ADHD, THE ADA, AND FIRST-YEAR LAW SCHOOL EXAMINATIONS

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Every year, roughly thirty-five thousand law students complete their first-year law school exams. The format for these first-year exams is mostly the same across different courses and across different schools: Students are given a fact pattern (or two, or three) to analyze according to the substantive law learned by the students during the term. Students work within time restraints (usually about three hours); students almost always leave the exam feeling that they could have performed a better legal analysis if they had been given more time.

In recent years, schools have altered this format for students who have obtained a diagnosis of attention-deficit hyperactivity disorder ("ADHD"). These students are usually given 50% more time to complete the exam than students who have not received a similar diagnosis. In some cases, students with an ADHD diagnosis are given twice as much time to complete the exam.

This result (which is standard operating procedure at most law schools) is based on the assumption that the "accommodation" of extra time is required under federal statutes protecting the disabled (such as the Americans with Disabilities Act). This legal conclusion, however, is erroneous. This Article explains why.

I. INTRODUCTION

In *Oser v. Capital University Law School*,[1] law student Andrew Oser—after struggling in law school—obtained a diagnosis from Doctor Nancy Krasa that he suffered from attention-deficit hyperactivity disorder (ADHD).[2] Doctor Krasa recommended that Mr. Oser be provided extra time to complete his law school exams; Dr. Krasa's suggestion was that Mr. Oser be given an extra ten minutes for each hour of law school exam.[3] Capital University Law School, however, declined the accommodation

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[1] Oser v. Cap. Univ. L. Sch., No. 2:09-cv-709, 2009 WL 2913919 at *1 (S.D. Ohio Sep. 8, 2009).

[2] *Id.*

[3] *Id.* at *2.

recommended by Dr. Krasa.[4] Mr. Oser then sued, arguing that the failure to award him ten minutes for each hour of law school exam constituted a violation of the Americans with Disabilities Act and the Rehabilitation Act of 1974.[5] Capital University Law School defended its decision not to grant the recommended ten-minutes-per-hour accommodation by arguing that (1) time pressure on law school exams plays an important academic function in measuring the speed at which students perform a legal analysis and (2) law school grades—which are set on a curve—determine class rank, which is an important factor for prospective employers in deciding whether to offer future employment to law students.[6] The federal court sided with Capital University Law School.[7]

The result in *Oser* is probably shocking to most law students or recent law-school graduates. Law schools now routinely provide extra time on law school exams for students that have obtained a medical diagnosis of ADHD.[8] Moreover, the extra time now provided is much more than what was requested by Oser. Oser was denied an accommodation of 17% extra time (an extra 10 minutes/hour); law students with an ADHD diagnosis today are usually given 50% extra time (an extra 30 minutes/hour); in some cases, students are given 100% extra time (an extra hour/hour).[9] The *Oser* decision has not been overruled, and no other case squarely addresses the question of extended time on law school exams for a student with an ADHD diagnosis. Thus, law schools (*law* schools!) are presently giving an

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[4] *Id.*

[5] *Id.* at *3. Oser also brought claims under the Ohio Civil Rights Act. *See id.*

[6] *Id.* at *8.

[7] *Id.*

[8] *See* Scott Devito, *The Kids Are Definitely Not All Right: An Empirical Study Establishing A Statistically Significant Negative Relationship Between Receiving Accommodations in Law School and Passing the Bar Exam*, 102 OR. L. REV. 1, 19 (2023) (documenting that the percentage of law students receiving accommodations increased from 8.60% in 2019 to 10.94% in 2021); Ruth Colker, *Extra Time as an Accommodation*, 69 U. PITT. L. REV. 413, 413 (2008) ("[T]he provision of extra time has become the standard method of accommodating students with various disabilities when they take . . . in-class timed [law school] exams."); Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 569 (1996) (finding that law schools granted accommodation requests 98% of the time).

[9] *See* Ruth Colker, *Towards Universal Design in the Classroom*, 71 J. LEG. EDUC. 57, 72–73 (2021) (discussing the "blanket" and "flawed" policy by which law students are given testing accommodations of time-and-a-half or double time).

accommodation that is not required according to the only judicial precedent on the issue.[10]

This article addresses the topic of accommodations on law school exams. More precisely, this article addresses a small component of this broad topic: Is extra time for students with ADHD a required accommodation under federal law for timed "fact-pattern"[11] first-year law school exams? The clear legal conclusion is "no." In other words, the *Oser* court got it right, and law schools are presently getting it wrong.

