not enough. This is the most natural reading of the words and structure of Title VI and VII, especially given the background against which those statutes were written—a long history of intentional discrimination against blacks.¹⁰⁹

That does not mean, however, that **section504** is best read in the same fashion. In *Alexander v. Choate*,¹¹⁰ the Court wrestled with the question whether **section504** reaches innocently motivated conduct that has a discriminatory impact on handicapped persons. In dicta, the Court expressed reluctance to conclude either that only intentional discrimination can violate the statute¹¹¹ or that all actions with a disparate impact on the handicapped are covered.¹¹² Ultimately, the Court ducked the question, holding that even if **section *262 504** reaches some unintentional discrimination,¹¹³ it reaches at most only those intentional barriers that deprive the handicapped of ‘meaningful access’¹¹⁴ to federally funded programs, which the Court concluded does not encompass the discrimination at issue in *Choate*: a state limit on the number of days of in-patient hospital care covered by Medicaid.¹¹⁵ In refusing to adopt the view that ‘proof of discriminatory animus is always required to establish a violation of **section504**,’¹¹⁶ the Court trenchantly observed that ‘discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.’¹¹⁷ This observation finds structural support in the Rehabilitation Act’s provisions dealing with architectural barriers.¹¹⁸ Such barriers ‘were clearly not erected with the aim or intent of excluding the handicapped,’¹¹⁹ but plainly have the effect of doing so, and just as plainly were part of the background problem against which the Rehabilitation Act was enacted. Accordingly, it is plausible to read the phrase ‘by reason of . . . handicap’ in **section504** more broadly than one might read the phrase ‘because of . . . race’ in Titles VI and VII.

Doing so goes a long way towards solving the problem that troubled the Court in *Choate* without importing into this portion of the statute a made-up requirement of ‘meaningful access.’¹²⁰ The context and structure of the Rehabilitation Act make it very unlikely that **section504** is best read to require proof of a discriminatory motive. The Court’s search for a principle that will keep the statute ‘within manageable bounds’¹²¹ in the absence of an intent requirement need, and should, extend no further than the statute’s language—only those barriers and practices that impede the handicapped ***263** ‘by reason of . . . handicap’ violate **section504**. That phrase, given a broad but plausible reading, requires a direct **causal** relationship between exclusion and handicap. Architectural barriers are thus discriminatory by reason of handicap, whether or not they were intended to exclude the handicapped, because there is a clear nexus between exclusion and handicap. Similarly, an employer who requires her applicants to have driver’s licenses discriminates against blind applicants by reason of handicap, however benign her motives.¹²²

Choate presents a more difficult case. The State of Tennessee reduced the number of in-patient hospital days per year that it would cover through Medicaid from twenty to fourteen.¹²³ It conceded that individuals with handicaps generally require more days of in-patient care than persons without handicaps, and that the reduction would therefore disproportionately affect, and hence discriminate against, handicapped persons.¹²⁴ It is not clear, however, that any particular individual with handicaps who needs more than fourteen days of hospitalization suffers discrimination ‘by reason of his handicap.’ He may after all have required more than fourteen days of hospitalization even if he had not been handicapped. The **causal** relationship between the discrimination and the handicap is at best indirect, and is thus arguably outside the statute, though a case can also be made that *Choate* reached the wrong result.

If the but-for test is the correct one for determining when discrimination occurs by reason of handicap, then the dicta in *American Hospital Association* questioning **section504’s** applicability to two-tiered discrimination¹²⁵ is wrong. If **section504’s** applicability to requirement of a discriminatory motive on the part of the specific defendant then even a decision-making process that incorporates someone else’s handicap-based judgment could, in a **causal** sense, involve discrimination ‘by reason of . . . handicap.’ Consider the case of the ***264** innocently motivated employer who requires her applicants to have driver’s licenses, a test that all blind applicants fail because of their inability to obtain licenses. If two-tiered discrimination is outside the bounds of **section504**, this employer has not violated the statute even if her driver’s license requirement is not job-related.¹²⁶ Under the *American Hospital Association* rationale, she can say that possession of a driver’s license is by itself a permissible requirement under **section504**, and if a blind person fails to meet that requirement because of his handicap, it is only because the state motor vehicle department discriminated by reason of handicap. That is no more discrimination by reason of handicap on the recipient’s part than is a federally funded hospital’s refusal to treat an infant because the infant’s parents discriminated by reason

of handicap. Or, conversely, discrimination by the hospitals in *American Hospital Association* is no *less* discrimination by reason of handicap than is discrimination by an employer using a driver's license requirement.¹²⁷

Discrimination by reason of handicap can occur even in the absence of an explicit judgment based on handicap, whether made by the recipient or a third party. Imagine an employer who, for wholly innocent but unnecessary reasons, will only hire applicants who can run the mile in under ten minutes. The attribute of being unable to run the mile in ten minutes is not, standing alone, a handicap, nor is it necessarily indicative of a handicap. However, it is an attribute that ineluctably *results* from any number of handicaps, such as paralysis. If an individual with such a handicap applies for the position and is rejected because of his inability to pass the running test, then he can readily claim that his inability was *caused* by his handicap, and that his exclusion was therefore *by reason* of his handicap. Of course, the **causal** relationship between handicap and running ability *265 is not perfect; it is possible that the applicant would have been unable to run the mile in under ten minutes even in the absence of the handicap. Most adults who do not have such handicaps, however, could probably pass a ten-minute test. It is thus a fair inference, even if not a certain one, that the applicant would have successfully run the mile but for his handicap.¹²⁸

The discussion thus far has pointedly ignored the fact that **section504** only prohibits discrimination that occurs ‘*solely* by reason of . . . handicap.’ The word ‘*solely*’ seems to require that handicap be not merely a but-for cause of discrimination, but the *exclusive* cause. If correct, that **interpretation** of the statute brings serious consequences in its wake. If an employer excludes all individuals with handicaps who were born on any day of the year except February 29, her conduct does not, on this **interpretation**, violate **section504**, because it is not based *solely* on handicap. True, handicap is a but-for cause of the exclusion, but birthday also plays a role, however small.

This is an unattractive and unlikely **interpretation**.¹²⁹ ‘*Solely*’ could of course have that meaning, but is more plausibly read as an explicit affirmation of a but-for **causation** requirement. Imagine a statute that prohibits discrimination against otherwise qualified individuals with handicaps ‘*just* because they are handicapped.’ Conceivably, one could read the word ‘*just*’ to require that handicap be the exclusive basis for discrimination, but the more natural reading would surely be that individuals with handicaps are not to be excluded *simply* by reason of their handicaps—that is, that handicap should not be a but-for cause of exclusion. The language of **section504** is more pompous, but to the same effect.

C. Summary

The key concept for a proper understanding of the Rehabilitation Act is **causation**. In order for a person to be an individual with handicaps, he must have, have a record of, or be regarded as having *266 a physical or mental impairment which *medically causes* a substantial limitation on major life activities. Discrimination against an individual with handicaps occurs by reason of his handicap when the handicap is a *but-for cause* of exclusion from or discrimination under a covered program. These are not the terms that courts and agencies have generally used to discuss **section504**, but no other **interpretation** does justice to the language and structure of the statute.

II. AIDS, ASTROLOGY, AND HANDICAP DISCRIMINATION

Before applying the **interpretation** of **section504** set forth in Part I to discrimination against persons with **AIDS** and related conditions, it is instructive to see how that **interpretation** applies in some carefully crafted hypothetical situations. The absurd hypotheticals posed here are intended to illustrate some simple but important propositions about the scope of **section504** that experience suggests are best explored in a context less emotionally and politically charged than **AIDS**-related discrimination.

A. Stars in Her Eyes

Imagine an administrator of a federally funded program—an employer, for example—who firmly believes in **astrology**. One fine day, she consults her horoscope and concludes that all job applicants who are Scorpios should be rejected. An eminently qualified Scorpio, physically and mentally healthy in all respects, applies for a job. The employer reads his application form, notes his birthday, and summarily rejects him. Has the employer violated **section504**?

Obviously not. Although **astrology** is laughable as a basis for decision-making—there is no credible scientific evidence for its validity, and no theoretical reason to expect any¹³⁰—one's **astrological** sign is not a handicap. It is not a physical or mental impairment, and it does not substantially limit any major life activities. Nor does the employer *regard* the applicant's **astrological** sign as a physical or mental impairment which substantially limits major life activities; she just doesn't feel compatible with Scorpios. Nor would the applicant's ***267 astrological** sign be an impairment or a substantial limitation on life activities if every relevant employer felt the same way; that would be to accept with a vengeance the invalid bootstrapping argument implicit in some of the HHS regulations.¹³¹ The applicant, who is assumed to be healthy in fact, record, and perception, is therefore not an individual with handicaps under the statute. And if the applicant is not handicapped, then *a fortiori* he did not suffer discrimination by reason of his handicap. The poor fellow may have lined up an army of physicists and astronomers ready to testify in court that belief in **astrology** is scientific hokum, but those experts, like the applicant, will not even get through the courthouse door. **Section504** is a prohibition on discrimination against individuals with handicaps by reason of their handicaps. It is not a general requirement of rational decision-making.

Little of consequence changes if the hypothetical applicant is, in fact, handicapped—for example, because he is blind (or has a reason of blindness, or is regarded as being blind). He is now an individual with handicaps under the statute, but as long as the employer keeps relying on her horoscopes, the reason for exclusion remains the applicant's **astrological** sign rather than his handicap. If the applicant were not handicapped, he would have been excluded just as surely and just as summarily. Indeed, if the employer bases her exclusionary decisions wholly on birthdays appearing on written applicants, she may well exclude the applicant without even discovering, much less caring, that he is blind. Accordingly, the blind applicant, while handicapped, has not suffered discrimination ‘by reason of his handicap.’

His handicap does, however, change one thing. The applicant can now argue that the testimony of his scientific experts at least satisfies a minimal standard of relevance. An employer does not avoid the coverage of **section504** merely by *articulating* some reason for exclusion other than handicap; she must *mean* it.¹³² If the trier of ***268** fact concludes that the employer's proffered reason is actually a pretext masking handicap discrimination, the plaintiff will prevail. In the hypothetical considered here, the applicant could use his scientific experts to argue that belief in **astrology** is so ridiculous that no person in her right mind could seriously use it as a decision-making tool, and that when the employer claims that she relies on horoscopes, the trier of fact should conclude that this is merely a pack of lies concocted to conceal discrimination against blind people.

This argument and its accompanying evidence are plainly admissible. However, unless the excluded applicant has specific evidence suggesting pretext in this particular case, he cannot expect an easy victory. Tens of millions of people in this country believe in **astrology** at some level, and millions actually allow it to affect their behavior.¹³³ Of course, that does not prove that *this particular employer* believes in and relies on **astrology**—she may cleverly be using this mass delusion as a smokescreen to conceal her dislike for blind people—but it does counsel against a hasty conclusion that any such claim *must* be a lie. After all, the goal of a pretext analysis is not to determine the rationality of the employer's proffered belief, but to determine its sincerity. If the trier of fact concludes that the employer, however irrationally, truly did discriminate against the applicant because of his **astrological** sign rather than because of his blindness, that discrimination is not a violation of **section504**.

The Article now turns from the absurd but plausible to the merely absurd. Suppose that the employer, in addition to believing in **astrology**, believes that all blind persons are Scorpios. She does not even feel a need to look at their employment applications to discover their signs; the fact that they are blind proves that they are Scorpios and therefore should be excluded. A blind person who is a Gemini applies for a job, meets the employer, and is excluded when the employer wrongly concludes that he is a Scorpio. Has the employer finally ***269** violated **section504**?

The answer is yes. The employer's ultimate ground for decision is still **astrological** sign rather than handicap, but handicap now serves as a minor premise in a syllogism that results in exclusion: (1) all Scorpios must be excluded; (2) all blind persons are Scorpios; therefore, (3) all blind persons (including the applicant) must be excluded. Proposition (1) does not implicate section 5048 but proposition (2) does, as it constitutes a judgment ‘by reason of . . . handicap’—or, in the Cooper Opinion's useful terminology, a ‘*handicap-based* stereotype.’¹³⁴ But for the applicant's handicap, the syllogism would not have been applied to him, and he would not have been excluded in the fashion that he was. The employer is permitted under **section504**

to base employment decisions on an applicant's **astrological** sign. She is not, however, permitted to base her conclusion that her **astrological** criterion is satisfied in a particular case on the actual or imagined fact of handicap. ¹³⁵

The issue becomes even more complicated if the blind applicant *really is* a Scorpio. In that case, the employer's handicap-based judgment concerning the applicant is *true*. If the applicant had not been excluded because he was blind (and therefore, in the employer's deranged judgment, a Scorpio), he would have been excluded when his **astrological** sign became apparent from an examination of his written application. Thus, his handicap, while the cause of his initial classification as a Scorpio, was not a but-for cause of his ultimate exclusion; if he had not been handicapped, he would still have been excluded, albeit by different means. Has **section504** been violated?

The answer depends on what it means to be 'subjected to discrimination' under a covered program ¹³⁶—an enormously complicated question which this Article has thus far deliberately avoided. ¹³⁷ If discrimination requires an actual difference in result as a consequence of the employer's handicap-based judgment, then this particular applicant has no claim. That, however, is not an inevitable construction of the statute. The law provides that no otherwise qualified individual with handicaps shall, solely by reason of his handicap, *270 'be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under' a federal or federally funded program. ¹³⁸ If 'subjected to discrimination' is read narrowly to require a difference in outcome, the term is arguably superfluous, since **section504's** other two prohibitions deal with outcome-determinative situations. One might argue that if the phrase 'subjected to discrimination' is to have any independent meaning, it must be construed to require equal *treatment*, even if the ultimate outcome is not affected. ¹³⁹ For example, if applicants who are not blind are summarily excluded only if their written applications reveal them to be Scorpions, then blind applicants are entitled to the same treatment. Even a blind applicant who is in fact a Scorpio is thus entitled to be rejected because of the birthday appearing on his application, rather than because of a chain of reasoning leading from blindness to birthday to **astrological** sign. When the time comes to determine an appropriate *remedy*, it will be highly relevant that the applicant would not have received the job in any event. At the *liability* stage, however, a good case can be made that blindness, in this example, is a but-for cause of different treatment. The blind applicant, therefore, can rightfully demand to be subjected to the same decision-making process, however ridiculous it may be, that non-handicapped persons face.

On the other hand, this broad construction of 'subjected to discrimination' is not inevitable either. One can fairly argue that precisely because the first two classes of conduct forbidden by **section504**—'exclu[s]23() from the participation in' and 'deni[all] [of] the benefits of' covered programs—are outcome-determinative, the third term in the series—'subject[ion] to discrimination under' covered programs—should similarly be read to encompass only other forms of outcome-determinative conduct. On this reading, the blind applicant who is truly a Scorpio is not only limited in his remedies; he will lose at the liability phase because he would plainly have been excluded even in the absence of his handicap.

Moreover, these two extreme constructions do not represent the *271 only possible meanings of discrimination under **section504**. Title VII, for example, prohibits race-, religion-, and sex-based classifications of employees that 'tend to deprive' them of employment opportunities. ¹⁴⁰ On its face, that standard requires something less than outcome-determinativeness, but more than a bare, inconsequential difference in treatment. ¹⁴¹ The term 'discrimination' in **section504** can plausibly be read to contain a similar intermediate standard, perhaps in the nature of the 'meaningful access' requirement suggested by the Court in *Alexander v. Choate*. ¹⁴²

Some of the various possible meanings of discrimination under **section504** can be illustrated by examining the facts of *Traynor v. Turnage*, ¹⁴³ although all of the **interpretations** lead to the same conclusion in that case. Under the G. I. Bill, honorably discharged veterans are entitled to educational assistance benefits, ¹⁴⁴ which they must use within ten years of discharge or release from active duty. ¹⁴⁵ The ten-year period can be extended if a veteran is unable to use his benefits within that time 'because of a physical or mental disability which was not the result of such veteran's own willful misconduct.' ¹⁴⁶ At all times relevant to *Traynor*, the Veterans' Administration (VA, now the Department of Veterans Affairs ¹⁴⁷) conclusively presumed, under regulations designed to codify a longstanding administrative practice, that alcoholics and drug addicts—who for this purpose are individuals with handicaps under section 706(8)(B) ¹⁴⁸—had engaged in 'willful misconduct' unless they could

show that their alcoholism or addiction was ‘secondary to and a manifestation of an acquired psychiatric disorder.’¹⁴⁹ Some veterans *272 who were unable to use their educational benefits in timely fashion because of alcoholism and could not show that their alcoholism resulted from an acquired psychiatric disorder challenged the VA's presumption under **section504**.¹⁵⁰ The Supreme Court, after determining that it had jurisdiction to review the validity of the VA's regulations,¹⁵¹ ruled that in 1977 Congress affirmatively codified the VA's presumption,¹⁵² and that the 1978 amendments to the Rehabilitation Act, which made **section504** applicable to federal programs,¹⁵³ did not impliedly repeal that codification.¹⁵⁴

If discrimination requires a difference in outcome, then the alcoholic veterans raising claims in *Traynor* did not suffer discrimination by reason of their handicaps. If they were not handicapped, they would still have been denied extensions of time in which to use their educational benefits. Their failure to receive extensions was not the result of their handicaps, but rather of their *lack* of handicaps, namely, their lack of acquired psychiatric disorders.

There was similarly no discrimination if **section504** requires that individuals with handicaps generally be subjected to the same decision-making process as non-handicapped persons. No veteran received an extension unless he could show that he was disabled as a result of something other than willful misconduct. That procedure was applied neutrally by the VA to veterans handicapped with alcoholism and to veterans without handicaps.

If there was any discrimination in *Traynor*, it was between veterans *273 handicapped with alcoholism (or drug addiction) and veterans handicapped with other conditions. Veterans with handicaps other than alcoholism received an individualized determination of whether their condition was the result of willful misconduct. Alcoholics, however, were *presumed* to have engaged in willful misconduct unless they could show that their alcoholism resulted from an acquired psychiatric disorder. If **section504** encompasses differences in treatment between classes of individuals with handicaps, and if *any* difference in treatment suffices to establish liability, then the lack of individualized consideration which was afforded veterans with handicaps other than alcoholism could conceivably have violated the statute.

A number of courts have questioned whether **section504** applies to discrimination between classes of handicapped individuals.¹⁵⁵ The Court in *Traynor* thought it clear that ‘nothing in the Rehabilitation Act . . . requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons.’¹⁵⁶ In fact, this is not clear at all—**section504** prohibits discrimination against any individual with handicaps ‘by reason of *his* handicap,’ and that language could encompass distinctions among handicaps. On balance, however, the Court has the better view. When benefits are extended to a class of handicapped persons, but denied to persons with different handicaps, an individual with handicaps who is denied benefits would have received the same treatment even if he had not been handicapped. As suggested above, he suffers discrimination, not by reason of his handicap, but by reason of his failure to have a different handicap.¹⁵⁷

If discrimination means not just differences in treatment, but differences that matter, then the distinctions between classes of individuals with handicaps in *Traynor* would be permissible even if **section504** encompassed them in principle. The alcoholic veterans who were denied benefits in *Traynor* could gain nothing from individualized *274 consideration; unless they suffered from an acquired psychiatric disorder, they had no relevant evidence of lack of willfulness to present in an individualized hearing.¹⁵⁸ They could have benefitted from individualized consideration only if ‘willful misconduct’ in the context of alcoholism meant something other than conduct that is not the result of an acquired psychiatric disorder—in other words, if the VA's construction of the veterans' benefits statutes was incorrect. However, that challenge was doomed to failure, since the VA's decision was beyond judicial review,¹⁵⁹ and since the agency's **interpretation** of the statute was reasonable.¹⁶⁰

I do not know which, if any, of these **interpretations** of ‘discrimination’ is correct. The term is a slippery one, with shifting meanings in different contexts, and a definitive treatment of the subject has yet to be written. With respect to **section504**, the Court's suggestion in *Choate* that the statute is violated by classifications and differences in treatment that deny persons with handicaps ‘meaningful access’ to covered programs seems to capture some of the best elements of the **interpretations** of ‘discrimination’ discussed above. Perhaps an even better formulation is that **section504** prohibits all handicap-based classifications and differences in treatment except those that result only in meaningless denials of access,¹⁶¹ leaving to common

sense the judgment of when denials of access are meaningless.¹⁶² In the next section, the implications of all of these *275 theories are considered.

B. AIDS, Contagion, and Section 504

The remainder of Part II addresses the question of how section 504 applies to discrimination against persons with AIDS, ARC, or infection with HIV, or persons with a record of, or who are wrongly regarded as having, any of those conditions. If some of the answers seem surprising or counterintuitive, one would do well to remember the lessons of the previous section—section 504 prohibits handicap discrimination, not foolishness.

1. Is AIDS a Handicap?—The first issue is whether a person with full-blown AIDS—that is, HIV-induced immunosuppression plus a life-threatening opportunistic disease, often accompanied by neurological damage¹⁶³—can be characterized as an individual with handicaps under section 504. Of course he can. The question would not even merit discussion if a federal district judge had not accepted the outlandish proposition that tuberculosis, a disease which is handicapping in its physical manifestations, somehow ceases to be a handicap merely because it is contagious.¹⁶⁴ That judgment has no conceivable basis in the language of the Rehabilitation Act. If tuberculosis is a physical or mental impairment which substantially limits one or more major life activities, that is the end of the matter. Similarly, if full-blown AIDS satisfies the statutory definition of a handicap, its contagious character cannot undo that fact.

A more interesting question is whether AIDS is a handicap *276 merely by virtue of the victim's immunosuppression, or whether one must make reference to the effects of the resulting opportunistic diseases or neurological damage. The former seems correct. If the victim's HIV infection has so affected his immune system that he has contracted an opportunistic disease, that is obviously an impairment—in the language of the regulations, it is a 'physiological disorder' that '[adversely] affect[s]' the victim's 'hemic and lymphatic' systems.¹⁶⁵ While engaging in the resistance of fatal diseases perhaps stretches the boundaries of the term 'major life activities,' it does not seem to break them. The fact that disease resistance is 'substantially limit[ed]' by the impairment associated with AIDS is evidenced by the fact that the individual has contracted a disease that he almost surely would not have contracted but for his HIV-induced immunosuppression.

Hence, everyone with full-blown AIDS is disabled within the meaning of section 706(8)(B)(i)—or, rather, *would* be disabled if not for the Civil Rights Restoration Act of 1987, which excludes from the definition of an individual with handicaps 'an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or . . . is unable to perform the duties of the job.'¹⁶⁶ With all disabilities other than alcoholism, drug addiction, and contagious diseases, this sort of inquiry into risks to others and ability to perform would take place under the rubric of the 'otherwise qualified' element of section 504. However, with respect to contagious diseases like AIDS, the inquiry becomes part of the determination of whether the individual is handicapped, to the extent that it can remove someone from section 706(8)(B) who otherwise meets its requirements. Hence, those persons with AIDS who cannot perform their jobs are not handicapped however severe their medical conditions.¹⁶⁷ Since I assume throughout this Article that all plaintiffs are otherwise qualified, the discussion of necessity encompasses only those persons with AIDS or ARC who, despite their condition, can perform their jobs. Henceforth, the qualifications to the discussion that would otherwise be necessary in light of the amendment will be omitted.

If one finds it difficult to conceive of engaging in the resistance *277 of diseases as a major life activity, then a more subtle inquiry is needed to determine whether persons with AIDS are individuals with handicaps. First, a person with full-blown AIDS by definition has an opportunistic condition of some seriousness,¹⁶⁸ such as Kaposi's sarcoma¹⁶⁹ or *Pneumocystis carinii* pneumonia,¹⁷⁰ that may well satisfy the statutory definition of a handicap. In addition, the full-blown AIDS patient may suffer from neurological damage that constitutes a handicap.¹⁷¹ Finally, the individual may be regarded by others as having a disability, whatever the state of his actual health. Nonetheless, a factual question remains as to whether any of these conditions in a particular case constitutes, or is regarded as constituting, a physical or mental impairment which substantially limits major life activities. One or more of these conditions would probably constitute such an impairment, but that conclusion is not inevitable;

many persons with full-blown **AIDS** are capable of functioning normally for years.¹⁷² And, as repeatedly emphasized here, such a person is *not* disabled merely because employers fail to hire him (and thereby substantially limit his ability to work) unless those employers regard the full-blown **AIDS** patient as having a physical impairment which itself substantially limits his ability to perform basic physical or mental tasks.

Assuming that full-blown **AIDS** is necessarily a handicap, anyone who has a record of having **AIDS** or who is regarded as having **AIDS** is also handicapped under the statute. The latter category is *278 important and requires careful examination. Section 706(8)(B)(iii), in conjunction with section 706(8)(B)(i), defines a person as handicapped if he is regarded as having a physical or mental impairment which substantially limits major life activities. **AIDS**, as that condition is defined by the Centers for Disease Control (CDC),¹⁷³ constitutes such a disability. Thus, if a person is regarded as having CDC-defined **AIDS**, he is obviously an individual with handicaps. However, when a recipient of federal funds expresses the view that someone ‘has **AIDS**,’ it is not obvious that she is referring to the condition as it is formally defined by medical experts. If the recipient construes ‘**AIDS**’ to mean some condition—any condition—that satisfies the statutory definition of a disability, then she regards the person who ‘has **AIDS**’ as handicapped, even if she has a totally wrong-headed understanding of the physical effects of **AIDS**. For example, if the recipient does not know the CDC's definition of **AIDS**, but thinks, in general terms, that it is a disease that substantially interferes with the victim's ability to resist fatal diseases, that suffices to establish ‘**AIDS**,’ as the term is used by the recipient, as a handicap. Similarly, if the recipient thinks that ‘**AIDS**’ is a disease that makes it impossible for the victim to breathe, that also establishes ‘**AIDS**’ as a handicap for that recipient. However, if by ‘having **AIDS**,’ the recipient means only that the individual is infected with a communicable virus, then ‘**AIDS**’ in that context is a handicap only if infection with a communicable virus is by itself a handicapping condition, an issue discussed below.¹⁷⁴ In determining whether a person is handicapped under section 706(8)(B)(iii), one must therefore undertake a careful factual inquiry to determine precisely what physical or mental conditions that person is perceived by others to have.¹⁷⁵ One cannot rely on the medical meaning of the words used by lay people to describe the physical or mental condition they believe an individual to have; one must discover their subjective understanding of those words, which may not correspond to correct *279 medical usage.

2. Is ARC a Handicap?—A similar analysis must be applied to determine whether a person with ARC is an individual with handicaps. It is questionable whether the kind of blanket judgment possible with **AIDS** can be made with respect to ARC. While ARC reflects some degree of immunosuppression with clinical manifestations¹⁷⁶ and hence reflects a physical impairment, it does not involve a breakdown of the immune system sufficient to cause the victim to contract an opportunistic disease—although the victim may do so in the future and then be properly classified as having full-blown **AIDS**. Nevertheless, it is possible that the lesser degree of immunosuppression constitutes a ‘substantial’ limitation on the victim's ability to fight diseases, or that the symptoms associated with his condition are debilitating enough substantially to limit major life activities,¹⁷⁷ but those possibilities require factual inquiries that must be resolved on a case-by-case basis. Again, it is not relevant to those inquiries whether the individual has suffered social exclusion by virtue of his symptoms, unless it shows that he is regarded as having **AIDS** in the sense noted above. In the unlikely event that someone is regarded as having ARC, that individual is handicapped if the condition he is regarded as having would be a physical or mental impairment substantially limiting major life activities if it truly existed.¹⁷⁸

3. Is Infection with HIV a Handicap?—Far more important than whether **AIDS** or ARC is a handicap is the question whether infection with HIV, without more, constitutes a handicap. Obviously, if a person infected with HIV is regarded as having **AIDS** or some disabling form of ARC, the individual is handicapped. But if he is merely infected with the virus, or is regarded as being infected with the virus while being asymptomatic, the individual is not handicapped within the meaning of the statute. Since the entire argument advanced by this Article regarding the application of **section504** to **AIDS**-related discrimination rests on this proposition, it is explored in some depth.

By definition, a person who is shown by tests to be infected with *280 HIV but is asymptomatic displays no clinical symptoms associated with **AIDS** or ARC.¹⁷⁹ Nor does an asymptomatic carrier have the degree of immunosuppression characteristic of **AIDS** or ARC. Upon initial infection with HIV, there is often no immunosuppression of practical consequence.¹⁸⁰ As the asymptomatic infection proceeds, and the HIV continues to attack the immune system, some detectable immunosuppression will generally develop.¹⁸¹ As long as the person remains properly classified as asymptomatic, however, that immunosuppression

will not be ‘clinically relevant.’¹⁸² Assume, however, that once the infection is known or suspected by others, their fear of contracting the virus is so great that the infected individual finds it difficult or impossible to find employment or participate in other social activities.

Such an individual does not have a physical or mental impairment which substantially limits one or more major life activities. First, in all likelihood, he has no impairment. In the case of a pure carrier—a truly asymptomatic person who displays no immunosuppression worthy of mention—the viral infection will have no present adverse physical consequences. It does not lessen or diminish any of the individual's capacities. Even those asymptomatic carriers who display some degree of immunosuppression are by definition clinically well;¹⁸³ if not for a sophisticated test, they would not even know of their infection. As the infection proceeds, some of these people may well develop levels of immunosuppression that qualify as physical impairments. However, it is not possible to maintain that mere asymptomatic HIV infection always constitutes an impairment.¹⁸⁴ *281 Moreover, HIV infection cannot be considered an impairment on the grounds that it is a statistical—or even a certain—predictor of a future impairment, such as full-blown AIDS. The infected individual may in the future ‘ha[ve] a physical . . . impairment,’ but it is not the case that he now ‘has a physical . . . impairment.’ Nor is his infection an impairment simply because other people shun him for fear of contracting the virus, no more than cosmetic disfigurements or astrological signs become physical impairments merely by virtue of others' adverse reactions to them. Truly asymptomatic carriers of HIV have physical conditions, but they do not have physical impairments.

Although the OLC formerly endorsed this view,¹⁸⁵ the Kmiec Opinion rejected it,¹⁸⁶ relying primarily on a letter from Surgeon General Koop stating that, in his view, asymptomatic HIV infection is a physical impairment.¹⁸⁷ The Surgeon General's discussion, in its entirety, reads:

As I sought to emphasize during our meeting, much has been learned about HIV infection that makes it inappropriate to think of it as composed of discrete conditions such as ARC or ‘full blown’ AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations, i.e., impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system. Almost all, HIV infected persons will go on to develop more serious manifestations of the disease and our present knowledge suggests that all will die of HIV infection barring premature death from other causes.

Accordingly, from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill. Regrettably, given the absence of any curative therapy for AIDS, a person with cancer currently has a much better chance of survival than an HIV infected *282 individual.¹⁸⁸

Most of the Surgeon General's claims concern the likely *future* effects of HIV infection, which have no bearing on whether infection is a physical impairment here and now. The only evidence of *present* impairment he offers are the observations that ‘early stages of the disease may involve subclinical manifestations’¹⁸⁹ (which he conclusively refers to as ‘impairments’¹⁹⁰) and that ‘the overwhelming majority of infected persons exhibit detectable abnormalities of the immune system.’¹⁹¹ This may very well be enough to demonstrate that ‘from a purely *scientific* perspective, persons with HIV infection are clearly impaired,’¹⁹² but the relevant question is whether it suffices to show that infection is an impairment *from the perspective of section 706(8)(B)(i)*. On *that* question, the Surgeon General's view hardly merits the uncritical approval given by the Kmiec Opinion; indeed, it is quite clearly wrong.¹⁹³

Even if HIV infection could somehow be viewed as a physical impairment (as it might be in cases where immunosuppression is not merely detectable but in some sense clinically cognizable), it does not substantially limit any major life activities. If

the infected person is asymptomatic in the strong sense of the term, then his immune system by definition suffers no practical decrease in its ability to resist fatal diseases. Even if the HIV infection has some measurable effect on some component of his immune system, perhaps enough in some cases to constitute an impairment, that effect is not handicapping unless it constitutes a 'substantial limitation' on a major life *283 activity. That is unlikely to be the case with someone who is not classified as having at least ARC. A condition is not a handicap merely because sophisticated testing equipment can detect it.¹⁹⁴ Furthermore, the infection does not substantially limit major life activities merely because the individual becomes a social, or even unemployable, outcast because of others' fears of contracting the virus. To constitute a handicap under section 706(8)(B), the impairment must either medically cause a substantial limitation on major life activities or be perceived medically to cause a substantial limitation on major life activities.

A number of commentators have sought to answer this argument. Professor Leonard, for example, argues as follows:

[I]t seems clear that infection by the virus is a physical impairment, since it is a condition which affects one or more of the listed body systems, even in the absence of physical symptoms (other than antibody production). Furthermore, seropositivity is clearly an impairment under the regulatory definition of the 'regarded as having such an impairment' category because it may prevent the employee from working due to the attitudes of others toward this condition.¹⁹⁵

First, while it is true that infection with HIV is a 'condition which affects one or more' body systems, and thus comes within the literal terms of the regulatory definition of an impairment, that definition is clearly beyond the pale of section 706(8) (B).¹⁹⁶ Second, Professor Leonard's argument for infection (or seropositivity) as a perceived disability is an extreme example of the bootstrapping position criticized so often in this Article,¹⁹⁷ as it characterizes social exclusion from working not merely as a substantial limitation on major life activities, but, even less defensibly, as a *physical or mental impairment*. Not even the attitudinal regulation attempts this great a leap; it at least requires that the individual have an actual physical or mental impairment towards which others have a negative attitude.¹⁹⁸ Finally, Professor Leonard's contention that infection 'may' prevent an individual from working because of others' attitudes does not lead *284 to the conclusion that it therefore 'is clearly,' rather than 'may be,' an impairment.¹⁹⁹

Professor Wasson argues that a condition need not have a physical manifestation in order to constitute an impairment, as evidenced by the fact that mental impairments, alcoholism, and drug addiction are handicaps.²⁰⁰ He is correct that a *mental* impairment can be established without physical manifestations. A *physical* impairment, however, cannot be, and the latter is in general the only kind of impairment relevant to AIDS-related discrimination under [section 504](#).²⁰¹ As for alcoholism and drug addiction, the Attorney General ruled that they were handicaps because, in his judgment, they constituted either physical or mental impairments.²⁰² That factual judgment may well be wrong, but the legal premises are not. In other words, whether or not alcoholism and drug addiction are, in fact, physical or mental impairments which substantially limit major life activities, the Attorney General regarded them as constituting such impairments. In the alternative, Professor Wasson argues that the presence within one's body of a transmissible, possibly fatal, agent constitutes a physical manifestation.²⁰³ This is true, but a physical manifestation is a necessary but not sufficient condition for a physical impairment. It must be a manifestation of a kind that presently diminishes the individual's capacities.

A student Note presents a more elaborate defense of HIV infection as a handicap.²⁰⁴ All of its arguments save one were answered in Part I of this Article—in brief, the Note too readily accepts the regulatory definition of an impairment,²⁰⁵ adopts the bootstrapping position of the attitudinal regulation (though not the extended version offered by Professor Leonard),²⁰⁶ and incorrectly treats conditions that may in the future diminish a person's capacities as present impairments. *285²⁰⁷ The remaining argument is addressed below.²⁰⁸

Oddly enough, what is far and away the strongest argument in favor of HIV infection as a handicap—its effect on sexual and reproductive activities—has not been developed at length in any source that I am aware of. Two commentators²⁰⁹ and one court²¹⁰ have mentioned it in passing. It was argued at greater length by some amici in *Arline*²¹¹ and developed most fully (though even there somewhat perfunctorily) in the Kmiec Opinion.²¹² I set forth below the most persuasive versions of this argument that I can construct.²¹³

HIV can be transmitted by one sexual partner to another through either homosexual or heterosexual sexual activity,²¹⁴ and by infected women to their offspring, primarily before or during childbirth.²¹⁵ Infected persons who engage in sexual activity thus run a meaningful risk of transmitting the virus to their partners, and infected women who become pregnant run a meaningful risk of passing the virus on to their children. Since a substantial percentage (and perhaps even all) of those who contract the virus will eventually succumb to AIDS,²¹⁶ infected persons cannot engage in sexual activity and childbirth without running a cognizable risk of killing their partners or unborn children. Accordingly, it can be argued that infection with HIV is a physical impairment which substantially limits sexual and reproductive activity.²¹⁷

Obviously, sexual and reproductive activity will be substantially limited in one sense if either the infected individual or his or her *286 prospective partners refrain from engaging in that conduct. That alone, however, is not enough to qualify infection as a handicap under the statute. Assuming for the moment that HIV infection is an impairment, the resulting substantial limitation on life activities is a product of *attitudes* towards that impairment—either one's own attitudes or those of others. But, as this Article has repeatedly emphasized, an impairment must itself medically limit, or be regarded as medically limiting, a life activity in order to satisfy the statute.

In response, one can maintain that this is not a mere bootstrapping argument based on attitudes, but an argument proceeding from actual medical impairments and limitations.²¹⁸ Indeed, if engaging in sexual activity poses, in solid medical fact, a serious risk to the health of one's partner, and becoming pregnant poses, in solid medical fact, a serious risk to the health of one's unborn child, what could possibly be more medically limiting?

The argument is tempting but unsuccessful. First, consider the case of sexual activity. An individual's physical capacity to engage in that activity is not affected by HIV infection. Neither the infected individual nor his or her sexual partner, if they are unaware of the infection, will ever notice any difference while the activity is taking place.²¹⁹ More simply, there is no physical impairment of the individual's sexual abilities, or of the body systems involved in sexual activities; in the language of the regulations, there is no condition or disorder diminishing the functioning of an infected person's reproductive systems.²²⁰ In the case of the male sexual reproductive system, erection continues to be possible, semen continues to be produced and ejected, and the infected person remains capable of fertilizing an ovum. Infected women remain as capable as before of achieving orgasm, having ova fertilized, and bearing children to term. The basic, inescapable fact is that infection with HIV, without more, is not a physical impairment within the meaning of section *287 706(8)(B).

Nor does such infection cause, in a physical sense, a substantial limitation on major life activities. Only the infected person's ability to engage in sexual activity in a manner safe for his or her partner is substantially limited. That, however, is not a substantial limitation on a major life activity within the meaning of section 706(8)(B)(i). The fact that a person poses risks to others is relevant to an inquiry into whether that person is 'otherwise qualified' for the benefits sought under a federal or federally funded program, but it is not relevant to a determination of whether the individual is handicapped.²²¹ A person who poses a risk to others by engaging in certain conduct may behave immorally by doing so, but he does not thereby become disabled. The individual has a physical condition that *ought substantially* to limit his major life activities, but he does not have a condition *which*, in the sense required by section 706(8)(B), does in fact substantially limit those activities.²²²

The same analysis applies to reproduction.²²³ An infected mother is capable of giving birth to a child (and an infected father capable of fertilizing an ovum), and is even capable of giving birth to a child (or fertilizing an ovum) that will not be infected with HIV. The HIV infection makes that action risky for the child, and perhaps even irresponsible on the part of the parents, but the parents' reproductive systems are not substantially limited from their normal sexual functions within the meaning of

section 706(8)(B). A woman with a latent hereditary condition is in essentially the same position. Assume that she does not suffer from the condition, but that there is a greater than normal possibility that her offspring will develop it. Her ability to engage in procreation safely for her children is affected; her physical ability to engage in procreation is not. In other words, risk to others resulting from one's physical condition is only a *288 claim on the conscience of the individual carrier of the condition. It is not a disability, that is, a physical or mental impairment which substantially limits major life activities.

Accordingly, even assuming that infection constitutes, in fact or perception, a physical impairment, the concept of a major life activity must be manipulated in order to produce a plausible argument that infected individuals fall within the purview of **section 504**. Aside from defining *safe sex* or *safe pregnancies* as major life activities, one could maintain that raising a family is a major life activity, which is substantially limited by the prospect of having one's off-spring develop **AIDS** and die before reaching adulthood. The Kmiec Opinion takes the former approach, identifying the relevant life activity limited by HIV infection as 'the desire to conceive and bear *healthy* children.'²²⁴ This makes clear the transformation of section 706(8)(B)(i) from a medical to a sociological statute. While the point is concededly not beyond dispute, the context of section 706(8)(B)(i), which seeks to define *disabilities in fact*, strongly suggests that major life activities for purposes of this statute (though not necessarily in other contexts) refers to the performance of physical and mental operations, not broadly conceived social functions.²²⁵ The process of reproduction is not affected by HIV infection, though the consequences of that process may be tragically affected.