Most of this Article will address the legal question of whether extended time on the typical first-year law school exam is required under federal law for students with an ADHD diagnosis. It is a rather straightforward legal analysis. But this article will also attempt to explain how and why the current practice—which is to grant extra time—has come to fruition: Why do law schools routinely give an accommodation that is not required under the law? This question does *not* involve a legal analysis, but it is probably a more fascinating subject matter.

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[10] *See Oser*, 2009 WL 2913919.

[11] By a "fact pattern" exam I mean an exam in which a student is given a factual story and then prompted to conduct an analysis of some (or perhaps all) of the legal issues implicated by the factual story. *See, e.g.*, Adam J. Shapiro, *Defining the Rights of Law Students with Disabilities*, 58 U. MIA. L. REV. 923, 935 (2004) (discussing "comprehensive final examinations that test a student's ability to apply the law to hypothetical situations"). It is familiar to anyone who has attended law school, and it is designed to replicate the skills a practicing attorney will need to possess. In some instances, this exam format is referred to as an "essay" exam. *See* Elizabeth Sherowski, *Gen Z Meets Nextgen: Using Generation Z Pedagogy to Prepare Students for the Nextgen Bar Exam*, 101 U. DET. MERCY L. REV. 333, 349 (2024) (explaining that most law school exams are the "traditional long-form essay"). This is a poor label, because it suggests that a law-school fact pattern exam is similar to the essay examination that are often used in undergraduate courses. ("What were the causes of the American Civil War?"; or "Discuss Shakespeare's perspective on 'fate' and 'destiny' in the context of 'Romeo and Juliet.'"). Occasionally, law school exams will include questions that are appropriately labeled as "essay." ("Discuss how the shift from contributory to comparative negligence affected the rules regarding joint and several liability."; or "Discuss the practical significance of the Supreme Court's decision in *Citizens United v. FEC*.") These types of essay questions raise different legal issues with regard to whether accommodations are required; this Article does not address whether accommodations are required when a *true* essay question is included on a law school exam.

II. WHAT THIS ARTICLE IS **NOT** ABOUT

The topics addressed in this article are somewhat sensitive. Most readers of this article will probably have taken law school exams; some will have given them. Some readers will have ADHD (or other disabilities protected under the law); others will be employed at jobs devoted to protecting those disabilities. In short, most readers will have some personal connection to the topics discussed herein. Even those not personally connected to the issue can appreciate how the issue is delicate for others.

When someone is personally connected to a legal issue, it is more likely to trigger emotions. And emotions can thwart an objective legal analysis, which is the goal of this Article.

This has been my experience when discussing law school accommodations with colleagues, students, and administrators. The cool, detached legal analysis that regularly occurs for most legal issues tends to rupture when discussing law school accommodations; this result occurs even though the participants in these conversations are generally smart, calm, kind, and well-meaning folks. Simply put, the issue is so personal and raw that neutral legal discussion and analysis becomes much more difficult.[12] I do not claim to be immune from this tendency. After all, law school accommodations affect "*my*" exams; I am also intimately connected to the issue.

Often, the discussion of law school accommodations breaks down because of a tendency to overgeneralize from an assertion, observation, or argument. Stated conversely, subtle distinctions and differences are glossed over, even those that matter greatly to the controlling legal analysis.

In an attempt to ward off this overgeneralization phenomenon, this section will take the unorthodox step of first explaining what this article is **not** about. By carving away some of the sensitive topics that are not addressed in this article, a more focused and dispassionate legal analysis will hopefully become possible.

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[12] *See, e.g.*, Jeff Brown, *A Learning Disabled Lawyer's Perspective: A Response to "Lowering the Bar" Integrity, Stereotypical Attitudes and Reasonable Accommodation*, 42 S. TEX. L. REV. 129, 151 (2000) ("As a dyslexic who worked hard to graduate from college with honors and then go onto law school, I find his arguments offensive and devoid of empirical evidence.").