The foregoing argument relies on the fact that HIV infection makes certain activities dangerous to others. An amicus brief in **Arline** further argues that it makes those activities dangerous to the infected individual.²²⁶ It contends that there is some evidence that pregnancy increases the risk that an HIV-infected woman herself will develop ARC or **AIDS**,²²⁷ and that sexual activity increases the *289 risk that infected men will develop those conditions.²²⁸ As the brief tacitly acknowledges, the evidence for these risks is too thin to support the argument.²²⁹ If the evidence was there, however, the argument would be a substantial one—far more substantial than the argument premised on risk to others. Assume, for example, that engaging in sexual activity significantly increases the risk of conversion from infection to **AIDS**. Assume further that a particular individual's asymptomatic HIV infection results in a physical impairment of that person's sexual apparatus.²³⁰ One could then make a good argument that the impairment substantially limits major life activities. While the concept of a disability cannot be stretched to include the possible physical effects of a person's conduct on others, it more readily includes the possible physical effects of a person's conduct on himself. If, because of a physical impairment, engaging *290 in a major life activity results or is likely to result in serious physical damage to the individual, then it is plausible to say that that impairment substantially limits major life activities. The argument does not require inferring a present handicap from a future condition. The impairment, if it exists, exists now; and if the impairment generates a risk of deleterious physical consequences for the individual that would induce a reasonable man substantially to limit major life activities,²³¹ then arguably there is a present impairment, which presently and substantially limits those activities. This is not a case of confusing attitudes with effects, or moral restraints with physical restraints. There is an actual physical condition, which medically causes the performance of a major life activity to result in significant physical deterioration of the individual. While in a sense a refusal to engage in conduct that will have serious physical consequences for oneself represents an 'attitude' towards an impairment, just as a refusal to engage in conduct that puts others at risk represents such an 'attitude,' it is arguably an attitude sufficiently related to the state of being disabled to come within the medically **causal** standard that governs section 706(8)(B).

Even if one makes all of the necessary legal and factual assumptions (infection results in an impairment, sex increases the risk of conversion), this argument has difficulties.²³² Nonetheless, if I believed that infection was a physical impairment and that the factual premises of this argument were true, I would conclude that persons who meet all of the requirements of this argument are indeed handicapped under section 706(8)(B)(i). Allowing a condition's effects on others to constitute a substantial limitation on an infected individual's major life activities breaks the boundaries of those terms as they are used in section 706(8)(B)(i). Allowing the condition's effects on an individual's own health to constitute such a limitation does not.

In the end, however, the conclusion must be that persons with *291 truly asymptomatic HIV infections are not individuals with handicaps, either because they are not substantially limited in major life activities, or, more fundamentally, because they do not have physical or mental impairments. At a minimum, I do not see how it is possible to contend that *all* such persons are handicapped. And that is enough to carry the rest of my argument.

4. Does Contagion-Based Discrimination Occur ‘By Reason of . . . Handicap’?—Suppose a pure carrier of HIV is excluded from a federally funded program because the employer/recipient fears that the individual will transmit the virus through casual contact in the workplace. Assume that the applicant is, apart from the HIV infection, physically and mentally healthy in all respects, and is regarded by the employer as being physically and mentally healthy in all respects. The applicant lines up an army of medical and scientific experts prepared to testify that fear of the spread of HIV through casual contact in the workplace is on a par with belief in **astrology**.²³³ Does he have a claim under **section504**?

Plainly not, no more than the hypothetical job applicant who was excluded from the workplace because he was a Scorpio. Asymptomatic infection with a virus, like **astrological** sign, is not a disability under section 706(8)(B)(i). Nor, given the hypothetical facts, does the employer regard it as a disability. Nor, for the sake of completeness, is it a record of a disability. The asymptomatic carrier is therefore not an individual with handicaps under the statute, and does not even get into court to present his scientific testimony.

Suppose that the asymptomatic carrier is blind. Now the individual is handicapped, but if the reason for the exclusion was the employer's fear of the spread of HIV, then the discrimination did not ***292** occur ‘by reason of his handicap.’ The handicap, blindness, was utterly irrelevant to the employer's decision, just as it was in the case of the blind Scorpio. Had the applicant not been blind, he would have been excluded just as swiftly and just as surely. Handicap was therefore not a but-for cause, or even a contributing cause, of exclusion.

However, like the blind Scorpio, the excluded applicant can at least argue that his scientific experts should be allowed to testify. If the employer does not really fear the spread of HIV, but is merely using that claim as a pretext to mask her dislike of blind people, then she has violated **section504**. The applicant must be permitted to argue that fear of the spread of HIV in the workplace is so utterly absurd that no person could take it seriously, and that the trier of fact should not believe this particular employer when she claims such a fear. Alas, as in the case of the blind Scorpio, the applicant has a tough (though by no means impossible²³⁴) row to hoe. Just as millions of people believe in **astrology** and allow that belief to affect their conduct, millions of people fear the spread of HIV in circumstances where scientific evidence overwhelmingly shows such fear to be irrational. It may be that this particular employer is using that widespread fear as a smokescreen to conceal her discrimination against blind people, but absent specific evidence that the employer is lying, there is no good reason to presume that her fear is anything but genuine. If the proof at trial shows that the employer discriminated on the basis of her fear of the spread of HIV rather than the applicant's blindness, no **section504** violation has been demonstrated.

Suppose that the applicant is handicapped, not with blindness, but with **AIDS**. That is, he began as an asymptomatic carrier, but at the time that the employer makes an exclusionary decision, the applicant has either converted to **AIDS** or is regarded by the employer as having CDC-defined **AIDS**. Plainly, if the employer excludes the individual because of the disabling effects of **AIDS**, or because employees ***293** with **AIDS** threaten to upset the employer's insurance pool, then this handicapped applicant has suffered discrimination by reason of his handicap. Assume, however, that the employer could not care less about the present or anticipated debilitating effects of **AIDS**. Instead, she is scared silly by the threat of HIV infection, and can prove at trial that she excluded the applicant for that reason. Has she violated **section504**?

The first-cut answer, which I will shortly retreat from in part, is no. **AIDS** is a handicap. Infection with the virus, without more, is not. The individual with **AIDS** had an HIV infection before he developed **AIDS**, and he would still have the infection if the opportunistic condition that caused him to have **AIDS** were mysteriously to disappear. By hypothesis, the employer is interested only in the infection, not the disability. Accordingly, the applicant with **AIDS** is not excluded ‘by reason of his handicap.’ The employer's decision-making process is handicap-neutral: non-handicapped asymptomatic carriers are excluded just as unreasonably as handicapped persons with **AIDS**. Indeed, if the employer bases her exclusionary decisions on antibody test results, she may exclude the applicant without ever knowing that he is handicapped. The applicant's positive test result will be indistinguishable from, and will be treated the same way as, the test result of someone who is an asymptomatic carrier of HIV. Moreover, because the applicant's handicap—**AIDS**—is not a cause of the HIV infection (indeed, the reverse is true), one cannot say that he was excluded ‘by reason of his handicap’ in the sense that the handicap is responsible for the attribute that led to his exclusion.²³⁵

As a general proposition, then, discrimination based on fear of contagion is not discrimination ‘by reason of handicap’ within the meaning of **section504**, even if the person excluded is in fact handicapped, and even if that handicap consists of **AIDS** (or the mistaken belief that the person has **AIDS**). The rationality of the employer’s fear of contagion is not relevant except as it may tangentially bear on a pretext inquiry. Indeed, once it is assumed that the fear is genuine and not an attempt to conceal discrimination based on handicap, the rationality of the fear is so unimportant that evidence bearing on it would properly be held inadmissible. Fear of HIV contagion from casual contact is in this respect analogous to belief in **astrology**: it ***294** may be a thoroughly ridiculous basis for decision-making, but because contagiousness and **astrological** sign are not handicaps, decisions based upon them are not the sorts of decisions ‘by reason of . . . handicap’ that implicate **section504**.

If **section504** is violated only when a recipient of federal funds intends, in some sense, to discriminate on the basis of handicap, the inquiry is over. However, **section504** is best **interpreted** to reach discrimination that is attributable to handicap even if the employer’s motivation is wholly innocent.²³⁶ This includes multi-tiered discrimination in which handicap serves as one link in a chain resulting in discrimination against the applicant, even if that chain contains other links not based on handicap. As a consequence, it is an over-statement to say that every act of discrimination genuinely based on fear of contagion is beyond the scope of **section504**. Some additional factual paradigms must be examined.

Imagine an employer who believes that persons with CDC-defined **AIDS** can transmit HIV through casual contact, but further believes that persons who are merely infected with the virus cannot. She excludes from her program all persons who have **AIDS** (or who she believes have **AIDS**), but is not at all concerned about admitting asymptomatic carriers into her program. Assume that the employer successfully rebuts the inference that her claimed concern about contagion is in fact a pretext for discrimination against persons with **AIDS** because of the disabling effects of their handicaps. Despite her successful defense against a pretext charge, the employer has discriminated by reason of handicap. The proof is simple: but for their handicaps, whether they amount to actual **AIDS** or the employer’s perception of **AIDS**, the excluded applicants would not have been excluded. The employer’s judgment is not neutral among handicapped and non-handicapped persons; it pertains exclusively to a class of handicapped persons. More pointedly, it is a judgment *about a handicap*, and her actions based on that judgment are thus in a strong sense ‘by reason of . . . handicap.’²³⁷

Illustrations of this principle in other contexts abound. For example, I have been told that a startling number of people avoid persons in wheelchairs for fear that they will catch ‘the wheelchair disease.’²³⁸ Exclusion of persons in wheelchairs for that reason, even if ***295** not pretextual, would plainly be discrimination ‘by reason of . . . handicap.’ The underlying judgment is handicap-based, in the sense that handicap is a but-for cause of the applicant’s exclusion. Some people may have similar reactions to cancer patients.²³⁹ Again, a recipient of federal funds who excludes persons with (or who have a history of, or who are regarded as having) cancer because of a fear of contagion implicates **section504**; she has made and acted upon a judgment about a handicap. Similarly, the recipient who concludes that **AIDS** patients are contagious, and proceeds to exclude them as a class, has made a handicap-based judgment within the meaning of **section504**.

By contrast, the recipient who concludes that all persons infected with HIV are dangerous, whether or not they have **AIDS**, has not made a handicap-based judgment. Since infection is not itself a handicap, the recipient’s beliefs about HIV infection are not beliefs about a handicap, and exclusionary actions based on those beliefs therefore do not occur ‘by reason of . . . handicap.’ A recipient concerned about contagion who excludes a person with **AIDS** because of a positive test for HIV antibodies, which she neutrally applies to persons with and without handicaps, has made a blunderbuss judgment based on irrational fears, but it is a blunderbuss judgment *about the virus*, not about a handicap. **Section504** does not forbid all blunderbuss irrational judgments, only those that result in discrimination ‘by reason of . . . handicap.’ Thus, contagion-based discrimination is not always outside the scope of **section504**, but it is outside the statute when the underlying contagion-based judgments are made without reference to handicap.²⁴⁰

It is safe to assume that most people who make exclusionary decisions based on fear of the spread of HIV do not base their judgments about who has the virus on sophisticated antibody tests. They rely on observational, and sometimes wildly irrational, methods of determining who is and is not, in their judgment, excludable. If one adopts a **causal**, but-for model of **section504** liability, close attention must be paid to the circumstances under which those exclusionary ***296** judgments are made.

The simplest paradigms are the ones discussed above: exclusion based on wholly neutral tests, applicable to handicapped and non-handicapped persons alike, are outside the scope of **section504**; and exclusion based on the belief that **AIDS**, but not the virus, poses risks requiring exclusion is within the statute. A more complicated paradigm is the analogue to the case of the recipient who believes that all blind persons are Scorpios. Suppose an employer looks at her applicant pool, sees or believes that some applicants have **AIDS**, reasons that persons with **AIDS** also harbor the HIV virus, and excludes all persons with **AIDS**. Suppose that she also has other methods for determining who harbors the virus. Do the applicants who were rejected because they were believed or observed to have **AIDS** have a claim under **section504**?

Inferring infection with HIV from the condition of having **AIDS** does indeed constitute a handicap-based judgment, albeit a true one,²⁴¹ because the handicap serves as a but-for cause of the classification. However, the answer to this hypothetical turns not on the meaning of the phrase ‘by reason of . . . handicap,’ but on the meaning of ‘discrimination’ under **section504**. If discrimination must be outcome-determinative in order to violate **section504**,²⁴² then one must ask what would have happened to these applicants if they had not been excluded because they had **AIDS**. For example, if the employer gives antibody tests to all those whom she does not *297 exclude at first glance, then for persons who really have **AIDS** the outcome was not affected by their summary exclusion; had they survived the employer's initial scrutiny, they would have been excluded at the antibody testing stage. Those who are regarded as having **AIDS** but are in truth asymptomatic carriers would also have been excluded at the testing stage. However, those who are regarded as having **AIDS** but neither have it nor are infected with HIV would not have been excluded at the testing stage, and accordingly have a valid claim. Alternatively, suppose that the employer's second-stage criterion for determining infection is not antibody testing, but her gut-level judgment about which applicants engage in activities that pose a high risk of contracting the virus. A fact-bound inquiry into whether any particular applicant would have been judged by the employer to be a high-risk person would then be necessary.

On the other hand, if **section504** is construed to require effective equality of treatment even when differences in treatment are not outcome-determinative,²⁴³ then inquiries into what the situation would have been if it were not for the initial exclusion are relevant only at the remedy phase. Liability is established by showing that individuals with handicaps were subjected to a different selection procedure than individuals without handicaps—with, perhaps, an additional showing that the procedure tended to deprive individuals with handicaps of opportunities under, or meaningful access to, the program, or that eliminating the offending procedure would not be wholly meaningless. More specifically, persons with **AIDS** would be entitled to consideration in accordance with the employer's second-stage decision criterion—whether that criterion is an antibody test or her personal whim—even if they would probably be excluded at that stage.²⁴⁴ Hence, reasoning from **AIDS** to virus to exclusion can violate **section504**, just as can reasoning from blindness to Scorpio to exclusion. And this is the result even when the person with **AIDS** really does harbor the virus, just as it would be when a particular blind person really is a Scorpio.

One can imagine numerous other methods, of varying degrees of rationality, that recipients might use to determine who is infected. A recipient might conclude, for instance, that all homosexuals are HIV-infected, and thus exclude all persons who she thinks are homosexual. This would not violate **section504**—sexual preference is not *298 a handicap, and as long as the recipient does not base her judgment that a person is homosexual on handicap (by concluding, for instance, that all persons with **AIDS** are homosexual), she is free under **section504** to discriminate on that basis.

A more interesting case would be one in which the employer makes her exclusionary determination based on rumors about a person's infection (or sexual preference). That is, the employer hears through the grapevine, or from George (a hypothetical reference), that an applicant is HIV-infected. By itself, reliance on rumors or on George's recommendation does not implicate handicap. But suppose that the rumor or recommendation is founded on handicap—for example, suppose that George decided that the applicant was HIV-infected only by observing or believing that he had **AIDS**. When the employer then relies on George's recommendation, she is relying on a judgment that was handicap-based. This, of course, was precisely the situation in *American Hospital Association*,²⁴⁵ where hospitals made decisions based on parental determinations, which in turn were based on handicap.²⁴⁶ If the plurality's dicta in that case is correct, then the employer who relies on George has not violated **section504**. As explained earlier, however, that dicta is probably incorrect; this multi-step process should be considered an instance of handicap-based judgment as long as handicap plays a but-for role in the process.²⁴⁷

C. Summary

The fact-bound analysis that has just been detailed is tedious, technical, time-consuming, and to many intuitively unsatisfying. It would be far easier simply to observe that discrimination based on the fear of the spread of HIV is utterly irrational in most settings, and to conclude that this discrimination therefore violates **section504**. This would be easier, but wrong. As the discussion of **astrology**-based discrimination illustrates, the fact that discrimination is irrational does not mean that it therefore violates **section504**,²⁴⁸ even when irrational discrimination affects individuals with handicaps.²⁴⁹ *299 If infection with HIV is not always a handicap under the statute, then discrimination based on even the most preposterous judgments about that condition are not handicap-based, and discrimination based on those judgments is not discrimination ‘by reason of . . . handicap’ unless some real or perceived link between the infection and a handicap can be shown. That may not be what many people would like **section504** to say. It may not be what **section504** ought to say. It almost certainly is not what the Supreme Court will ultimately construe **section504** to say. But it is what **section504** says.


III. Arline AND CONTAGION-BASED DISCRIMINATION

An analysis similar in many important respects to that set forth in Parts I and II of this Article was presented to the Supreme Court in *School Board v. Arline*²⁵⁰ by the Justice Department²⁵¹ and, to a lesser extent, by the petitioning school board.²⁵² Many will therefore find it important to understand the holding of *Arline*, so that they may determine whether the analysis in this Article requires that a controlling precedent be overruled.²⁵³

In 1957, Gene **Arline** was hospitalized for infectious tuberculosis.²⁵⁴ The disease went into remission, and, in 1966, **Arline** began teaching elementary school in Nassau County, Florida.²⁵⁵ In 1977 and 1978, three cultures showed that her tuberculosis had once again become active and infectious.²⁵⁶ After being suspended twice from her job with pay, **Arline** was dismissed in April 1979, “not because she had done anything wrong,’ but because of the ‘continued reoccurrence sic of tuberculosis.’”²⁵⁷

Arline brought suit under, *inter alia*, **section504** of the Rehabilitation Act.²⁵⁸ The district court dismissed her claim of handicap discrimination on three grounds. First, the court held that, despite her past hospitalization for tuberculosis, **Arline** was ‘not ‘a handicapped person under the terms of the statute,’”²⁵⁹ because it was *300 “difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person.”²⁶⁰ Second, the court found that even if **Arline** was handicapped, she was not otherwise qualified to teach elementary school.²⁶¹ Finally, it ruled that the school board was not a recipient of federal financial assistance within the meaning of **section504**.²⁶² The court of appeals reversed the district court’s conclusions regarding the school board’s receipt of federal financial assistance.²⁶³ The court of appeals also reversed on the issue of **Arline’s** status as an individual with handicaps, finding nothing in the statute or regulations that would exclude contagious diseases from **section504’s** coverage.²⁶⁴ It also disagreed with the district court’s summary determination that **Arline** was not otherwise qualified and remanded for factual findings on that issue.²⁶⁵

The school board then sought certiorari on three questions:

1. Whether the contagious, infectious disease of Tuberculosis constitutes as handicap within the meaning of **[section504]**.
2. Whether the receipt of miniscule Federal financial **aid** . . . by a public employer pursuant to  20 U.S.C. Section 237 is sufficient to invoke jurisdiction under **[section504]**.

3. Whether the Eleventh Amendment to the United States Constitution bars an action against a school board in Florida, under [section504].²⁶⁶

The Court granted certiorari ‘limited to Question 1 presented by the petition.’²⁶⁷ *Sua sponte*, it also asked the parties to brief the additional question ‘whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being ‘otherwise qualified’ for the job of elementary-school teacher, within the *301 meaning of section504 . . .’²⁶⁸ Accordingly, the case came to the Court presenting two questions: (1) is tuberculosis a handicap under section504 notwithstanding the fact that it is contagious? and (2) was Arline otherwise qualified to teach elementary school?

The Justice Department filed an amicus brief on the side of the school board.²⁶⁹ It argued that no remand was necessary to determine whether Arline was otherwise qualified to teach elementary school; the record clearly showed that she was not.²⁷⁰ However, it agreed with the court of appeals that Arline's tuberculosis—or at the very least her history of tuberculosis—made her an individual with handicaps protected by section504.²⁷¹ Indeed, the Justice Department did not even list the question whether Arline was handicapped as an issue presented by the case, contending instead that it raised the following questions:

1. Whether Section504 . . . , which forbids discrimination in federally-assisted programs against an otherwise qualified handicapped individual ‘solely by reason of his handicap,’ makes unlawful discrimination based on concern about contagiousness.