A. This Is Not An Article About What Is "Fair"

It is common for conversations about law school accommodations to center around perceptions of fairness.[13] This article avoids these normative discussions. Instead, this article is descriptive only: What is the current law regarding extra time for ADHD students on timed-pressured, first-year law school exams? Congress has enacted statutes based on Congress's perception of fairness.[14] Perhaps Congress has struck the right balance; perhaps it has not. Normative discussions about what the law should be are important conversations to have. But this article has nothing to do with those policy debates.

B. This Is Not An Article About What I Personally Think Regarding Law School Accommodations

This point is related to the discussion in the preceding paragraph about "fairness," but requires a further bit of elaboration.

The conclusion in this article that accommodations are not required is not based on my own, subjective view as to whether law school accommodations are a good or bad thing. This article attempts to avoid normative discussions about what the law should be, and that includes my own personal views on policy and fairness.

Instead, this article is my attempt at an objective legal analysis under existing rules established by Congress and developed (and applied) by the courts. In my view, the legal question analyzed in this article is a relatively easy one (although admittedly involving a sensitive topic).

But here is where it gets a little tricky: In addition to the legal analysis contained herein, there is a portion of the article in which I speak from my perspective as one who actually gives first-year law school exams.[15] In that sense, I have dual voices which come through at different parts of the article. The questions addressed in this article require an objective legal analysis (in which I engage), but that legal analysis depends upon (and, indeed, defers to) the *reasons* that law professors structure exams in the

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[13] *See* Colker, *supra* note 8, at 418 ("Fairness must be our governing principle even if our practices fall short of that goal."); *id.* at 474 ("We teach our students the importance of the principle of fairness; we can set a good example by implementing the principle ourselves.").

[14] *See, e.g.*, Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–796l).

[15] *See* discussion *infra* Section V.A.1.

way that they do. My perspective as a first-year law professor is thus relevant to the legal analysis required under existing statutes and caselaw.[16]

To summarize this nuanced point: My views about what the law should be are not addressed in this article, but my experience and perspective as a law professor administering first-year exams is important to the legal analysis required under existing law.

C. This Is Not An Article About Whether ADHD Can Be A Disability Under Federal Law

Opponents of law school accommodations will sometimes couch their argument in terms of whether ADHD qualifies as a disability under federal

[16] I believe that I am well-suited to address the goals, reasons, and rationales associated with first-year law school exams. I have now taught law school for 20 years, and in every year (except the first) I have taught a first-year class. My experience is not limited to one particular first-year class: I have taught Torts, Property, and Civil Procedure first-year courses. (I have also taught Constitutional Law, which is a first-year class at some schools, although it was not a first-year class at the school where I taught it. Moreover, I have taught a few first-year legal writing classes, but they did not involve a final exam.) Nor is my experience limited to one school: I have taught at the University of Nebraska-Lincoln College of Law, Drake Law School, and Baylor Law School. Furthermore, Baylor Law School (where I have been since 2010) operates on the quarter system, meaning faculty do not have the typical Christmas and summer research sabbaticals; our Decembers and summers are mostly spent teaching. Thus, in a typical academic year at Baylor Law School, I will teach Torts I in the Fall Quarter and Torts II in the Winter Quarter, and I then repeat the process to a new group of students (Torts I in the Spring Quarter and Torts II in the Summer Quarter). I am thus teaching (and administering exams) much more frequently at Baylor Law School than I would be at schools which operate on the standard semester schedule. In addition, there have been multiple instances in which I was teaching two first-year classes at the same time: At Drake Law School, I taught both Civil Procedure and Property during the same semester. At Baylor Law School, there have been multiple quarters in which I have taught both Property and Torts. I have given a final examination in each of these courses; I have also frequently administered midterms (including multiple midterms during the same term). In short, I have been immersed in first-year law school exams for approximately two decades. By my count, I have taught first-year classes in 56 terms (semesters at Nebraska-Lincoln College of Law and Drake Law School, quarters at Baylor Law School); every one of these courses ended with an end-of-term exam. In addition to these 56 finals, I have administered (by my count) 65 graded midterms. These exams and midterms almost exclusively involve the time-pressured, fact pattern questions addressed by this Article.

law.[17] This is, generally speaking, a poor argument to make. There is modern consensus that ADHD can be a covered disability under federal law, particularly after the ADA Amendments Act of 2008.[18] Of course, that is only part of the analysis as to whether an accommodation is required in any particular case; a person with ADHD must show that he or she is "disabled" under the relevant statutory definition[19] and then must show that a requested accommodation is "reasonable."[20] But the question as to whether ADHD can result in a "disability" need not be embellished; the answer under existing law is crystal clear.