2. Whether a person who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being ‘otherwise qualified’ for the job of elementary-school teacher, within the meaning of Section504.²⁷²

With respect to the first of these questions, the Justice Department advanced essentially the same position espoused in this Article: while Arline may have been handicapped, she did not suffer discrimination because of the real or perceived physical effects of that handicap. *302²⁷³ She suffered discrimination because of her infection with tubercle bacilli, and would have received precisely the same treatment had that infection never manifested itself as a handicap.²⁷⁴ Since the record clearly showed that the school board's stated concern about contagion was not a pretext for discrimination based on the physical effects of tuberculosis, the school board did not discriminate by reason of Arline's handicap within the meaning of section504.²⁷⁵

The Department obviously concluded that the questions on which the Court actually granted certiorari fairly encompassed the question whether contagion-based discrimination is discrimination ‘by reason of . . . handicap.’ That conclusion is ridiculous. Whether discrimination against an individual occurs by reason of his handicap is an entirely separate question from whether the individual is handicapped. Each is a distinct element of a section504 cause of action. The latter no more encompasses the former than it does the question whether the individual is otherwise qualified, on which the Court specifically requested separate briefing, or the question whether the school board was a recipient of federal financial assistance, on which the Court denied certiorari.²⁷⁶

The majority of the Court appears to have understood the case correctly.²⁷⁷ The opinion's opening paragraph declares that the case ‘presents the questions whether a person afflicted with tuberculosis, a contagious disease, may be considered a ‘handicapped individual’ within the meaning of the Act, and, if so, whether such an individual is ‘otherwise qualified’ to teach elementary school.’²⁷⁸ The majority does not indicate that the case raised the question whether discrimination based on the fear of contagion is discrimination by reason of handicap.

The Court had no trouble concluding that **Arline** was an individual with handicaps. **Arline** had in the past ‘suffered tuberculosis ‘in an acute form in such a degree that it affected her respiratory *303 system,’ and was hospitalized for this condition.’²⁷⁹ The effect of the tuberculosis on her respiratory system constituted a physical impairment,²⁸⁰ and that impairment limited her major life activities enough to require hospitalization.²⁸¹ Her 1957 hospitalization thus sufficed ‘to establish that she has a ‘record of . . . impairment’ . . . and is therefore a handicapped individual.’²⁸²

Although the school board argued in its brief that **Arline** was not an individual with handicaps,²⁸³ it conceded at oral argument that **Arline's** record of tuberculosis satisfies section 706(8)(B)(ii).²⁸⁴ The Court noted this concession.²⁸⁵ That effectively answered the first question before it, leaving only the question whether **Arline** was otherwise qualified. Nonetheless, the Court went on to address the school board's additional contention that ‘**Arline's** record of impairment is irrelevant in this case, since the School Board dismissed **Arline**, not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others.’²⁸⁶ That issue was not before the Court, and any discussion of the point in **Arline**, as discussed earlier, is therefore dicta.²⁸⁷

That dicta is by and large ill-considered, and sometimes simply *304 unintelligible. The Court's initial response to the school board's additional contention was:

We do not agree with petitioners that, in defining a handicapped individual under [section] 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. **Arline's** contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.²⁸⁸

In a footnote, the Court responded to the Justice Department's similar argument that **Arline** suffered discrimination because of her contagiousness, not because of her handicap:

The argument is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment *and* to contagiousness. This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as **AIDS** could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.²⁸⁹

There is an evident discontinuity between the argument that the Court claimed to be responding to and the answers that it gave. The Court's two responses pertain to ‘defining a handicapped individual under [section] 504’ and determining when a person ‘can be considered a handicapped individual’ as defined by the Act. That, of course, is the issue that was properly before the Court, but it is not the issue raised by the argument that it was purportedly addressing. The best explanation (or at least the one most charitably inclined toward the Court) is that the Court translated the school board's and Justice Department's argument into terms that made it relevant to the case. That is, it may have construed the argument to contend (as the school board, though not the Justice Department, did in fact contend) that contagion-based discrimination is not generally within section 504 because contagious persons are not handicapped even if they otherwise satisfy section 706(8)(B). The discussion immediately *305 following the quoted passages supports this interpretation. The Court argued that ‘[n]othing in the legislative history of [section] 504 suggests that Congress intended such a result’²⁹⁰—that result presumably being the per se exclusion of persons with contagious diseases from section 706(8)(B)'s definition of an individual with handicaps. The legislative history, the Court argued, ‘demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual’²⁹¹—Congress extended coverage in 1974 ‘to those individuals who are simply ‘regarded as having’ a physical or mental impairment,’²⁹² and the Senate report on that amendment ‘provides as an example of a person who would be covered under this subsection ‘a person with some kind of visible physical impairment which in fact does not substantially limit that

person's functioning.’²⁹³ The Court then defended the attitudinal regulation²⁹⁴ in a discussion I have elsewhere criticized at length.²⁹⁵ While the relevance of that discussion to any issue of consequence is not evident, everything in it pertains to the question of who is an individual with handicaps, not to when discrimination occurs by reason of handicap.²⁹⁶

It is possible, however, that the discussion was instead directed to the issue of discrimination by reason of handicap—saying, in essence, *306 that **Arline's** contagiousness and handicap cannot meaningfully be separated, and that discrimination based on her contagiousness is therefore necessarily discrimination by reason of handicap. If so construed, the discussion is largely incoherent, or at least a nonsequitur, and in any event extends little, if at all, beyond the particular facts of **Arline**. The Court's responses to the school board and Justice Department express an inability to distinguish between handicap and contagiousness in, respectively, ‘a case such as this’ and ‘this case.’ According to the Court, **Arline's** handicap and her contagiousness ‘each resulted from the same underlying condition,’ because her tuberculosis ‘gave rise’ both to her handicap and her contagiousness.²⁹⁷ Contagiousness, in other words, was an effect of her handicap.

If contagiousness is in fact caused by the handicapping condition of tuberculosis, then it would indeed, as the Court says, ‘be unfair to allow an employer to seize upon’ a distinction between the two as a justification for discrimination against persons with tuberculosis.²⁹⁸ More to the point, it would mean that contagion-based discrimination involving tuberculosis would necessarily occur ‘by reason of . . . handicap,’ and would thus not only be ‘unfair,’ but would also violate **section504**. If not for the handicap, there would be no contagiousness. The school board thus could not have had a policy of exclusion that was neutral between handicapped persons with tuberculosis and non-handicapped carriers, because if contagiousness arises from tuberculosis, there are no non-handicapped carriers. As the American Medical Association cogently argued in its amicus brief, if a person meets the statutory definition of an individual with handicaps, it violates **section504** to discriminate against that person ‘because of one of the *effects*—communicability—of the *disabling disease*.’²⁹⁹

While the Court's legal analysis was, even if unwittingly, on the right track, it appears to have been wrong on the facts in **Arline**, though its conclusion was understandable given the record before it. The American Civil Liberties Union's amicus brief related to the Court a brief description of tuberculosis authored by the CDC.³⁰⁰ *307 According to that description, a ‘person with tuberculosis coughs or sneezes into the air thousands of tiny, moist droplets which may contain one or two tubercle bacilli,’ which then ‘dry out and become small flecks, called ‘droplet nuclei,’ which are light enough to remain floating in the air.’³⁰¹ Another person can catch the disease if ‘a droplet nucleus . . . ride s the air deep into the lungs without being stopped.’³⁰² Most of the time, the body's natural defenses stop the growth of the disease, and the bacilli remain dormant with no ill effects on the infected person's health.³⁰³ Sometimes, however, the infection will develop into the disease, possibly soon after infection, but more often after a lengthy period of dormancy.³⁰⁴ ‘When the disease develops, the infection can be spread to others.’³⁰⁵

It is thus easy to see how the Court could have concluded that tuberculosis *qua* handicap causes contagiousness. That conclusion, however, appears to be wrong. It does not follow from the fact that tuberculosis can be spread only by someone with a ‘develop[ed]’ case of the disease that contagiousness and handicap are inseparable in a case such as **Arline's**. When tubercle bacilli enter one's system, they form lesions.³⁰⁶ Ordinarily, if the invasion is small, those lesions are quickly healed, and the bacilli that are not killed ‘become walled off as a result of the defense machinery . . .’³⁰⁷ It is possible at some later time for these walled-off bacilli to ‘break out of such ‘healed’ lesions, to spread and multiply. During the latter state the patient has active (clinical) tuberculosis.’³⁰⁸ Thus, it is true that only persons with ‘active’ or ‘clinical’ tuberculosis are capable of spreading the bacilli. However, one cannot assume that all persons with active or clinical tuberculosis are handicapped. For example, ‘d uring the initial spread of the bacilli there are usually no clinical symptoms although the disease is in an active and infectious stage.’³⁰⁹ Thus, even if all persons with active—and therefore infectious—tuberculosis have a physical impairment (a question this Article does not explore), that impairment does not always substantially limit major life activities, and the ability to spread tuberculosis is *308 therefore not always associated with a handicap.

If the Court in fact made such a factual error, there is no reason to extend that error to HIV and **AIDS**. It is not true that **AIDS** gives rise to or causes the ability to spread HIV; most people who are capable of spreading HIV do not in fact have full-blown **AIDS** or any other handicapping condition. Certainly, if a recipient of federal funds *believes* that **AIDS** causes contagiousness, then the handicap and contagiousness are in that particular case inseparable, and discrimination based on fear of contagion is discrimination by reason of handicap. On the other hand, in the absence of such an erroneous belief, discrimination based on fear of the spread of HIV is not discrimination by reason of handicap within the meaning of **section 504**, even with respect to a person with **AIDS**, unless a handicap-based judgment lurks beneath the surface.

The remainder of this portion of the **Arline** opinion is devoted to the proposition that '[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of **section 504**, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.'³¹⁰ The Court presumably meant to refer to prejudiced attitudes or ignorance *about handicaps*; surely it did not mean to say that **section 504** prohibits employers from denying jobs to handicapped persons because of prejudiced attitudes or ignorance about celestial motions and birthdays. Read that way, and viewed in light of the Court's apparent perception that **Arline's** handicap caused her contagiousness, the point is uncontroversial and uninformative. The Court concluded this discussion with a lengthy paean to rational, medically sound attitudes towards contagion,³¹¹ to which one can only say, 'Amen,' but *309 none of which has the slightest bearing on whether contagion-based discrimination that does not involve either an underlying handicap-based judgment or a cause-in-fact relationship between the handicap and the contagiousness is discrimination 'by reason of . . . handicap.'

With respect to whether **Arline** was otherwise qualified to teach elementary school, the Court concluded, as had the court of appeals, that the district court 'will need to conduct an individualized inquiry and make appropriate findings of fact.'³¹² That inquiry, said the Court, should be governed by the standard set forth in the AMA's amicus brief, which requires:

facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm . . .³¹³

The standard is uncontroversial, and indeed is indistinguishable from that set forth in the Cooper Opinion.³¹⁴

In the final analysis, **Arline's** holding is correct. **Arline** was indeed *310 an individual with handicaps, and a determination of whether she was otherwise qualified to teach elementary school requires factual findings from the district court. The opinion in **Arline**, however, is a mass of confusion, shifting from discussions of who is handicapped to discussions of when discrimination is handicap-based, to discussions having nothing to do with any of the terms of the Rehabilitation Act. Fortunately, its flaws are so evident that even those who take court opinions more seriously than I do should have little trouble giving it short shrift.

IV. RESPONSE TO CRITICS

A number of possible criticisms of my argument have already been addressed in the course of this Article. Here, some of the widespread criticisms of the Cooper Opinion and Justice Brief that might also be raised against my argument are considered, along with a methodological criticism uniquely applicable to this Article's analysis.

Far and away the most common criticism of the Justice Department's original position, in both the popular media and the scholarly journals, has been that it is contrary to the overwhelming scientific evidence showing that the risk of HIV transmission through casual contact is minimal to nonexistent.³¹⁵ The criticism takes two very *311 different forms: that the analysis is based on faulty medical judgment that there is a meaningful risk of **causal** transmission of HIV,³¹⁶ and that the analysis, while perhaps not based on a rejection of the medical data, takes insufficient cognizance of that data's implications.³¹⁷

The criticism in its first form will be very difficult to level against this Article. The analysis employed here declares that scientific evidence pertaining to actual risks of contagion is only remotely relevant as part of a pretext inquiry.³¹⁸ It is therefore impossible seriously to contend that the analysis is *based* on any judgments, whether correct or incorrect, about this evidence. However, the same is true of the Cooper Opinion,³¹⁹ and while that may have slowed these critics down somewhat, it certainly did not stop them. Evidently, the feeling runs very deep that no one could possibly conclude that discrimination based on fear of contagion is outside the scope of **section504** unless he somehow believed that the fear was justified. This Article should present these critics with an even stiffer challenge than the Cooper Opinion did,³²⁰ as it has repeatedly and explicitly stated that belief in a significant risk of HIV transmission through **causal** contact is on a par with belief in **astrology**.³²¹

*312 By contrast, it can fairly be said that both the analysis in this Article and the original Justice Department's analysis give little import to the medical evidence regarding HIV transmission. However, that is no more telling a criticism than is the equally correct claim that the analysis here gives little import to the scientific evidence regarding **astrology**. In a determination of whether someone is otherwise qualified under **section504**, evidence of actual risk of contagion is critical. But in a determination of whether someone is an individual with handicaps, or whether he suffers discrimination by reason of his handicap, that evidence is relevant only as part of a pretext inquiry,³²² or to exclude someone who otherwise satisfies the requirements of section 706(8)(B) from the class of individuals with handicaps under the 1987 amendments to the Rehabilitation Act.³²³

The second major, and usually somewhat amorphous, criticism of the Justice Department's former position, presumably applicable here as well, is that this position is contrary to the congressional policy underlying **section504** of replacing unreasoned fears with sound medical judgments.³²⁴ The response to this argument was suggested in Part III in answer to a similar suggestion made by the Court in *Arline*:³²⁵ the policy of **section504** is only to prohibit irrational, stereotypical judgments that are *based on handicap*. Once a person is shown (1) to be an individual with handicaps as defined by the statute and (2) to have suffered discrimination in a federally funded program solely by reason of his handicap, then of course **section504** permits that discrimination only when it is founded on reasoned judgments about medical risks, the costs of accommodating those risks, or whatever other concerns are cognizable under an 'otherwise qualified' inquiry. That inquiry and policy, however, only come into play when (1) and (2) have first been established. It cannot be used, in bootstrap fashion, to establish them.

This Article openly invites a third criticism that is not available against either the Cooper Opinion or the Justice Brief. The methodology of this Article can fairly be described as plan meaning with a vengeance. No serious references are made to the Rehabilitation Act's legislative history, and reliance is placed on non-textual and non-structural indicia of legislative intent only in the most general, and even trivial, sense of looking to the broad background against which the statute was enacted. Even more conspicuously, little or no credence is given to court decisions construing the Rehabilitation Act. They are used more as objects of ridicule than as **aids** to construction.

Obviously, a full defense of my methodology would require a separate article, but a short comment is appropriate here. Let me start with court decisions. In point of fact, I do not generally view court decisions—whether of the United States Supreme Court or the Delaware Chancery Court—as useful guides to statutory construction. If one is making a Holmesian prediction of what courts will in fact do in statutory cases, then few things are as important as what courts have in fact done and said with regard to the relevant statute. The same is true if one is trying to influence the outcomes that courts will reach. However, if one's goal is to determine what a statute actually says, there is little reason to expect much help from courts. Judges are not generally selected for their expertise in construing statutes. A federal judge, for example, is as likely to have been selected because she is the drinking buddy of the brother-in-law of a major campaign contributor of the senior senator from which-ever state 'owns' the seat in question under the Senate's informal geographical allocation of federal judgeships as for her legal ability. Such a person's decisions have real legal force in our culture. They may even be thoughtful and persuasive, in which case they will prove very helpful to the constructive enterprise—as indeed is true of some of the decisions discussed in this Article. The mere fact that they are written by someone labelled a 'federal judge,' however, is no assurance that they represent a correct, or even a rational, **interpretation** of the terms and structure of a particular written text.

Moreover, many, if indeed not most, judicial opinions are not even written in principal part by judges. The major drafters of judicial opinions are often law clerks, with judges serving merely as editors, and sometimes as rubber signature stamps. Law clerks are generally no more than one or two years out of law school, and spend less time on the typical opinion than they did on seminar papers in school. Again, many of these decisions are fine pieces of work that can greatly aid one in the task of interpreting statutes. Most are not.


The role of legislative history in statutory interpretation is a much larger subject, which I do not want to delve deeply into here. I *314 will simply indicate, without supporting argument, some of the reasons why I find legislative history to be of little utility. First, trying to identify the 'intentions' of legislators encounters all of the familiar problems of trying to identify the 'original intent' of the Framers of the Constitution, most notably the problems of determining how to get inside the head of a legislator and how many legislators' motives one must discover.³²⁶ Second, there is no reason to believe that most, or even many, legislators actually read committee reports, the usual material of legislative history. Those reports are written and read (if at all) by staffers, and there is no more reason to put one's trust in congressional staffers than in law clerks.³²⁷ Third, statements in the *Congressional Record* are particularly suspect, since that volume is edited by congressmen (or their staffers), and thus does not even accurately reflect what was said during debates.³²⁸ Fourth, and most significantly, what counts in the end is not what legislators meant to say, but what they did say. A legislative intention that was not enacted into statutory language is nothing more than an intention that was not enacted into statutory language.³²⁹ Legislators do not create or enforce rights and obligations by having intentions; they create or enforce them by passing laws, either with the executive's signature or over her veto. The only way to determine what rights and obligations a legislature has created or enforced is to read the statutes it has passed.

In any event, the debate over legislative history as a tool for statutory construction is a sidebar here, as the legislative history of the Rehabilitation Act sheds no light on the questions discussed in this Article.³³⁰ Indeed, the legislative history is so uninformative that the Cooper Opinion and Justice Brief, in a much misunderstood analysis, took that silence as additional support for their conclusion that contagion-based discrimination is generally not prohibited by *315 section504.³³¹ The argument is not that congressional silence can remove from the statute a form of discrimination fairly within its terms, or that silence alone generally gives rise to an inference of exclusion under the Rehabilitation Act. The argument pertains specifically to the long history of federal and, more importantly, state laws concerning contagious diseases. If section504 applies to actions taken to control the spread of contagious diseases, then it covers such actions taken by recipients of federal funds at the direction of state public health officials, thus subjecting every federally funded state public health action concerning contagion to case-by-case review by federal judges. In cases where the health measures are obviously justified, that is not a serious concern—the state will always win. Where the health measures are obviously unjustified (as in the case of exclusion of HIV-infected persons from workplaces), the prospect of conflict between state and federal law is again not troublesome. However, those polar examples are not the only possible cases. There will surely be intermediate cases in which state public health actions are arguably justified, but also reasonably subject to challenge. If section504 applies to contagion-based discrimination, then in these hard cases as well as in the easy ones 'the two words 'otherwise qualified,' and whatever gloss is placed on them by agencies and courts, would in essence take the place of the entire body of public health law that would otherwise have governed.'³³² That is the sort of change in the federal-state balance to which one ordinarily applies a 'clear statement' test.³³³ While I do not rely on this argument, none of the critics of the Justice Department's use of legislative silence have fairly represented or come to grips with it.³³⁴

V. CONCLUDING REMARKS

The kind of plain meaning approach advanced in this Article has something of a quaint ring to modern ears.³³⁵ Place it alongside *316 the Supreme Court's discussion in *Arline*, which seemed more concerned with emoting in the appropriate fashion than with construing the words of section504, and it is clear that we have a failure to communicate. In view of the overwhelmingly approving reception that *Arline* has received in the scholarly journals, it is not difficult to perceive whose voice is the loudest. Nonetheless, defending the interpretative primacy of statutory language seems to me a worthy goal to pursue; there is, quite simply, no other way to determine what statutes actually say. One is free, of course, to argue that one should not care what statutes actually say if their message is contrary to sound public policy. I ask only that those who do so, do so openly, and with knowledge and recognition of what is thereby lost.

Footnotes

^a Assistant Professor, Northwestern University School of Law; B.A. Claremont Men's College, 1980; J.D. Yale Law School, 1983. In view of this Article's criticism of the opinion in  *School Board v. Arline*, 480 U.S. 273 (1987), I think it necessary to note that I helped formulate the position unsuccessfully argued in that case by the United States Department of Justice as amicus curiae. In addition, I was a law clerk to Justice Antonin Scalia when *Arline* was heard and decided by the Supreme Court, but had no involvement with the case in that forum. I am grateful to Akhil Amar for helpful comments on an earlier draft of this Article; to Chrles J. Cooper and the many people in the Justice Department in the spring of 1986 who helped shape my thinking on the issues discussed herein; and to the Civil Liability Program at Yale Law School for Support.