Of course, there is a separate question as to whether ADHD should be considered a qualifying disability. This is an interesting normative question, but it is beyond the purview of this article. This article deals with federal law as it exists, not with policy discussions about what federal law should look like.

Another related issue concerns the process for determining whether a student "has" ADHD. In order to qualify for ADHD accommodations, a student will usually need to obtain a formal diagnosis from a doctor.[21] Opponents of law school accommodations will sometimes argue that this process is abused, such that students who are not "really" suffering from ADHD will nevertheless obtain a determination from a medical provider

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[17] *See* Kristen L. Aggeler, *Is ADHD a "Handy Excuse"? Remedying Judicial Bias Against ADHD*, 68 UMKC L. REV. 459, 459–61 (2000) (discussing the reluctance to consider ADHD as a qualifying disability).

[18] *See* Christine M. Muller, *Expanding Protection for Attention Deficit Hyperactive Disorder Individuals Under the Americans with Disabilities Act*, 17 LOY. J. PUB. INT. L. 61, 75 (2015) (acknowledging some conflicting older cases but asserting that "[t]oday, most courts agree ADHD is a valid disorder that *could* warrant ADA protection"); Elliot Hamlet, "*Over-Accommodation" in Higher Education: An ADA Sanctioned Injustice Exposed*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 491, 493 (2014) (citing 42 U.S.C.A. § 12102(2)) ("The ADAAA specifically extends the ADA's coverage to mental impairments involving concentration, thinking, and communication.").

[19] *See* LAURA ROTHSTEIN & JULIA IRZYK, *Students with Learning Disabilities*, *in* DISABILITIES AND THE LAW § 3:22, Westlaw (2023) ("Although the 2008 amendments make it more likely that individuals with learning disabilities will meet the definition for protection, a diagnosis of a learning disability does not guarantee protection.").

[20] *See* Robin Paul Malloy, *Advancing Accessible Communities*, 27 VA. J. SOC. POL'Y & L. 232, 250 (2020) (describing that an accommodation is only required if it is "reasonable").

[21] *See* Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349, 360 (2008) (discussing the requirement that a claimant prove her disability with "a proper diagnosis").

(who has no real skin in the game regarding the consequences of the diagnosis).[22] Undoubtedly, at least some abuse does occur. This abuse (whether frequent or infrequent), however, is irrelevant to the question addressed in this article.[23] Even though some students might "game" the process for determining whether someone is disabled (with an assist, perhaps, from careless or disinterested doctors), this abuse is immaterial to the legal question as to what accommodations are required for those students who qualify as disabled.

Finally, it is worth again emphasizing that not every student suffering from ADHD will qualify as "disabled" and thus be protected under federal law. The process for determining whether a student is disabled requires an individualized assessment.[24] Thus, acknowledging that ADHD can lead to "disability" status does not mean that every student with ADHD will necessarily qualify for federal protection. This article says nothing about the individual process for determining whether a particular student is disabled.

D. This Is Not An Article About Disabilities Other Than ADHD

This article concerns only the disability of ADHD. ADHD affects a person's ability to concentrate, focus, and complete mental tasks.[25] Law students and lawyers, of course, need to be able to concentrate, focus, and complete mental tasks.[26] Not surprisingly, first-year law school exams

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[22] *See* Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner*, 6 NEV. L. REV. 116, 127 (2005) (discussing the skepticism towards those who first obtain a disability diagnosis during law school); Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 219–20 (2003) (discussing instances in which institution of higher education granted accommodations that were not compelled by federal disability law).

[23] For an interesting note considering whether a fear of fraudulent claims of disability might excuse a company from complying with the federal disability law, *see* Eric Fram, *Queue & ADA:* A.L. v. Walt Disney Parks and Resorts *and How the Fear of Fraud May Fundamentally Alter the ADA*, 31 S. CAL. INTERDISC. L.J. 591 (2022).

[24] *See* Laura Rothstein, *Millennials and Disability Law: Revisiting* Southeastern Community College v. Davis, 34 J.C. & U.L. 169, 170 (2007) (describing "individualized determinations" as an "underlying principle[]" of the ADA).

[25] *See* THOM HARTMANN, ATTENTION DEFICIT DISORDER: A DIFFERENT PERCEPTION 5–7 (Publisher's Group West 1997) (describing the common symptoms of ADHD).

[26] *See* SHAILINI JANDIAL GEORGE, A LAW STUDENT'S GUIDE TO DOING WELL AND BEING WELL, at xv (2021) ("Lawyers and law students use their brains to produce value . . . .

require these attributes,[27] which means that first-year law school exams depend upon the exact qualities that ADHD affects. This is a critical point to the controlling legal analysis as to whether accommodations are required. But the same does not necessarily hold true for other disabilities. Law school exams are not constructed with the goal of measuring a student's sight; thus, a blind student might be entitled to an accommodation whereas an ADHD student is not.[28] The conclusions in the article are limited only to the disability of ADHD.

E. This Is Not An Article About Undergraduate Accommodations

The governing legal analysis regarding undergraduate accommodations is dramatically different than that for professional schools (such as law schools) teaching the skills and knowledge required for a particular profession.

F. This Is Not An Article About Accommodations in Professional Schools Other Than Law Schools

Although medical schools, accounting schools, and law schools share a common goal of training skilled professionals, law school exams are unique in ways that matter to whether accommodations are required under federal law. Many medical schools, for instance, do not grade exams except to indicate that the student passed or failed (or, at some schools, achieved "honors").[29] This is obviously different than the cut-throat, forced

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Literally, we are paid to think."); Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 18–19 (1999) ("First, these disabilities [such as ADHD] usually involve one or more of the mental, communicative, expressive, or organizational skills which are related to being a competent attorney.").

[27] *See* Rebecca Flanagan, *Open Books, Better Skills: An Argument for Limited Open-Book Exams*, 54 STETSON L. REV. 51, 64 (2024) (describing the "higher order thinking and problem-solving skills" necessary for law school exams).

[28] *See* Freedley Hunsicker, *Learning Disabilities, Law Schools and the Lowering of the Bar*, 42 S. TEX. L. REV. 1, 9–10 (2000) ("By definition, colleges are institutions of higher learning, and accommodating reading and writing disorders that directly impair learning is more challenging than accommodating those who are otherwise academically able but suffer from commonly-recognized disabilities such as blindness, deafness, or they are wheel-chair bound.").

[29] *See Pass Fail Medical Schools*, NEXTGRADUATE, https://nextgraduate.org/colleges/pass-fail-medical-schools/ [https://perma.cc/Y5JS-XDAA] ("An exact count of medical schools using the pass/fail grading system remains elusive, but it's estimated that over 79 institutions use this system for pre-clinical years, the majority being AAMC and MD

curve that exists at almost all law schools. Medical schools generally do not rank students;[30] an overwhelming majority of law schools do rank their students.[31] Quite obviously, then, medicals schools (1) play a slightly different market role than do law schools and (2) deliver a product that is different than that delivered by law schools. The primary product delivered by medical schools is education. Whereas law schools also provide education, most law schools also provide an entirely different product: ranking/distinguishing law students.[32] Legal employers are the customers who are served by this product. As will be demonstrated later in this Article, the role of law schools in "sorting" students to the right types of legal jobs and legal employers is a critical component of the conclusion that students with ADHD are not entitled under existing law to extra time on first-year, fact-pattern exams.

G. This Is Not An Article About Accommodations For the LSAT

In the *Oser* litigation, the court rejected the claim of an ADHD student who was denied his extra-time accommodation request on law school exams.[33] There has not been a corresponding, direct judicial pronouncement as to whether an ADHD student is entitled to an extra-time accommodation on the LSAT.[34] That said, the question of accommodations

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medical schools."); *See also Curriculum Reports: Grading System Used in Medical School Programs*, AAMC, https://www.aamc.org/data-reports/curriculum-reports/data/grading-systems-used-medical-school-programs (last visited Apr. 8, 2025) [https://perma.cc/V5DQ-9LBB] (documenting the momentum in favor of pass-fail grading).

[30] *See Which Medical Schools are Graded? Which Rank Students?*, PREMED PLUG (Aug. 4, 2022), https://premedplug.com/medical-schools-grading-policy-comparison/ [https://perma.cc/TT4X-SWS9] (listing the medical schools that do, and do not, rank students).