¹  29 U.S.C. § 794 (Supp. IV 1986).

²  480 U.S. 273 (1987).

³  *Id.* at 280-89.

⁴  *Id.* at 286-87.




⁵ Acquired Immunodeficiency Syndrome, or **AIDS**, is a presently incurable, and by all indications invariably fatal, viral disease. *See* Fauci, *The Human Immunodeficiency Virus: Infectivity and Mechanisms of Pathogenesis*, 239 *SCIENCE* 617, 617 (1988). The **AIDS** virus, *see infra* note 7, selectively destroys or inhibits key components of the victim's immune system, rendering him or her susceptible to a variety of life-threatening 'opportunistic' infections and malignancies. *See* Fauci, *supra*, at 618-21; *NIH Conference—The Acquired Immunodeficiency Syndrome: An Update*, 102 *ANNALS INTERNAL MED.* 800, 809 (1985) [hereinafter *NIH Conference*]. The virus may also directly damage the brain and central nervous system. *See* Fauci, *supra*, at 621. To be classified as having **AIDS**, at the condition is defined for reporting purposes by the federal Centers for Disease Control (CDC), it is not sufficient to display signs of infection with the virus and some range of physical symptoms; one must be diagnosed as having one or more specified opportunistic conditions ('indicator disease'). *See Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 *MORBIDITY & MORTALITY WEEKLY REP.* 3S (1987) [hereinafter *CDC Definition for AIDS*]. Thus, the definition of **AIDS** is quite narrow. While nearly 50,000 cases of **AIDS** were reported in this country through the end of 1987, *see* Curran, Jaffe, Hardy, Morgan, Selik & Dondero, *Epidemiology of HIV Infection and AIDS in the United States*, 239 *SCIENCE* 610, 610 (1988)⁸ that is a small fraction of the one to two million persons that the United States Public Health Service estimates are infected with the virus. *see* fauci, *supra*, at 617. It is not yet possible confidently to predict how many of those infected with the virus will eventually succumb to the syndrome, but current projections are that 20 to 30 percent will develop 'fullblown' **AIDS** within five years of infection. *See id.*

⁶ Because the definition of **AIDS** requires an actual diagnosis of an opportunistic condition, *see supra* note 5, researchers have coined the term '**AIDS-Related Complex**,' or ARC, to refer to the condition of patients 'who manifest a constellation of signs and symptoms that are suggestive of the syndrome but do not manifest the secondary complications of the disease.' *NIH Conference, supra* note 5, at 800-01.

7 While at least one researcher has questioned the link between **AIDS** and HIV, *see* Duesberg, *HIV Is Not the Cause of AIDS*, 241 *SCIENCE* 514 (1988), the consensus of scientific opinion strongly favors the view that ‘HIV causes **AIDS**.’ *See, e.g.*, Blattner, Gallo & Temin, *HIV Causes AIDS*, 241 *SCIENCE* 515, 515 (1988); *see also NIH Conference, supra* note 5, at 800. More precisely, the consensus favors the view that some strain, or combination of strains, of HIV causes **AIDS**. *See* Marx, *The AIDS Virus Can Take on Many Guises*, 241 *SCIENCE* 1039 (1988). For ease of exposition, this Article refers simply to ‘HIV’ or ‘the **AIDS** virus.’

As many as two million persons in this country may be infected with the **AIDS** virus and yet display no symptoms of either **AIDS** or ARC. *See* Fauci, *supra* note 5, at 617. Although most of these persons show ‘laboratory signs of immunological abnormality one year after infection,’ Osborn, *The AIDS Epidemic: Discovery of a New Disease*, in **AIDS AND THE LAW: A GUIDE FOR THE PUBLIC** 17, 24 (Dalton, Burris & the Yale Law **AIDS** Project eds. 1987), they are nonetheless commonly referred to as asymptomatic carriers because, despite those abnormalities, they are in general ‘clinically well.’ *Id.* The virus is communicable primarily through sexual intercourse, blood transfusion, parenteral (blood-to-blood) inoculation, sharing of contaminated needles among intravenous drug users, and perinatal transfer from infected mother to child. *See* Friedland & Klein, *Transmission of the Human Immunodeficiency Virus*, 317 *NEW ENG. J. MED.* 1125 (1987). In the absence of a direct exchange of bodily fluids through similar mechanisms, transmission of the virus is at most a remote theoretical possibility. *See infra* note 233.

Current tests for infection with the **AIDS** virus search for antibodies to the virus rather than the virus itself. A positive antibody test result (‘seropositivity’) is not conclusive of infection, *see Recommendations for Assisting in the Prevention of Perinatal Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus and Acquired Immunodeficiency Syndrome*, 34 *MORBIDITY & MORTALITY WEEKLY REP.* 721, 724 (1985) [hereinafter *Perinatal Transmission*], nor is a negative result conclusive of noninfection, *see* Dunton & Meyers, *The Ethical and Scientific Considerations of Human Immunodeficiency Virus Antibody Screening in Volunteers for Clinical Pharmacologic Research*, 35 *CLINICAL RES.* 511, 513 (1987). For purposes of this analysis, nothing of consequence turns on the distinction between infection and seropositivity, and I henceforth ignore it.

8 *See, e.g.*, Brief of Amicus Curiae Congressmen William E. Dannemeyer, Robert K. Dornan, Earl Hutto, Helen Bentley, Jim Hansen, Larry Craig, Joe Barton and Senator Jesse Helms at 18-19,  *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277); Brief for the American Public Health Association, American Civil Liberties Union, American Nurses Association, and National Association of Protection and Advocacy Systems as Amici Curiae at 33-35,  *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277) [hereinafter *ACLU Brief*]; Brief Amici Curiae of Doctors for **AIDS** Research and Education in Support of Respondent at 2-6,  *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277) [hereinafter **AIDS** Doctors Brief].

9 *See* Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, to Ronald E. Robertson, General Counsel, Department of Health and Human Services (June 20, 1986) [hereinafter *Cooper Opinion*] (on file at Hofstra Law Review) (discussing the application of §504 of the Rehabilitation Act to persons with **AIDS**, **AIDS**-related complex, or infection with the **AIDS** virus); Brief for the United States as Amicus Curiae Supporting Petitioners, *School Bd.* (No. 85-1277) [hereinafter *Justice Brief*].

10 Kamen, *AIDS Ruled a Protected ‘Handicap,’* *Wash. Post*, Mar. 4, 1987, at A1, col. 1.

11  *Arline*, 480 U.S. at 284-85.

12 29 U.S.C. § 706(8)(B) (Supp. IV 1986).

- 13 Cooper Opinion, *supra* note 9, at 23-29; Justice Brief, *supra* note 9, at 12-21.
- 14 Cooper Opinion, *supra* note 9, at 23-29; Justice Brief, *supra* note 9, at 12-21.
- 15 Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988) [hereinafter Kmiec Opinion] (on file at Hofstra Law Review (discussing application of §504 of the Rehabilitation Act to HIV-infected individuals).
- 16 *Id.* at 1-2 (emphasis added) (footnote omitted).
- 17 Compare Cooper Opinion, *supra* note 9, at 23-24, with Kmiec Opinion, *supra* note 15, at 7-9.
- 18 Compare Cooper Opinion, *supra* note 9, at 24-25, with Kmiec Opinion, *supra* note 15, at 9-13.
- 19 Kmiec Opinion, *supra* note 15, at 3 n.4. The opinion also cites as a ‘subsequent legal development[]’ Congress’ passage of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 28, *see* Kmiec Opinion, *supra* note 15, at 3 n.4, but correctly notes that this statute effects no change in §504’s coverage. *See id.* at 16; *see also infra* text accompanying notes 46-49.
- 20 Letter from C. Everett Koop, Surgeon General, to Douglas Kmiec, Assistant Attorney General, Office of Legal Counsel 2 (July 29, 1988) [hereinafter Koop Letter] (on file at Hofstra Law Review).
- 21 *See* 480 U.S. 273, 282-86 (1987).
- 22 *See infra* text accompanying notes 269-76.
- 23 *See infra* text accompanying notes 288-311.
- 24 On the other hand, if one is merely seeking to predict how courts will decide cases arising under §504, *Arline’s* dicta is probably as good a guide as any. While the Kmiec Opinion does not state whether it is trying to provide a correct **interpretation** of the state or a correct prediction of how courts will construe the state, there is reason to believe that its focus was the latter. *See* Kmiec Opinion, *supra* note 15, at 10-11. I do not disagree with its conclusions in this regard.
- 25 *See infra* text accompanying notes 209-30.
- 26 *See infra* text accompanying notes 35-129. It is conventional to refer to the Rehabilitation Act’s anti-discrimination provisions, 29 U.S.C. §§ 791-794a (1982 & Supp. IV 1986), by their section numbers in the session laws, Rehabilitation Act of 1973, Pub. L. No. 93-112, secs. 501-504, 87 Stat. 355, 390-94 (codified as amended at 29 U.S.C. §§ 791-794 (1982 & Supp. IV 1986)) (enacting §§ 501-504); Rehabilitation, Comprehensive Services, and

Developmental Disabilities Act of 1978, Pub. L. No. 95-602, sec. 120, 92 Stat. 2955, 2982-83 (codified at 29 U.S.C. § 794a (1982)) (adding § 505), and to all other provisions of the Act by their section numbers in the Title 29 codification.

27 **Section 504** employs a generic male pronoun. For ease of exposition, I ordinarily follow the same practice when discussing potential plaintiffs under the statute and use generic female pronouns in most other contexts.

28 *See infra* text accompanying notes 43-98.

29 *See infra* text accompanying notes 100-28.

30 *See infra* text accompanying notes 163-247.

31 *See infra* text accompanying notes 130-62. The analysis in Parts I and II draws on, though it differs substantially from, the argument advanced by the Justice Department in the Cooper Opinion and Justice Brief. Because there is value in knowing the Justice Department's original position, and because that position has been grossly misrepresented by much of the scholarly and popular literature, I will try to indicate the points at which my argument contradicts the Cooper Opinion or Justice Brief or explores questions they do not address. Where nothing to the contrary is indicated, it is reasonable to assume that my argument fairly reflects the substance (though *not* the style or form) of the original Justice Department position.

32 *See infra* text accompanying notes 250-314.

33 *See infra* text accompanying notes 310-34.

34 *See infra* text accompanying note 335.

35 Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796i (1982 & Supp. IV 1986)).

36 *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 1986 U.S. Code CONG. & ADMIN. NEWS (100 Stat.) 1807.

37 *See* 29 U.S.C. §§ 720-776 (1982 & Supp. IV 1986).

38 29 U.S.C. § 791(b) (Supp. IV 1986). The EEOC must 'insure that the special needs of . . . individuals [with handicaps] are being met,' *id.* § 791(a) (footnote omitted), and is instructed to approve an agency's plan only if it determines 'that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps,' *id.* § 791(b). Section 505 of the Rehabilitation Act, enacted as part of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 62 Stat. 2955, makes available to plaintiffs bringing actions under § 501 the remedies provisions

of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(f)-(k), 2000e-16 (1982). *see* 29 U.S.C. § 794a (1982).

39 *See* 29 U.S.C. § 792 (1982 & Supp. IV 1986).

40 *Id.* § 793(a) (Supp. IV 1986). This section is enforceable only by the Department of Labor, upon the complaint of an aggrieved individual. *See id.* § 793(b).

41 *Id.* § 794.

42 ‘Federal’ in this context means ‘conducted by any *Executive* agency or by the United States Postal Service.’ *Id.* (emphasis added). *Congressional* activities are conspicuously beyond the reach of §504, as indeed they are beyond the reach of all congressionally enacted civil rights laws. It is instructive to recall James Madison’s discourse on the House of Representatives:

I will add, as a fifth circumstance . . . restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. . . . If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves . . . ? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America . . .

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.

THE FEDERALIST No. 57, at 358 (A. Hamilton or J. Madison) (H.C. Lodge ed. 1902).

43 *See* 29 U.S.C. § 706(8)(B) (Supp. IV 1986). The Rehabilitation Act originally used the expression ‘handicapped individual.’ *See id.* § 706(7)(B) (1982). The phrase ‘individual with handicaps’ was substituted in 1986 at the behest of representatives of persons with disabilities, who suggested ‘that by retaining the adjective ‘handicapped’ before the noun ‘person’ [sic] the legislation might be inadvertently adding to the stereotype that persons with handicaps are less worthy.’ H.R. REP. NO. 571, 99th Cong., 2d Sess. 17 (1986).

44 29 U.S.C. § 706(8)(B) (Supp. IV 1986). This definition applies only to the Rehabilitation Act’s administrative and anti-discrimination provisions. The rest of Act is governed by a definition of ‘individual with handicaps’ that originally applied to the anti-discrimination provisions as well: ‘any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . .’ *Id.* § 706(8)(A). The definition currently provided in § 706(a)(A) nicely suits the Act’s principal purpose of providing vocational training for persons with disabilities, but was viewed by some as too narrow for the purposes of the anti-discrimination laws. *See* S. REP. NO. 1270, 93d Cong., 2d Sess. 25-26 (1974); H.R. REP. NO. 1457, 93d Cong., 2d Sess. 25-26 (1974); 120 CONG. REC. 30,531 (1974) (statement of Sen. Cranston). Accordingly, the Rehabilitation Act Amendments of 1974, Pub. L. No. 93-651, sec. 111(a), 89 Stat. 2-3, 2-5 (codified as amended at 29 U.S.C. § 706(8)(B) (Supp. IV 1986)), added the broader definition now found in subsection (B), 29 U.S.C. § 706(8)(B) (Supp. IV 1986).

45 29 U.S.C. § 706(8)(B) (Supp. IV 1986).

- 46 Pub. L. No. 100-259, 1988 U.S. CODE CONG & ADMIN. NEWS (102 Stat.) 28.
- 47 *Id.* sec. 9, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 31-32 (to be codified at 29 U.S.C. § 706(8)(C)).
- 48 The first amendment followed a 1977 decision of the Attorney General ruling that alcoholics and drug addicts are individuals with handicaps. *See* 43 Op. Att'y Gen. 12 (1977) 43 Op. Att'y Gen. 12 (1977). The second was a response to *Arline's* holding that a person with infectious tuberculosis comes within § 706(8)(B). *See* U.S. 273, 280-86, 289 (1987).
- 49 *Accord* Kmiec Opinion, *supra* note 15, at 16. The amendments by their plain terms do not apply to § 501. *See supra* text accompanying notes 46-47. Thus, the affirmative action plans of federal agencies must take account of the 'special needs,' 29 U.S.C. § 791(b) (Supp. IV 1986), of alcoholics, drug addicts, and contagious individuals who cannot perform their jobs and who pose a safety risk to others. Even more interesting results follow from the Drug Abuse Office and Treatment Act of 1972, 42 U.S.C. § 290ee-1 (Supp. IV 1986), and Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. § 290dd-1 (Supp. IV 1986), but this for another time.
- 50 *See infra* note (0).
- 51 29 U.S.C. § 706(8)(B)(i) (Supp. IV 1986).
- 52 The regulations were first promulgated by the Secretary of Health, Education and Welfare (now Health and Human Services (HHS)) in 1977. *See* 45 C.F.R. pt. 84 (1977). At that time, the Secretary had principal responsibility for coordinating Executive Branch enforcement of § 504. *See* Exec. Order No. 11,914, 3 C.F.R. 117 (1977). That responsibility has since been transferred to the Department of Justice, *See* Exec. Order No. 12,250, § 1-201(c), 3 C.F.R. 298 (1981), which was 'deemed to have . . . issued' the HHS regulations. *Id.* § 1-502, 3 C.F.R. at 300. At present, the Justice Department and HHS regulations are identical. Following standard usage, this Article henceforth refers to the latter.
- 53 No one can quarrel with the regulations' desire to read § 504 and § 706(8)(B) broadly. An analysis accompanying the regulations correctly observes that promulgating agencies have 'no flexibility' to confine the reach of the Rehabilitation Act 'to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps.' 45 C.F.R., pt. 84 app. A at 374 (1988). Indeed, those persons all under the Act's separate definition of an 'individual with severe handicaps,' 29 U.S.C. § 706(18)(A) (Supp. IV 1986) (emphasis added); the term 'individual with handicaps' must therefore sweep more broadly. However, the Act's limited focus on physical or mental conditions precludes claims of handicap based on 'environmental, cultural, and economic disadvantage . . . [or] prison records, age, or homosexuality' 45 C.F.R. pt. 84 app. A at 374 (1988).
- 54 45 C.F.R. § 84.3(j)(2)(i) (1988).
- 55 *See* 45 C.F.R. pt. 84 app. A at 344 (1988) (providing that '[t]he term includes . . . such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, disease, diabetes, mental retardation, emotional illness, and . . . drug addition and alcoholism.').

56 *See id.* (providing that ‘[t]he definition [in paragraph (j)(2)(i)] does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list.’).

57 *See* [de la Torres v. Bolger](#), 610 F. Supp. 593, 596 (N.D. Tex. 1985) (holding that left-handedness is not a physical impairment, since ‘impairment’ cannot be divorced from its dictionary and common sense connotation of a diminution in quality, value, excellence or strength.’), *aff’d*, [781 F.2d 1134](#) (5th Cir. 1986); [E.E. Black, Ltd. v. Marshall](#), 497 F. Supp. 1088, 1098 (D.C. Haw. 1980) (defining an impairment as ‘any condition which weakens, diminishes, restricts, or otherwise damages an individual’s health or physical or mental activity.’); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1131 (1986) (defining ‘impair’ to mean ‘to make worse: diminish in quantity, value, excellence, or strength: do harm to . . .’).

Professor Leonard has questioned this analysis. *See* Leonard, [AIDS and Employment Law Revisited](#), 14 HOFSTRA L. REV. 11, 32 n.99 (1985). Taking specific issue with the holding in *de la Torres*, he observes that ‘left-handedness is clearly a physiological condition that affects the neurological and musculoskeletal systems. . . .’ *Id.* The same, of course, could be said of right-handedness and ambidextrousness. Professor Leonard does not explain how a regulatory definition that treats literally every person as having a physical impairment can be squared with the plain meaning of § 706(b)(B)(i). For another insufficiently critical endorsement of this regulation, see Note, [Asymptomatic Infection with the AIDS Virus as a Handicap under the Rehabilitation Act of 1973](#), 88 COLUM. L. REV. 563, 570-72 (1988) (authored by Robert A. Kushen) (arguing that future adverse effects are sufficient to establish a present impairment, and noting that the regulation as written requires neither present nor future adverse effects); *see also infra* text accompanying notes 66-67 (responding to this argument).

58 I am not suggesting that the regulation is valid if properly **interpreted**. Read in context, the regulation will not bear a saving construction; it says and means ‘affecting,’ not ‘adversely affecting.’ Hence, even to one inclined to give deference to agency **interpretations** of statutes, the regulation is invalid. However, its focus on the relationship between disorders and body systems is instructive, and its illustrative list of covered body systems is useful. Accordingly, this Article continues to use the regulation (as suitably amended) for its heuristic value.

59 45 C.F.R. § 84.3(j)(2)(i)(A) (1988).

60 *See infra* text accompanying notes 71-76.

61 One Note has used this ‘cosmetic’ aspect of the regulation to argue that discrimination based on physical appearance violates [§504](#). *See* Note, [Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance](#), 100 HARV. L. REV. 2035, 2044-45 (1987). The author does not explain how dispensing with the requirement that a disfigurement adversely affect a body system can be squared with the plain meaning of § 706(8)(B)(i).


62 29 U.S.C. § 706(8)(B)(i) (Supp. IV 1986) (emphasis added).

63 *See infra* text accompanying notes 74-83.



64 45 C.F.R. pt. 84 app. A at 345 (1977).

- 65 See 45 C.F.R. pt. 84 app. A at 374 (1988) (continuing to state that '[t]he Department does not believe that a definition of this term is possible at this time.').
- 66 See Note, *supra* note 57, at 568 n.33, 571-72.
- 67 There are other anti-discrimination statutes under which an anticipated disability can be immediately handicapping. See *id.* at 582-83 (noting state statutes that include asymptomatic conditions); Comment, *Are AIDS Victims Handicapped?*, 31 ST. LOUIS U.L.J. 729, 737-38 (1987) (authored by Mary Landolt) (stating that a few states are willing to extend 'disability' to include latent defects, although most do not).
- 68 45 C.F.R. § 84.3(j)(2)(ii) (1988).
- 69 See *infra* text accompanying notes 74-77.
- 70 This emphasis on disabilities is not a surreptitious attempt to make substantive use of my shorthand terminology, see *supra* text accompanying note 50, or somehow to limit the Rehabilitation Act to its pre-1974 scope. When the Rehabilitation Act was first enacted, an individual with handicaps under § 504 was defined in part as someone who 'has a physical or mental disability' 29 U.S.C. § 706(6)(A) (Supp. III 1973) (superseded 1974) (emphasis added). That definition was replaced in 1974 by the present, broader language. See *supra* note 45. The current definition eliminates any necessary link between language. See *supra* note dispenses with the old requirement that an individual with handicaps be able to benefit from vocational training, and makes clear that one can be handicapped even if one merely has a record of or is regarded as having a disabling physical or mental condition. See *supra* note 45. But there is neither intrinsic nor extrinsic evidence to suggest that the 1974 amendments cast aside the Rehabilitation Act's original concern for (using the word in its ordinary sense) disabilities, even if it did cast aside its original *exclusive* focus on them. Section 706(8)(B) refines, and in significant respects expands, the pre-1974 definition of an individual with handicaps, but the concept of a (past, present, or perceived) disability would be an important one for understanding the present statute even if I had not chosen the term for expository purposes.
- 71 29 U.S.C. § 706(8)(B)(ii) (Supp. IV 1986).
- 72 45 C.F.R. § 84.3(j)(2)(iii) (1988).
- 73 See 45 C.F.R. pt. 84 app. A at 374 (1988).
- 74 29 U.S.C. § 706(8)(B)(iii) (Supp. IV 1986).
- 75 45 C.F.R. § 84.3(j)(2)(iv) (1988). The accompanying analysis, see 45 C.F.R. pt. 84 app. A at 375 (1988), provides no useful elaboration.
- 76 45 C.F.R. § 84.3(j)(2)(iv)(B) (1988) (emphasis added).
- 77 See *id.* § 84.3(j)(2)(ii) (1988); *supra* text accompanying notes 68-70.

78

See Brief of the American Medical Ass'n as Amicus Curiae in Support of Petitioners at 13-14,  *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277) [hereinafter AMA Brief]. Such a reading would not merely result in some measure of overlap among the three definitions; rather, if § 706(8)(B)(i) requires only but-for **causation**, it is difficult to imagine anything of consequence that is added to the statute by § 706(8)(B)(iii). Because § 706(8)(B)(iii) was enacted specifically to provide coverage for persons disabled in perception rather than fact, *see supra* notes 45, 70, it would be especially odd to read § 706(8)(B)(i), the heir to the pre-1974 definition of an individual with handicaps, as including those persons.

79

See, e.g.,  *Tudyman v. United Airlines*, 608 F. Supp. 739, 745 n.6 (C.D. Cal. 1984);  *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1100-01 (D. Haw. 1980). *But see* *Pridemore v. Legal Aid Soc'y*, 625 F. Supp. 1171, 1174-76 (S.D. Ohio 1985) (correctly **interpreting** this aspect of the statute).

80

See, e.g., 41 C.F.R. pt. 60-741 app. A at 208 (1988) (defining 'substantially limits' under the Office of Federal Contract Compliance Programs regulations implementing § 503 to mean 'the degree that the impairment affects employability').

81

See, e.g., Haines, *E.E. Black, Ltd. v. Marshall: A Penetrating Interpretation of 'Handicapped Individual' for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A.L. REV. 527, 541-42 (1983); Leonard, *supra* note 57, at 31-32; Wasson, *AIDS Discrimination under Federal, State, and Local Law After Arline*, 15 FLA. ST. U.L. REV. 221 (1987); Note, *supra* note 57, at 573-74; Note, *AIDS: Des It Qualify as a 'Handicap' under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572, 585 (1986) (authored by Gregory M. Shumaker); Note, *Protection of AIDS Victims from Employment Discrimination under the Rehabilitation Act*, 1987 U. ILL. L. REV. 355, 369-70 (authored by Terry L. Pabst) [hereinafter Note, *Protection of AIDS Victims*]; Note, *AIDS and Employment Discrimination: Should AIDS be Considered a Handicap?*, 33 WAYNE L. REV. 1095, 1106-07 (1987) (authored by Patricia A. Curylo); Comment, *supra* note 67, at 740; Comment, *Running from Fear Itself: Analyzing Employment Discrimination Against Persons with AIDS and Other Communicable Diseases under Section 504 of the Rehabilitation Act of 1973*, 23 WILLAMETTE L. REV. 857, 875-78 (1987) (authored by Janet H. Leader) [hereinafter Comment, *Fear Itself*].

82

The fact of exclusion from employment may well be evidence that employers view the impairment as substantially limiting the individual's ability to work in a medical sense; my point is only that the exclusion cannot itself constitute either an impairment or a substantial limitation on major life activities.

83

Cooper Opinion, *supra* note 9, at 25 n.67.


84


 480 U.S. 273 (1987).

85

Transcript of Oral Argument at 15-16,  *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277).

86

See  *Arline*, 480 U.S. at 283 (stating that a '[disfiguring] impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.');

 *id.* at 284 (stating that § 706(8)(B)(iii) includes 'not only those who are actually physically impaired, but also those who are regarded as impaired *and who, as a result, are substantially limited in a major life activity.*' (emphasis added)).

87

It may, however, be a very good guide to predicting how courts will decide future cases under [§504](#).

88

[480 U.S. at 283 n.10](#).

89

The brief of the American Civil Liberties Union in [Arline](#) had similar problems understanding both the Solicitor General's argument and the statute. Indeed, it sought to argue that social exclusion can constitute not merely a substantial limitation on major life activities but also a (physical or mental) impairment. *See* ACLU Brief, *supra* note 8, at 40 (arguing that '[t]he inability to interact with others can be the *impairment caused by a handicap*, even when the *handicap* causes no impact on the intellectual ability or physical strength necessary for the job . . . ' (emphasis added)). Of course, to speak of a handicap *causing* an impairment, as though 'impairment' is a relevant concept once the fact of handicap is established or assumed, is to miss the most basic feature of [§ 706\(8\)\(B\)](#). It is ironic that the ACLU Brief's counsel of record had the gall to characterize the Justice Department's position in [Arline](#) as "politically motivated" and "inspired by the desire to permit discrimination by people most affected by [AIDS](#), especially gay men." Kamen, *supra* note 10, at A9, col. 3 (quoting Nan D. Hunter).

The Kmiec Opinion reluctantly accepts the Supreme Court's discussion as the best guide to what courts are likely to do in the future, though it strongly suggests that the Court has misconstrued the statute. *See* Kmiec Opinion, *supra* note 15, at 12-13.

90

Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, sec. 120, 92 Stat. 2955, 2982-83 (codified as amended at [29 U.S.C. § 794a\(a\)\(2\)](#) (1982)).

91

See [Alexander v. Choate](#), 469 U.S. 287, 304 n.24 (1985); [Consolidated Rail Corp. v. Darrone](#), 465 U.S. 624, 634-35 (1984) (citing S. REP. NO. 890, 95th Cong., 2d Sess. 19 (1978)).

92

See [Darrone](#), 465 U.S. at 635 n.16.

93

[465 U.S. 624](#) (1984).

94

Id. at 635; *see* [42 U.S.C. § 2000d-3](#) (1982).

95

See [29 U.S.C. § 794a\(a\)\(2\)](#) (1982). The term 'rights' which follows 'remedies' and 'procedures' in § 505 plainly refers to procedural, not substantive, rights.













96















See [Darrone](#), 465 U.S. at 635 (stating that § 505's 'terms do not incorporate [Title VI's] 'primary objective' limitation.').

97

Id. (citation omitted).

- 98 See Brief for the Petitioner at 42, [Bowen v. American Hosp. Ass'n](#), 476 U.S. 610 (1986) (No. 84-1529); Reply Brief for the Petitioner at 14, [Bowen v. American Hosp. Ass'n](#), 476 U.S. 610 (1986) (No. 84-1529).
- 99 See [29 U.S.C. § 794](#) (Supp. IV 1986).
- 100 The kind of **causation** required for liability is a major subject of controversy in Title VII litigation involving employment actions influenced by both permissible and impermissible motives. The operative language of Title VII prohibits employment discrimination that occurs ‘because of . . . race, color, religion, sex, or national origin.’ [42 U.S.C. § 2000e-2\(a\)\(1\)](#) (1982). Some courts have explicitly construed this language, as I would, to require that the protected characteristic be a but-for cause of any adverse employment action for liability to attach. See, e.g., [McQuillen v. Wisconsin Educ. Ass'n Council](#), 830 F.2d 659, 664 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1068 (1988); [Haskins v. United States Dep't of the Army](#), 808 F.2d 1192, 1197-98 (6th Cir.), *cert. denied*, 108 S. Ct. 68 (1987). Others have held that, although but-for **causation** may be relevant at the remedy stage, a showing that a protected characteristic is a significant or substantial factor in the decision-making process is sufficient to establish liability. See, e.g., [Hopkins v. Price Waterhouse](#), 825 F.2d 458, 469-71 (D.C. Cir. 1987) (holding that a showing of a significant role of sex as a factor in the employment decision was sufficient to establish plaintiff's Title VII case), *cert. granted*, 108 S. Ct. 1106 (1988); [Bibbs v. Block](#), 778 F.2d 1318, 1321-23 (8th Cir. 1985) (en banc) (holding that a Title VII violation was established by a showing that race was a discernible factor in the decision); [Fadhil v. City & County of San Francisco](#), 741 F.2d 1163, 1165-66 (9th Cir. 1984) (holding that sex was a significant factor sufficient to establish Title VII liability); [Whiting v. Jackson State Univ.](#), 616 F.2d 116, 121 (5th Cir. 1980) (requiring that discrimination be a significant factor). It appears, however, that the courts are arguing about the wrong question. Title VII makes it unlawful for an employer not only to deny someone employment because of race, religion, or sex, but also ‘to limit, segregate, or classify his employees or applicants for employment [on these bases] in any way which would deprive or tend to deprive any individual of employment opportunities.’ [42 U.S.C. § 2000e-2\(a\)\(2\)](#) (1982) (emphasis added). If a person is subjected to a different selection process than other applicants because of his race, then race is a but-for cause of a ‘limit[ation]’ or ‘classifi[ication]’ that arguably ‘tend[s] to deprive’ him of employment opportunities, even if it does not in fact deprive him of the job. Thus, the conflict among the circuits is perhaps better understood as an argument about when being subjected to a different selection process constitutes an unlawful limitation or classification than as a dispute over standards of **causation**. See *infra* text accompanying notes 137-62. Viewed that way, the courts advocating a broader theory of liability espouse the better argument, though for entirely the wrong reasons.
- 101 [476 U.S. 610](#) (1986).
- 102 See [id.](#) at 630-32 (plurality opinion).
- 103 See [id.](#) at 624-26. The two dissenting opinions maintained that the case actually concerned the Secretary's statutory authority to regulate medical treatment decisions concerning handicapped infants. See [id.](#) at 648 (White, J., dissenting); [id.](#) at 665 (O'Connor, J., dissenting).
- 104 See [id.](#) at 631-42 (plurality opinion).

- 105  *Id.* at 631.
- 106 *Id.* (emphasis in original).
- 107 The government did not directly disagree with this conclusion in *American Hospital Association*. It claimed only that when parents refused consent to treatment of handicapped infants, hospitals could not refuse to notify state agencies or refuse to seek state court orders overriding the parental decision when they would ordinarily take such action with respect to non-handicapped infants. See Brief for the Petitioner at 27-28,  *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986) (No. 84-1529). The plurality rejected this defense of the regulations because there was no evidence in the record that either kind of discriminatory refusal was taking place. See  *American Hosp., Ass'n*, 476 U.S. at 637-39, 643 (plurality opinion).
- 108 The remainder of Part I of this Article, with the exception of the concluding discussion of the word ‘solely,’ see *infra* text accompanying note 129, is not reflected, even by implication, in the Cooper Opinion or Justice Brief. In particular, they and I have very different views on whether and when  §504 reaches conduct with a discriminatory effect on individuals with handicaps. Compare *infra* text accompanying notes 110-28 with Cooper Opinion, *supra* note 9, at 36 n.86 and Justice Brief, *supra* note 9, at 21 n.19.
- 109 The plurality in *American Hospital Association* limited its rejection of two-tiered theories of race-based discrimination to Title VI. The reason is clear—the Court had already adopted a two-tiered theory under Title VII.  *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), holds (wrongly, in my view) that Title VIII prohibits more than just discrimination that comes from the mind of the employer; it prohibits even some facially neutral practices that have the unwitting effect of disproportionately excluding blacks from employment.  *Id.* at 431-32. The Court's reasoning was roughly as follows: Duke Power's failure to hire a certain number of blacks was not based on any overt discrimination, but on facially neutral test results, which by themselves are a permissible basis for decision under the statute (at least when not a pretext for improper discrimination); however, the disproportionate failure of blacks to pass these tests is the result of past discrimination in education, etc., and is thus (in a very remote sense) ‘because of’ their race. See  *id.* at 430-31. Hence, because the employer based its decision on a criterion which in turn was based on race, the employer's decision occurred, in two-tiered fashion, ‘because of’ race. See  *id.* at 432 (finding that ‘Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation . . .’).
- One could make a similar argument, with considerably more plausibility, in *American Hospital Association*. The hospitals' decisions not to treat handicapped infants were based on the parents' refusals to consent, and those refusals were in turn based on handicap. If the two-tiered discrimination in *Griggs* violated Title VII, then surely the two-tiered discrimination in *American Hospital Association* was a *fortiori* a violation of  §504.
- 110  469 U.S. 287 (1985).
- 111 See  *id.* at 295-97.
- 112 See  *id.* at 298-99.

- 113 See  *id.* at 299.
- 114  *Id.* at 302.
- 115 See  *id.* at 302-09.
- 116  *Id.* at 292-94.
- 117  *Id.* at 295.
- 118  29 U.S.C. § 792 (1982) & Supp. IV 1986); 45 C.F.R. §§ 84.21-.23 (1988) (regulating the physical accessibility of programs covered by  §504).
- 119  469 U.S. at 297.
- 120 The Court in *Choate* did not indicate which, if any, of the terms of  §504 it was construing when it proposed its ‘meaningful access’ standard. If the standard is meant to determine when discrimination occurs by reason of handicap, it is pure invention. However, it may well be an appropriate **interpretation** of the word ‘discrimination.’ See *infra* text accompanying notes 142, 159-62.
- 121  469 U.S. at 299.
- 122 Because this Article generally assumes that the hypothetical plaintiffs are otherwise qualified for the positions or benefits sought, one can assume that the driver's license requirement is not essential to this employer's federally funded program. Similarly, in the previous example, if accommodating an individual with handicaps would be unduly expensive or would require fundamental changes in a federally funded program, the individual is not ‘otherwise qualified’ for the program, and his exclusion, even by reason of his handicap, does not violate  §504. See *Southeastern Community College v. Davis*, 422 U.S. 397, 405-12 (1979) (holding that a college's unwillingness to make major changes in its nursing program to accommodate a hearing-impaired applicant did not violate  §504).
- 123  *Choate*, 469 U.S. at 289.
- 124  *Id.* at 289-90.
- 125 See *supra* text accompanying notes 104-07.

- 126 One regulation implementing §504 forbids the use of employment tests that tend to screen out handicapped applicants unless the tests are job-related or necessary, *see* 45 C.F.R. § 84.13 (1988), but I will not beg the question by assuming its validity. If that agency interpretation of §504 is a permissible one, then two-tiered discrimination must, in all contexts, fall within the statute's scope, as there is no conceivable basis in the statutory language for limiting a prohibition on two-tiered discrimination to employment tests.
- 127 If the assumption that the 'otherwise qualified' element of §504 always exists is relaxed, it becomes clear that the motor vehicle department's discrimination was lawful under that statute, as blind persons are not otherwise qualified for driver's licenses. By the same token, however, parental discrimination against handicapped infants is lawful under §504, because the parents are not recipients of federal funds. In cases of multi-tiered discrimination, it should not matter whether the lower-tier discriminatory decisions would themselves violate §504; it is enough that they are based on a protected characteristic and become an integral part of a covered institution's decision-making process.
- 128 If the employer's hiring criterion is changed to applicants' successful completion of a five-minute mile, the conclusion changes dramatically. At the eight-minute level, the case starts to look like *Choate*, as good arguments can be made on both sides. Hence the but-for test can often be difficult to apply, though surely no more difficult in this context than a 'meaningful access' test.
- 129 Lest I be misunderstood, I do not believe that the latter follows from the former. Congress is under no obligation to pass attractive or sensible statutes, and there is no reason to believe that it always, or even often, does so. If the language of the statute sustained only an unattractive construction, I would unhesitatingly defend that construction.
- 130 *See* Dean, *Does Astrology Need to Be True?* (pts. 1 & 2), 11 SKEPTICAL INQUIRER 166, 257 (1986-87); Good, *Statistics on Dean's Astrology Article*, 11 SKEPTICAL INQUIRER 418 (1987); Ianna & Tolbert, *A Retest of Astrologer John McCall*, 9 SKEPTICAL INQUIRER 167, 170 (1984-85); Kurtz & Fraknoi, *Scientific Tests of Astrology do not Support its Claims*, 9 SKEPTICAL INQUIRER 210; Lackey, *A Controlled Test of Perceived Horoscope Accuracy*, 6 SKEPTICAL INQUIRER 29, 30 (1981); *Special Report: Astrology and the Presidency*, 13 SKEPTICAL INQUIRER 3 (1988).
- 131 *See supra* text accompanying notes 76-83. The acceptance of the bootstrapping argument under these circumstances is 'with a vengeance' because the employer exclusion would be used not merely to satisfy the statutory requirement of a substantial limitation on major life activities, as with the attitudinal regulation, but also to satisfy the requirement of a *physical or mental impairment*. Some hardy souls have not blanched at this prospect. *See supra* note 89; *infra* text accompanying note 198.
- 132 Several commentators have incorrectly attributed to the Cooper Opinion the view that §504 is not violated as long as an employer 'articulates,' Note, *Employment Discrimination and AIDS: Is AIDS a Handicap under Section 504 of the Rehabilitation Act?*, 38 U. FLA. L. REV. 649, 662 (1986) (authored by Patricia Mitchell), or 'simply contend[s],' Carey & Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 293 (1987), that she has a reason for her discrimination other than handicap, such as contagiousness. This is a difficult error to understand. It is one thing to say that a statute which requires a pretext inquiry may allow many employers to conceal their true motivations because proving a pretext is often so difficult. It is quite another thing to say—or to characterize the Cooper Opinion as saying—that mere *articulation* of a reason for discrimination other than handicap is a complete defense to a §504 claim. *Cf.* Cooper Opinion, *supra* note 98 at 34-36.

- 133 A recent survey indicates that two-thirds of all adults in this country read **astrology** reports ‘sometimes’ or ‘often,’ 29% consider them ‘sort of scientific,’ 7% think them ‘very scientific,’ and 7% have changed their behavior because of them. *See Survey Examines Level of Scientific Illiteracy in U.S.*, 11 SKEPTICAL INQUIRER 116, 116-18 (1986).
- 134 *See Cooper Opinion, supra* note 9, at 35 n.83 (emphasis added).
- 135 Of course, if the phrase ‘solely by reason of his handicap’ means that **§504** is violated only when the employer relies *exclusively* on handicap as a basis for decision, *see supra* text accompanying note 129 (analyzing and rejecting this **interpretation**), then any decision-making process that contains *either* a major or minor premise not involving handicap will not violate the statute.
- 136 *See* 2. U.S.C. § 794 (Supp. IV 1986).
- 137 The Cooper Opinion and the Justice Brief do not address this issue.
- 138 **29** U.S.C. § 794 (Supp. IV 1986).
- 139 This Article does not address the conditions under which ‘equal treatment’ really means giving individuals with handicaps more favored treatment. *See* **Southeastern Community College v. Davis**, 442 U.S. 397, 412-13 (1979) (noting that ‘[s]ituations may arise where a refusal to modify an existing program might become . . . unreasonable . . . [Identifying] where a refusal to accommodate the needs of a disabled person amounts to discrimination . . . continues to be an important responsibility of HEW.’)
- 140 **42** U.S.C. § 2000e-2(a)(2) (1982).
- 141 For example, suppose an employer organizes her computer files on her employees by race. However, when any actual employment decisions are made, the files are merged. This is plainly a classification of employees on the basis of race, but it does not deprive or tend to deprive any of them of employment opportunities.
- 142 **469** U.S. 287 (1985), discussed *supra* text accompanying notes 110-19.
- 143 **108** S. Ct. 1372 (1988).
- 144 *See* **38** U.S.C. § 1661 (1982).
- 145 *See id.* § 1662(a)(1) (Supp. IV 1986).
- 146 *Id.*; *see also id.* §§ 105, 310, 410, 521 (1982 & Supp. IV 1986) (disfavoring disabilities resulting from ‘willful misconduct’).