[31] *See* Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. REV. 879, 888 (1997) (stating that outside "the most elite end of the [law school] spectrum" most law schools calculate class ranking).

[32] *See* Stewart E. Sterk, *Information Production and Rent-Seeking in Law School Administration: Rules and Discretion*, 83 B.U. L. REV. 1141, 1150 (2003) ("First, some grading system is almost certainly necessary for student placement purposes. Employers might reduce hiring from a school that refuses to sort students and from a school that reduces incentives for students to work.").

[33] *See* Oser v. Cap. Univ. L. Sch., No. 2:09-cv-709, 2009 WL 2913919, at *8 (S.D. Ohio Sep. 8, 2009).

[34] This is not to say that there has been no litigation on the matter. A lawsuit alleging violations of federal law was filed against the Law School Admission Counsel, the entity which created and administered the LSAT. This lawsuit was settled by consent decree

on the LSAT seems to be closely related to the question of accommodations on first-year exams. Both exams are testing roughly the same qualities, and both are administered under time restraints.[35]

Despite the similarities between the LSAT and first-year law school exams, this article will not purport to resolve the question of whether a student with an ADHD diagnosis is entitled extra time on the LSAT. There are two obvious distinctions which might alter the legal analysis of whether accommodations are required. First, the LSAT is a multiple-choice exam;[36] this Article does not address multiple choice exams (which is explained below). Second, the LSAT purports to predict the likely success of a student in the first year of law school.[37] Exams administered during the first year of law school are measuring the actual success of a student during their first year of law school. I will leave it to someone else to figure out whether this difference matters to the question of accommodations. The narrow issue addressed in this article—first-year, law school exams—is one in which I am intimately familiar; I will not extend my conclusions to the LSAT, with which I am not as familiar.

H. This Is Not An Article About Accommodations On The Bar Exam

The bar exam is dramatically different than first-year law school exams in ways that matter to whether accommodations are legally required. First,

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without any judicial determination on the merits of the suit. This litigation will be discussed later in the article because it is important to understanding why accommodations that are not required under federal law are routinely given. *See infra* Part V.

[35] *See* Rothberg v. L. Sch. Admission Council, 102 F. App'x. 122, 127 (10th Cir. 2004) (reversing a district court's preliminary injunction requiring a time-and-half accommodation for a learning disabled test taker); Bach v. L. Sch. Admission Council, 1:13-CV-888, 2014 WL 12987279 (M.D.N.C. Feb. 4, 2014) (denying a preliminary injunction seeking LSAT accommodation for plaintiff who claimed to be suffering from ADHD).

[36] *About the Test Format and Testing Interface*, LSAC, https://www.lsac.org/lsat/register-lsat/accommodations/specifications-lsat-and-lsat-argumentative-writing [https://perma.cc/8AJF-B7NY].

[37] *See The Law School Admission Test: Reliability and Validity in Brief*, LSAC, https://www.lsac.org/data-research/research/lsat-reliability-validity [https://perma.cc/SL9Y-5V93] ("The LSAT is designed to assist in the admission process by predicting success at the end of the first year of law school (1L)."). The test is successful in this regard, as there is a correlation between LSAT scores and first-year law school grades. *See* Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law Student Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 205, 230 (2016).

the bar exam is primarily designed to test one's knowledge of the law.[38] As will be explained in more depth later, first-year law school exams are testing the skill of legal analysis rather than simply a student's knowledge of the material.[39] Second, the bar exam is "graded" entirely differently than first-year law school exams. There are two results for a bar-exam taker: either the student passes the bar (and thus can proceed with a legal career) or the student fails and is barred from practice.[40] In this sense, the bar exam performs a gatekeeping function to the profession.[41] Anyone familiar with first-year law school exams, however, knows that these exams are graded with an entirely different objective in mind. The grades awarded in first-year exams do not just indicate whether students can—or cannot—be practicing attorneys; instead, the curved grades offer an assessment of the *relative* abilities of each student. For first-year exams, the primary objective is not to determine whether students are "good" enough to be lawyers; instead, the objective is to determine *how good* each student is in relation to his or her peer group with regard to the particular skills being tested.[42] This assessment of a student's relative abilities is the information that is coveted by legal employers.