- 147 See Department of Veterans Affairs Act, Pub. L. No. 100-527, sec. 2, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2635, 2635 (1988) (to be codified at 38 U.S.C. § 201 note).
- 148 See *supra* note 48.
- 149 **Interpretation** of the Term ‘Willful Misconduct’ as Related to the Residuals of Chronic Alcoholism I (Veterans' Admin. No. 988, Aug. 13, 1964), reprinted in Joint Appendix on Writs of Certiorari at 138, Traynor v. Turnage, 108 S. Ct. 1372 (1988) (Nos. 86-622, 86-737); see 38 C.F.R. § 3.1(n) (1988) (generally defining ‘willful misconduct’); *id.* § 3.301(c)(2) (discussing ‘willful misconduct’ as it applies to alcoholism); *id.* § 3.301(c)(3) (same for drug usage).
- 150 See Traynor, 108 S. Ct. at 1376.
- 151 See *id.* at 1378-80. That determination was plainly wrong. When *Traynor* was decided, courts were generally forbidden from reviewing ‘decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . .’ 38 U.S.C. § 211(a) (1982). Because the Administrator had the power and duty to decide in particular cases whether his actions conformed to §504, he necessarily decided in the cases before the Court that §504 did not invalidate the VA's regulations. That decision was therefore beyond review. See McKelvey v. Turnage, 792 F.2d 194, 209-10 (D.C. Cir. 1986) (Scalia, J., concurring in part and dissenting in part), *aff'd sub nom.* Traynor v. Turnage, 108 S. Ct. 1372 (1988).
- 152 Traynor, 108 S. Ct. at 1380-81; see GI Bill Improvement Act of 1977, Pub. L. No. 95-202, sec. 203(a)(1), 91 Stat. 1433, 1439 (codified as amended at 38 U.S.C. § 1662(a) (1982 & Supp. IV 1986)).
- 153 See Rehabilitation Act, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, sec. 120, 92 Stat. 2955, 2982-83 (codified at 29 U.S.C. § 794a(a)(2) (1982)).
- 154 See Traynor, 108 S. Ct. at 1381.
- 155 See, e.g., McKelvey v. Turnage, 792 F.2d 194, 200 n.2 (D.C. Cir. 1986), *aff'd sub nom.* Traynor v. Turnage, 108 S. Ct. 1372 (1988); Colin K. v. Schmidt, 715 F.2d 1, 9 (1st Cir. 1983).
- 156 Traynor, 108 S. Ct. at 1382.
- 157 Suppose a recipient of federal funds wishes to give special consideration to one class of individuals with handicaps—blind persons, for example. A person who is hearing-impaired is not denied special consideration by reason of his hearing impairment, but by reason of his good vision. Suppose now that a recipient chooses to give special treatment to *all* individuals with handicaps *except* persons who are blind, who she treats evenhandedly in comparison with non-handicapped persons. Is this discrimination by reason of handicap? Arguably not, unless the blind person has another

handicap that would have qualified him for special treatment if he was not blind. The result is troubling, but I see no way to avoid it.

158 See  *McKelvey*, 792 F.2d at 202.


159 See *supra* note 151.

160 Whether or not the Court correctly construed the statute, as I think it did, the Veterans' Benefits and Programs Improvement Act of 1988, Pub. L. No. 100-689, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 4161, now prescribes a different result. See *id.* sec. 109, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) at 4170 (to be codified at 38 U.S.C. § 105(c)) (providing that '[f]or the purposes of any provision relating to the extension of a delimiting period under any education-benefit or rehabilitation program administered by the Veteran's Administration, the disabling effects of chronic alcoholism shall not be considered to be the result of willful misconduct.').





161 As Mr. Spock is reportedly fond of saying, 'A difference which *makes* no difference *is* no difference.' J. BLISH, SPOCK MUST DIE! 4 (1970) (emphasis in original).

162 A similar analysis is suggested by the court of appeals in *McKelvey*:

Where the VA to promulgate a regulation requiring those claiming paralysis to submit to medical examination, but not requiring such examination for those claiming disability on the basis of loss of limbs, it would be absurd to think that the Rehabilitation Act was violated. It is no discrimination, in other words, to establish for various disabilities the sorts of procedures that are distinctively appropriate. Alcoholism, unlike any other disability except drug addiction (which has been subjected to be same procedural presumption) is self-inflicted—whether or not the self-infliction can be considered 'willful.' It is therefore feasible for alcoholism, as it is not for all other disabilities except drug addition, to make a generalized determination that willfulness exists unless there is established the singular exculpation for self-infliction (psychiatric disorder) that the agency has chosen to acknowledge. Since we have approved the substance of that determination, it would insult common sense to require the agency to make it repetitiously, by consistently denying non-psychiatric defenses in individual adjudications instead of precluding them generically, as it has, by rulemaking.

 792 F.2d at 203 (citations omitted).

163 This is not a correct description of **AIDS**, as that term is defined by the Centers for Disease Control. See *CDC Definition for AIDS*, *supra* note 5. An individual can be classified as having **AIDS** without an explicit showing of HIV infection, and, apparently, even without a diagnosis of immunosuppression. See *id.* However, to avoid unduly complicating the analysis, this Article assumes that all persons diagnosed as having **AIDS** in fact suffer from HIV-induced immunosuppression.

164 See  *School Bd. v. Arline*, 480 U.S. 273, 277 (1987). With respect to **Arline**, '[t]he district court held . . . that although there was '[n]o question that she suffers a handicap,' **Arline** was nevertheless not 'a handicapped person under the terms of that statute.'" The Eleventh Circuit reversed,  772 F.2d 759 (11th Cir. 1985), and the Supreme Court affirmed, holding that 'the fact that a person with a record of physical impairment is also contagious does not suffice to remove that person from coverage under  §504.'  480 U.S. at 286.

165 45 C.F.R. § 84.3(j)(2)(i)(A) (1988).

- 166 Pub. L. No. 100-259, sec. 9, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 28, 31-32 (to be codified at 29 U.S.C. § 706(C)).
- 167 See *infra* note 233 (discussing the contagiousness of the HIV virus).
- 168 See CDC Definition for **AIDS**, *supra* note 3.
- 169 Kaposi's sarcoma is a multicenter neoplasm (tumor) recognized since 1872 as an indolent tumor producing lesions on the legs of older men of Mediterranean descent. Macher, *The Medical Background*, in **AIDS AND THE LAW** 1, 12 (W. Donnette ed. 1987). The tumor was rare until the onset of **AIDS** revealed a rapidly progressive form prevalent among **AIDS** patients, primarily male homosexuals, which invades the shin, mucous membranes, and gastro-intestinal tract. *Id.*
- 170 *Pneumocystis carinii* pneumonia is a severe pneumonia which occurs only in immunocompromised hosts. R. GRAY & L. GORDY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶46.41 (3d ed. 1987). The disease has become the most common form of pneumonia among **AIDS** patients, and **AIDS** patients account for the majority of cases in the United States. *Id.*
- 171 See Macher, *supra* note 169, at 11 (stating that '[n]eurological disorders are common in **AIDS** patients and can have devastating consequences on the quality and duration of life.'). Generally, a progressive encephalopathy (brain disease) results in 'diminished cognitive function and social withdrawal.' *Id.* Other neurological disorders common in **AIDS** patients are meningitis, cerebral hemorrhage, epidural lymphomas, peripheral neuropathies, and progressive multifocal leukoencephalopathy. *Id.* Decreased visual acuity, and even complete loss of sight, may also occur as a result of chorioretinitis. *Id.*
- 172 See Leonard, *supra* note 57, at 19. For example, a person with **AIDS** may have Kaposi's sarcoma, but the disease may not have developed to such a stage that it substantially limits major life activities. *Id.* at 19 n.43.
- 173 See CDC Definition for **AIDS**, *supra* note 5.
- 174 See *infra* text accompanying notes 179-232.
- 175 The few courts that have faced this question have not undertaken especially careful inquiries. See *Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50, 54 (D.D.C. 1987) (finding that for individuals to be handicapped under the Rehabilitation Act, '[i]t is enough if they are perceived to be handicapped . . .'); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 414-15, 502 N.Y.S.2d 325, 336-37 (Sup. Ct. 1986) (concluding that automatic exclusion of students with **AIDS** from school would be 'treating' them as impaired, bringing them within the protections of the Rehabilitation Act).
- 176 See *supra* note 6.
- 177 Those symptoms can include 'generalized lymphadenopathy, unintentional weight loss, fever, chronic diarrhea, malaise and lethargy, lymphopenia, leukopenia, anemia, idiopathic thrombocytopenia, immunologic abnormalities characteristic of acquired immunodeficiency syndrome, and oral thrush.' *NIH Conference, supra* note 5, at 801.

- 178 *See supra* text accompanying notes 163-72.
- 179 *See* Laurence, *The Immune System in AIDS*, SCI. AM., Dec. 1985, at 84, 92.
- 180 *Id.*
- 181 *See id.*; Leonard, *supra* note 57, at 19-20. *See generally* Lang, Anderson, Perkins, Grant, Lyman, Winkelstein, Royce & Levy, *Clinical, Immunologic, and Serologic Findings in Men at Risk for Acquired Immunodeficiency Syndrome*, 257 J. A.M.A. 326 (1987) (studying single men from areas with high incidence of AIDS to examine ‘the relationships of symptoms, physical findings, and laboratory values to the presence of [HIV] antibody.’).
- 182 Fauci, *supra* note 5, at 621. An asymptomatic carrier who does not fit this description falls outside the bounds of this discussion.
- 183 *See id.*; Osborn, *supra* note 7, at 24.
- 184 This qualified position differs from the categorical ‘never-an-impairment’ position taken in the Cooper Opinion. *See* Cooper Opinion, *supra* note 9, at 27-28. In the spring of 1986 when that opinion was being prepared, the Justice Department was led to believe that asymptomatic always meant asymptomatic, in the strong sense of that term. It is now evident that some level of immune system dysfunction shows up in most HIV-infected persons at some point after infection but before the onset of clinical symptoms, and that there are thus different classes of ‘asymptomatic’ carriers. *See* Laurence, *supra* note 179, at 92. As the subsequent discussion shows, that fact (and hence the Surgeon General's recent ‘clarification’ to OLC) has no effect on the ultimate legal analysis, but it does make the specific question whether asymptomatic carriers have physical impairments a more subtle one than I or the Justice Department initially supposed.
- 185 *See* Cooper Opinion, *supra* note 9, at 27-28.
- 186 *See* Kmiec Opinion, *supra* note 15, at 7-9.
- 187 Koop Letter, *supra* note 20, at 1-2. The opinion's other proffered reason for reconsideration is discussed *infra* text accompanying notes 212-25.
- 188 Koop Letter, *supra* note 20, at 1-2.
- 189 *Id.* at 1.
- 190 *Id.*
- 191 *Id.* at 1-2.
- 192 *Id.* at 2 (emphasis added).

193 The Kmiec Opinion states:

In our view, the type of impairment described in the Surgeon General's letter fits the HHS definition of 'physical impairment' because it is a 'physiological disorder or condition' affecting the 'hemic and lymphatic' systems. We therefore believe that, in light of the Surgeon General's medical assessment, asymptomatic HIV-infected individuals, like their symptomatic counterparts, have a physical impairment.

Kmiec Opinion, *supra* note 15, at 8-9. The Kmiec Opinion also makes reference to the possible effects of the **AIDS** virus on the brain and central nervous system, the effect of infection on reproduction, and the Surgeon General's comparison of HIV infection and cancer. *See id.* at 8 n.9. The first and third references are ludicrous—an HIV infection that results in damage to the brain or nervous system is by definition not asymptomatic, and the Surgeon General's comparison of HIV infection and cancer is no more significant than a similar comparison between HIV infection and a high cholesterol level. The effect of HIV infection on sex and childbirth is discussed *infra* text accompanying notes 209-25.

194 *See Pridemore v. Legal Aid Soc'y*, 625 F. Supp. 1171, 1174-75 (S.D. Ohio 1985) (holding that cerebral palsy is not a handicap where its effects on motor functions were 'discernible only with the use of sophisticated diagnostic equipment.').

195 Leonard, *supra* note 57, at 31-32.

196 *See supra* text accompanying notes 57-58.

197 *See, e.g., supra* text accompanying notes 76-98.

198 *See* 45 C.F.R. § 84.3(j)(2)(iv)(B) (1988).

199 A charitable reader would ignore this last error. However, since Professor Leonard saw fit to write a letter to the editor of the *New York Times* criticizing the Cooper Opinion before he had bothered to read it, *see* Leonard, *Justice Dept. Delivers Injustice to AIDS Victims* (letter to the editor), *N.Y. Times*, July 3, 1986, at A30, col. 4, I have no inclination to be charitable towards him.

200 *See* Wasson, *supra* note 81, at 242-43.


201 Conceivably, contracting **AIDS** or an HIV infection could cause a person to develop a mental condition serious enough to constitute a handicap in its own right. *See* Carey & Arthur, *supra* note 132, at 293 n.53.

202 *See* 43 Op. Att'y Gen. No. 12, at 8-9 (1977).

203 *See* Wasson, *supra* note 81, at 242.

204 *See* Note, *supra* note 57.

205 *See id.* at 570-71; *supra* text accompanying notes 57-58.

- 206 *See* Note, *supra* note 57, at 573-74; *supra* text accompanying notes 76-83.
- 207 *See* Note, *supra* note 57, at 571-72; *supra* text accompanying notes 66-67.
- 208 *See infra* text accompanying notes 209-32.
- 209 *See* Note, *supra* note 57, at 572, 574; Comment, *supra* note 67, at 740.
- 210 *See*  *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 379 (C.D. Cal. 1987) (noting that '[e]ven those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others.').
- 211 *See* **AIDS** Doctors Brief, *supra* note 8, at 43-48.
- 212 *See* Kmiec Opinion, *supra* note 15, at 10-11.
- 213 My thoughts on this question have profited greatly from conversations and correspondence in 1986 with then OLC attorney, now Professor, Marc Miller. Needless to say, none of the specific arguments that are presented and criticized here should be attributed to Professor Miller.
- 214 *See* Friedland & Klein, *supra* note 7, at 1128-30.
- 215 *See id.* at 1130-31.
- 216 *See* Koop Letter, *supra* note 20, at 1-2.
- 217 Sexual activity and reproduction are not specifically mentioned in the regulatory definition of major life activities. *See* 45 C.F.R. § 84.3(j)(2)(ii) (1988). I have some doubts whether they can be characterized as *major* life activities once their social elements are removed, but I will swallow these doubts and treat both as major life activities. *Cf.* Kmiec Opinion, *supra* note 15, at 10-11 (stating that '[t]here is little doubt that procreation is a major life activity . . .').
- 218 *See* Kmiec Opinion, *supra* note 15, at 11 (noting that '[t]his limitation—the physical inability to bear healthy children—is separate and apart from the fact that asymptomatic HIV-infected individuals will choose not to attempt procreation.').
- 219 The Kmiec Opinion is careful to limit its discussion of this point to asymptomatic carriers who are *aware* of their infection. *See id.* at 10. This suggests (though it concededly does not prove) that the Opinion is tacitly relying on the attitudinal limitation on sex and childbirth that can result from HIV infection.
- 220 The regulations also make reference to the genito-urinary system, *see* 45 C.F.R. § 84.3(j)(2)(i)(A) (1988), but that system has no relevance to this argument. The HIV-infected individual's kidneys continue to function undisturbed, urine continues to be discharged, and metabolized waste products thereby continue to be ejected.

- 221 Obviously, this is not true with respect to the specific statutory exclusions of alcoholics, drug addicts, and persons with contagious diseases who pose health or safety risks to others. *See supra* text accompanying notes 45-49. I am referring only to the main body of § 706(8)(B).
- 222 The Kmiec Opinion acknowledges this argument. *See* Kmiec Opinion, *supra* note 15, at 11. In the context of sexual activity, it does not respond to it, except to observe that courts are likely to find that HIV infection substantially limits sexual activity, *see id.*, an observation with which I wholly agree.
- 223 With respect to childbirth, the Kmiec Opinion suggests that the argument is ‘disingenuous at least insofar as infection physically precludes the normal procreation of healthy children.’ *Id.* at 11 n.13. The allegation of disingenuousness, however, is itself disingenuous. For an analysis of why ‘disability’ does not include the reproductive activities of an HIV-infected mother, see the text accompanying this note.
- 224 Kmiec Opinion, *supra* note 15, at 10 (emphasis added). The Kmiec Opinion further states that ‘the physical ability to engage in *normal* procreation—procreation free from the fear of what the infection will do to one’s child—is substantially limited once an individual is infected with the **AIDS** virus.’ *Id.* at 11 (emphasis in original). The latter statement is patently false; one can engage in procreation without *fear* of transmitting the virus to one’s child as long as one is unaware of one’s infection (or the risks that it poses). The argument acquires a surface plausibility only through a conflation of physical and attitudinal limitations.
- 225 *See supra* text accompanying notes 68-70. The Kmiec Opinion, one should note, goes on to conclude that, in light of **Arline’s** endorsement of the attitudinal regulation, courts are likely to find that HIV-infected persons are substantially limited in major life activities without regard to the virus’ effect on sex or childbirth. Kmiec Opinion, *supra* note 15, at 11-13.
- 226 *See* **AIDS** Doctors Brief, *supra* note 8, at 13-14 & n.18, 47-48.
- 227 *Id.*
- 228 *Id.* at 48.
- 229 If sexual activity poses a serious risk of conversion from infection to ARC or **AIDS**, then the medical community has engaged in a conspiracy of silence on the point that is tantamount to criminal neglect. Recommendations for safe (or safer) sex through the use of condoms would be a cruel hoax; while those precautions may reduce the risk of transmission of the virus to one’s partner, they do nothing about any latent risks to oneself.

Medical experts have, by contrast, cautioned women who are HIV-infected to think carefully about pregnancy. *See Perinatal Transmission, supra* note 7, at 724-26. The principle concern is the risk of transmission of the virus to children, but the recommendations also prescribe that infected women ‘be counselled regarding their own risk of **AIDS**.’ *Id.* at 725. That caution rests upon the results of a single study involving sixteen mothers, which showed a higher-than-expected rate of seroconversion to ARC or **AIDS**. *See* Scott, Fischl, Klimas, Fletcher, Dickinson, Levine & Parks, *Mothers of Infants with the Acquired Immunodeficiency Syndrome*, 253 J. A.M.A. 363 (1985). One need not be a scientist to recognize that the study, while important and suggestive, is too thin a reed on which to build much of an argument. Nonetheless, the proposition that pregnancy poses risks of conversion strikes this layman as plausible. Pregnancy is associated with immunosuppression even in the absence of HIV infection, *see Perinatal Transmission, supra* note 7, at 722, and it is therefore reasonable to this untrained mind to suppose that HIV infection on top of pregnancy poses unique risks for

mothers. Accordingly, I do not suggest that there is nothing to this argument with respect to pregnancy. I merely point out that '[i]t is not known whether pregnancy increases an infected woman's risk of developing AIDS or ARC.' *Id.*

230 This argument fails to leave the starting blocks if immunosuppression is the only claimed impairment resulting from infection. The statute requires that there be 'a physical or mental impairment which substantially limits one or more of such person's major life activities,' 29 U.S.C. § 706(8)(B) (Supp. IV 1986) (emphasis added), not 'a condition resulting in a physical or mental impairment, which condition also substantially limits one or more of such person's major life activities.' In other words, one cannot use infection with the virus to establish both the physical impairment and the substantial limitation on life activities if the impairment and the limitation are not themselves causally related. If the impairment resulting from infection is immunosuppression, that impairment does not substantially limit sexual or reproductive activity, even if some other feature of the viral infection that causes the impairment does. For the argument in the text to be successful, the relevant physical impairment must be an impairment of the sexual or reproductive system, not the hemic or lymphatic system.

231 The unlikely alternative to an objective, reasonable man standard is a case-by-case inquiry that would depend upon each individual's risk preference.

232 It is somewhat problematic to say that a condition is substantially limiting if it permits a person to engage in certain conduct, but raises the physical or mental stakes of that conduct. Imagine a condition that, with each breath the person takes, materially increases his risk of contracting some serious disease, though without interfering with his intake of oxygen. Does it make sense to say that there is a substantial limitation on his ability to breathe? There may be a substantial cost attached to breathing—and even a cost in the sort of coin accepted by this statute (deleterious physical or mental effects on the individual)—but it is not obvious that every cost is a limitation.

233 There is currently no epidemiological evidence of transmission of HIV through casual contact with or proximity to infected persons. See Friedland & Klein, *supra* note 7, at 1133 (reporting that '[t]he accumulated data strongly support the conclusion that transmission of HIV occurs only through blood, sexual activity, and perinatal events.');








Friedland, Saltzman, Rogers, Kahl, Lesser, Mayers & Klein, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 NEW ENG. J. MED. 344, 348 (1986) (stating that '[t]his study supports the view that . . . longstanding household exposure to patients with AIDS is associated with little or no risk of transmission of HTLV-III/LAV infection.');








Laurence, *supra* note 179, at 84 (noting that '[a]ll epidemiologic evidence indicates that food, water, insects and casual contact do not spread AIDS.');







Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, 34 MORBIDITY & MORTALITY WEEKLY REP. 682, 683 (1985) (stating that 'HTLV-III/LAV has [not] been shown to be transmitted by casual contact in the workplace, contaminated food or water, or airborne or fecal-oral routes.').

234 Indeed, in the first administrative case decided after issuance of the Cooper Opinion, the Office of Civil Rights for HHS concluded that a hospital had violated §504 when it forced a nurse who was thought to have AIDS (and who later developed it) to take a medical leave of absence. See Charlotte Memorial Hosp., No. 04-84-3096 (Dep't HHS Region IV Aug. 5, 1986). The hospital had a prescribed set of guidelines for dealing with employees suspected of having contagious diseases, which it failed to follow in this case. *Id.* The hospital's disregard for its own contagion-control procedures made its claim that it was concerned about contagion rather than the disabling effects of AIDS very difficult to accept, and a finding of pretext was appropriately entered. See *id.*










235 This could be a valid argument for applicants in other contexts. See *supra* text accompanying notes 127-28. However, HIV infection does not causally flow from AIDS in the way that an inability to run flows from paralysis.

- 236 *See supra* text accompanying notes 108-28.
- 237 A similar analysis would apply if an employer believed, contrary to the facts, that HIV infection flows from **AIDS** in **causal** fashion.
- 238 This hypothetical was discussed in the Justice Department's amicus brief in **Arline**. *See* Justice Brief, *supra* note 9, at 23 n.21.
- 239 *See*  **School Bd. v. Arline**, 480 U.S. 273, 284 (1987) (noting that recovered epilepsy and cancer patients have faced discrimination resulting from fear that they might be contagious).
- 240 This section's analysis thus far is generally, though not entirely, consistent with the position originally taken by the Justice Department. *See* Cooper Opinion, *supra* note 9, at 35 n.83; Justice Brief, *supra* note 9, at 23 n.21. Everything that follows in Part II, however, reflects only my own view.
- 241 I formerly believed that the **AIDS**-to-virus case, unlike the blindness-to-Scorpio case, does not present an instance of a handicap-based judgment because the **AIDS**-to-virus inference is always true. This concern was evidently shared by the Justice Department; when discussing handicap-based judgments, the Cooper Opinion and Justice Brief consistently referred to false stereotypes. *See* Cooper Opinion, *supra* note 9, at 34 n.83 (arguing that '[i]f [a recipient] concludes . . . that a particular applicant is incompetent by virtue of a *false handicap-based stereotype* (e.g., all handicapped persons are incompetent), he has violated  **section504** . . . ' (emphasis added)); Justice Brief, *supra* note 9, at 12 (maintaining that the prohibition of '*false handicap-based stereotypical judgments* is a primary purpose of  **Section504**.' (emphasis added)); *id.* at 23 n.21 (observing that '[t]he more difficult issue, not raised in this case, is whether  **Section504** bars discrimination based on a *false stereotyped conclusion* derived solely from the fact that the person is handicapped . . . ' (emphasis added)).
- I was initially given pause by the fact that most stereotypical judgments will be true on some occasions, even if only by accident, as in the case of the blind persons who happens to be a Scorpio. In those cases, even if the particular applicant cannot get individual relief because his handicap was not outcome-determinative, injunctive relief should be available against the practice. Where the handicap-based judgment is always true, however, even injunctive relief seems inappropriate; there is no plaintiff even in principle who could possibly recover. I now believe that this confuses the question whether a judgment is handicap-based with the very different question of what constitutes prohibited discrimination under  **§504**.
- 242 *See supra* text accompanying notes 137-42.
- 243 *See supra* text accompanying notes 137-39.
- 244 If it is absolutely certain they would have been excluded at the second stage, then only the most sweeping conception of discrimination would bring this conduct within  **§504**.
- 245  **Bowen v. American Hosp. Ass'n**, 476 U.S. 610 (1986), discussed *supra* text accompanying notes 101-09.

- 246 *See supra* text accompanying notes 104-06.
- 247 *See supra* text accompanying notes 108-28. Of course, as the number of steps increases, the **causal** link between handicap and exclusion becomes progressively harder to establish. However, this is an evidentiary rather than an **interpretative** problem.
- 248 *See supra* text accompanying notes 130-62.
- 249 *See supra* text accompanying notes 132-62.
- 250  480 U.S. 273 (1987).
- 251 *See* Justice Brief, *supra* note 9.
- 252 *See* Brief for Petitioner,  *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277).
- 253 I am not among the ‘many.’ My goal here is to determine the actual meaning of  **§504**, not to determine what courts have claimed, or are likely to claim, its meaning to be.
- 254  **Arline**, 480 U.S. at 276.
- 255 *Id.*
- 256 *Id.*
- 257 *Id.* (quoting the school board hearing).
- 258 *Id.*
- 259 *Id.* at 277 (quoting the district court).
- 260 *Id.* (quoting the district court).
- 261 *Id.* The district court further held that the school board had no duty to seek to place **Arline** in other positions. *See*  **Arline** v. School Bd., 772 F.2d 759, 761 (11th Cir. 1985), *aff’d*,  480 U.S. 273 (1987).
- 262 *See*  772 F.2d at 761-62.

- 263 See  *id.* at 762-63.
- 264 See  *id.* at 763-64.
- 265 See  *id.* at 765 (remanding for findings on ‘whether the risks of infection precluded Mrs. **Arline** from being ‘otherwise qualified’ for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, . . . teaching less susceptible individuals, or in some other kind of position in the school system.’ (footnotes omitted)).
- 266 Petition for Writ of Certiorari at 1,  *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277) (citation omitted).
- 267 *School Bd. v. Arline*, 475 U.S. 1118 (1986).
- 268 *Id.* Justice Stevens objected, with considerable justification, that it made little sense for the Court to request briefing on whether **Arline** was otherwise qualified, as the district court had not yet even been given the opportunity to make the findings of fact ordered on remand by the court of appeals. *See id.* at 1119 (Stevens, J., dissenting). His protest was vindicated by the Court's ultimate disposition, which essentially reinstated the court of appeals' remand instructions. See  480 U.S. at 288-89.
- 269 See Justice Brief, *supra* note 9.
- 270 See *id.* at 24-27. The Justice Brief points out that ‘[t]he state health official, the school superintendent, and the school board all determined . . . , and the trial court expressly found, that the health risks presented by **Arline's** contagiousness made her unqualified to continue teaching elementary school.’ *Id.* at 25.
- 271 In its brief, the Justice Department assumed that **Arline** was handicapped. *See id.* at 12 n.8. At oral argument, the Solicitor General made clear the Department's view that **Arline** was ‘plainly a handicapped person; no question of that.’ Transcript of Oral Argument at 17,  *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277).
- 272 Justice Brief, *supra* note 9, at I.
- 273 *Id.* at 18-21.
- 274 *Id.* at 22-23.
- 275 *Id.* at 12-13.
- 276 I am thoroughly embarrassed to admit that while working for the Justice Department, I not only failed to grasp this obvious point, but enthusiastically supported the filing of this brief. Mea culpa.

- 277 However, Chief Justice Rehnquist and Justice Scalia, in dissent, did not. *See* 480 U.S. at 291 (Rehnquist, C.J., dissenting) (stating that ‘the central question here is whether discrimination on the basis of contagiousness constitutes discrimination ‘by reason of . . . handicap.’).
- 278 *Id.* at 275.
- 279 *Id.* at 281 (quoting the principal medical expert at trial).
- 280 *Id.*
- 281 *Id.*
- 282 *Id.* The Court did not discuss how long a period of hospitalization would be needed to demonstrate that an illness *substantially* limits major life activities. *Cf. Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) (holding that transitory illnesses with no permanent effects on health are not impairments).
- 283 Brief for Petitioner at 8, 11, 14-28, *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277).
- 284 Transcript of Oral Argument at 52-53, *School Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277).
- 285 480 U.S. at 281.
- 286 *Id.* (footnote omitted).
- 287 *See supra* text accompanying notes 86-89. There are additional indications that the Court’s holding was confined to the question of *Arline’s* handicapped status. The dissent accepted the Justice Department’s characterization of the case, *see supra* text accompanying note 235, and accused the Court of relying only ‘on its own sense of fairness and implied support from the Act.’ 480 U.S. at 289 (Rehnquist, C.J., dissenting). The Court responded that both the plain language and the legislative history of the Rehabilitation Act ‘support the conclusion that those with a contagious disease such as tuberculosis may be considered ‘handicapped’ under the Act.’ *Id.* at 286 n.15. That response has nothing to do with the arguments advanced by the dissent and the Justice Department, but everything to do with the question actually before the Court of *Arline’s* status as an individual with handicaps. In its concluding paragraph, the Court stated, ‘We hold that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of §504 of the Rehabilitation Act of 1973, and that respondent *Arline* is such a person.’ *Id.* at 289. This summary makes no mention of whether the school board discriminated against *Arline* by reason of her handicap.
- 288 480 U.S. at 282 (footnote omitted).

- 289  *Id.* at 282 n.7. It is distressing to see the Court speaking of a ‘handicap . . . [giving] rise . . . to a physical impairment,’ as though it is somehow important to discuss physical impairments once the fact of handicap is assumed.
- 290  *Id.* at 282.
- 291 *Id.*
- 292 *Id.*; see Rehabilitation Act Amendments of 1974, Pub. L. No. 93-651, sec. 111(a), 89 Stat. 2-3, 2-5 (codified as amended at 29 U.S.C. § 706(8)(B)(iii) (Supp. IV 1986)). This and the Court's subsequent discussion makes clear that ‘effect . . . on others’ in this context means effect on the *perceptions* of others, not a physical effect on the health of others. This is particularly important in view of the Court's reference in the immediately preceding paragraph to ‘the effects of a disease on others,’  480 U.S. at 282, in a context clearly referring to physical effects on others' health.
- 293  480 U.S. at 282 (quoting S. REP. NO. 1297, 93d Cong., 2d Sess. 64 (1974)).
- 294 See  *id.* at 282-83 (finding that a visible but harmless impairment ‘might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.’).
- 295 See *supra* text accompanying notes 83-89.
- 296 The latter question is touched on only by a footnote to the *Arline* Court's discussion, which claims that ‘Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others was evident from the inception of the Act.’  480 U.S. at 282 n.9. The footnote cites examples from the legislative history of ‘improper handicap discrimination,’  *id.* at 283 n.9, involving a child with cerebral palsy who was excluded from public school because his teacher claimed his appearance nauseated his classmates, and a woman with crippling arthritis who was denied a college job solely because the employer thought that students should not see her. See *id.* Both examples are easy cases of handicap discrimination under  §504; in each, the affected person is obviously an individual with handicaps, the discrimination plainly occurs by reason of the handicap, and ‘effects . . . on others’ in this context plainly means effects on others' perceptions. See *supra* note 292.
- 297  480 U.S. at 282 n.7.
- 298 One assumes that the phrase ‘seize upon’ is not an effort by the Court to confine its discussion to cases of pretext, as one might naturally infer from that language.
- 299 AMA Brief, *supra* note 78, at 25 n.20 (emphasis added).
- 300 ACLU Brief, *supra* note 8, at 6 (quoting CENTERS FOR DISEASE CONTROL, U.S. PUB. HEALTH SERV., TUBERCULOSIS 2-3 (undated)).

301 *Id.*

302 *Id.*

303 *See id.* at 7.

304 *Id.*

305 *Id.* (emphasis added).

306 2 R. GRAY & L. GORDY, *supra* note 170, ¶37.70.

307 *Id.*

308 *Id.*

309 *Id.*


310  480 U.S. at 284.

311 *See*  *id.* at 284-85. The Court stated:

By . . . [adding § 706(8)(B)(iii)], Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent

Id. (emphasis in original) (footnotes omitted).

312 *Id.* at 287.

313 AMA Brief, *supra* note 78, at 19, quoted in  *Arline*, 480 U.S. at 288.

314 See Cooper Opinion, *supra* note 9, at 37. Inexplicably, one article read the Cooper Opinion as concluding that a person with an HIV infection ‘will generally not be ‘otherwise qualified’ to work.’ Cecere, Payson & Kaynard, *AIDS in the Workplace*, TRIAL, Dec. 1986, at 40, 42. The Opinion actually said:

[A] person capable of communicating the **AIDS** virus is not ‘otherwise qualified’ to participate in a covered program or activity unless the risk that he poses to the health of other participants can be calculated with a high degree of medical certainty and is low enough . . . to be safely disregarded. Application of this standard to any particular program, of course, will have to await presentation of concrete facts and circumstances.

Cooper Opinion, *supra* note 9, at 38-39 (footnotes omitted). This (deliberately) nonspecific standard is entirely consistent with the view that in ordinary workplace settings the risk is sufficiently certain and sufficiently low that plaintiffs will always win on the issue. See *Chalk v. United States Dist. Court*, 840 F.2d 701, 706-09 (9th Cir. 1988) (reviewing medical opinion and recent court decisions which find that the risk of **AIDS** transmission is too low to exclude infected individuals from school).

315 See Leonard, *supra* note 57, at 33 (arguing that the Cooper Opinion's approach ‘fails to appreciate the critical distinction between diseases which present a genuine issue of workplace contagion and those which do not.’); Ritter & Turner, *AIDS: Employer Concerns and Options*, 38 LAB. L.J. 67, 72 (1987) (asserting that ‘[t]he conclusion that an employer may take adverse employment action based on the fear of contagion of **AIDS** appears questionable if one subscribes to the position that **AIDS** is not transmitted through casual contact.’ (footnote omitted)); *id.* at 73 (alleging that ‘[t]he analysis set forth in the [Cooper] memorandum is based on conclusions that are in direct contradiction to the findings of federal and state governmental agencies, courts, and medical experts . . .’); Rousseau, *The AIDS Epidemic and the Issues in the Workplace*, 72 MASS. L. REV. 51, 65 (1987) (stating that ‘[t]he fear of contagion defense as articulated in the [Cooper] [O]pinion ignores medical evidence.’); Note, *supra* note 132, at 662 (noting that the Cooper Opinion ‘determined that the ability to transmit the disease does not render a person handicapped under **section 504**,’ and hypothesizing that ‘[s]eemingly, the DOJ reached this conclusion by ignoring established medical opinions . . .’); *id.* at 663 (stating that the Cooper Opinion ‘asserted that employers are justifiably afraid because of the uncertain medical evidence regarding **AIDS** transmissibility.’); Note, *Protection of AIDS Victims*, *supra* note 81, at 375-76 (asserting that ‘[t]he [Cooper] [O]pinion substitutes the perceptions of employers concerning the transmissibility of HIV in place of objective medical data.’); Note, *AIDS and Employment Discrimination: Employer Guidelines and Defenses*, 23 WAKE FOREST L. REV. 305, 321 (1988) (authored by A. Lynn Farley); *cf.* Cecere, Payson & Kaynard, *supra* note 314, at 40-42 (describing the Cooper Opinion, without comment, as being based on perceived ‘uncertainties regarding the manner in which the virus is transmitted and its severe consequences . . .’). Citations to similar comments in the popular media would fill pages.

316 See Cecere, Payson & Kaynard, *supra* note 314, at 40-42; Ritter & Turner, *supra* note 315, at 73; Note, *supra* note 132, at 662, 663. Most of the criticisms in the popular media also took this form.

317 See Leonard, *supra* note 57, at 33; Ritter & Turner, *supra* note 315, at 72; Rousseau, *supra* note 315, at 65; Note, *Protection of AIDS Victims*, *supra* note 81, at 375-76; Note, *supra* note 315, at 314.

318 See *supra* text accompanying note 234.


319 See Cooper Opinion, *supra* note 9, at 34. The Cooper Opinion explicitly states:

It should be noted that the reasonableness of an employer's concern about the spread of disease is relevant only to the extent it bears on the question of pretext. As we have shown, **section 504** simply does not reach decisions based on

fear of contagion—whether reasonable or not—so long as it is not in truth a pretext for discrimination on account of handicap.

Id.

320 I do not mean to suggest that it was reasonable to infer that medical judgments about risks of contagion somehow lurked beneath the Cooper Opinion. Quite the contrary. Indeed, I have some difficulty restraining my anger at the ease with which this criticism has been levelled against the Cooper Opinion, as I suspect that those who make it often know better, but see it as a convenient way to discredit the Opinion. I had originally planned to include in this Article a sentence-by-sentence analysis of the Cooper Opinion's actual discussion of HIV transmission, but decided against it after recalling a quotation attributed to Nietzsche: 'It is not my function to be a fly swatter.' Rand, *A Last Survey* (pt. I), THE AYN RAND LETTER, Nov.-Dec. 1975, at 1, 2.



321 I have stated the issue in terms of *significant* risks of casual transmission. I do not mean to suggest that belief in some non-zero, theoretical risk of such transmission, however insignificantly small, is irrational. Indeed, for reasons that are not relevant here, that seems to me to be a more rational position than believing that the risk is flatly zero, though the point is unimportant to any conceivable question that could arise under  §504.

322 *See supra* text accompanying note 234.

323 *See supra* text accompanying notes 45-49.


324 For clear expressions of this position, see Leonard, *supra* note 57, at 31-33; AMA Brief, *supra* note 78, at 23.

325 *See supra* text accompanying note 310.

326 *See*   [Edwards v. Aguillard](#), 107 S. Ct. 2573, 2605-06 (1987) (Scalia, J., dissenting) (noting the impossibility of discerning the subjective motivation of legislators enacting a statute).

327 For a dramatic illustration, see  [Hirschey v. FERC](#), 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (excerpting floor debate exchange among senators concerning committee report).


328 *See* [Gregg v. Barrett](#), Civ. No. 84-0204, slip op. (D.D.C., May 30, 1984) (holding that the Speech or Debate Clause, U.S. CONST. art. I, § 6, bars court challenges to the editorial process used in publishing the *Congressional Record*).

329 *See*  [Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.](#), 108 S. Ct. 1350, 1354 (1988) (noting that 'unenacted approvals, beliefs, and desires are not laws').



330 *See* Cooper Opinion, *supra* note 9, at 45-47.

331 *See id.* at 47-49; Justice Brief, *supra* note 9, at 17-18.

332 Cooper Opinion, *supra* note 9, at 47.

333 See  *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 644 n.33 (1986) (plurality opinion) (reviewing case law enunciating the principle that courts are hesitant to construe a statute to change the federal-state balance of power in an area of law without a clear statement of congressional intent to do so).

334 See, e.g., Leonard, *supra* note 57, at 33 n.105; Wasson, *supra* note 81, at 241-42; Comment, *Fear Itself*, *supra* note 81, at 912-16.

335 *But see*  *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 419-21 (1988) (**interpreting** the word 'criteria' in § 902(f) (2) of the Black Lung Benefits Reform Act of 1977 according to its plain meaning);  *Bethesda Hosp. Ass'n v. Bowen*, 108 S. Ct. 1255, 1258-59 (1988) (applying the plain meaning approach to the **interpretation** of § 1335~~oo~~ of Title XVIII of the Social Security Act).

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