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[38] *See* Haley Moss, *Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law School Graduates*, 28 AM. U. J. GENDER SOC. POL'Y & L. 537, 560 (2020) ("The exam is a cumbersome, two-day test that measures minimum competence and the sheer amount of information students are expected to have learned while in law school, primarily information learned during a student's first year."); Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR. 219, 251 (2004) ("Bar examiners test individuals on their grasp of the law . . . .").

[39] *See* Kris Franklin, *How and When Do We Get to Maybe?*, 72 J. LEGAL EDUC. 687, 689 (2024) ("[K]nowledge of the law . . . remains only an entry point.").

[40] Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 163 (2022) ("Although many states formerly admitted law school graduates into legal practice via the diploma privilege, Wisconsin is the only state that recognizes the privilege today.").

[41] *See* Brenda D. Gibson, *Affirmative Reaction: The Blueprint for Diversity and Inclusion in the Legal Profession After* SFFA, 104 B.U. L. REV. 123, 158 (2024) ("The bar and the LSAT serve as gateways to the profession and are like the windows of the human soul.").

[42] *See* LEAH M. CHRISTENSEN, ONE L OF A YEAR 12 (2012) ("You are graded against your peers and *not* against an objective 'good' answer.").

I. This Is Not An Article Regarding Expulsion of ADHD Students From Law School

Some cases have addressed whether schools are required to amend their expulsion processes and standards to accommodate those with disabilities.[43] This caselaw is not determinative of the narrow questions addressed in this article; indeed, it is hardly even relevant. The decision to expel a student for poor performance would seemingly be based on the conclusion that the student could never practice law successfully (or at least to the standards adhered to by a particular school). In contrast, the objective of first-year, law school exams is to rank the relative abilities of students, not to merely determe whether they have the attributes necessary for practice.[44] This distinction matters greatly to the legal analysis as to whether accommodations are required.

J. This Is Not An Article About Classroom Accommodations

It has become commonplace for law students with disabilities (ADHD or otherwise) to receive classroom accommodations. Some of these are relatively uncontroversial, such as allowing a student with poor vision or hearing to sit near the front of the classroom. (I doubt that any law professor would deny this request, even if the ADA did not exist.) But some of these accommodations are more controversial, such as allowing students to record classes or to come-and-go as the student desires.[45] These classroom accommodations raise different issues than testing accommodations, and they are not addressed in this article.

K. This Is Not An Article Addressing Accommodations for Multiple Choice and Take-Home Exams

Multiple choice and take-home exams are sufficiently different than time-pressured, first-year, fact-pattern exams to warrant a different legal analysis regarding the legal requirement of accommodations. Often, multiple choice exams will primarily test a student's knowledge rather than

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[43] *See, e.g.*, Aloia v. N.Y. L. Sch., No. 88 CIV. 3184, 1988 WL 80236, at *8 (S.D.N.Y. July 27, 1988).

[44] *See* Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L. REV. 171, 172 (1998).

[45] *See* Alexis Anderson, *Classroom Taping Under Legal Scrutiny—A Road Map for a Law School Policy*, 66 J. LEGAL EDUC. 372, 383–88 (2017) (discussing the complexities involved when students record class discussions).

a student's ability to engage in legal analysis.[46] Even if a multiple choice exam is written so as to emphasize a student's legal analysis rather than merely a student's knowledge of the law, certain skills are harder to test on a multiple choice exam. For instance, fact pattern questions will usually require a student to "spot" a variety of issues; it is much more difficult to test this aspect of legal analysis on a multiple choice exam.[47] Finally, multiple choice exams may or may not be timed pressured; fact pattern exams, however, are almost always time pressured.

Take-home exams are also sufficiently different than timed fact pattern exams to warrant a different analysis. Take-home exams may test the same analytical skills that timed fact pattern exams measure. Even so, there is one dramatic difference: Take-home exams are not nearly as time-pressured as in-class, fact pattern exams. As will be shown later, the time-pressured aspect of first-year, fact-pattern exams is a critical component of the legal conclusion that extra time accommodations are not legally required for ADHD students taking a first-year, fact-pattern law exam.

L. This Is Not An Article About Exam Accommodations In Upper Level Law School Classes

It is common for upper-level courses (and accompanying exams) to emphasize knowledge of the law rather than the ability to perform a legal analysis. As such, it is not surprising that upper-level law school courses employ multiple choice exams more frequently than first-year law school courses.[48] That said, it is likely that the conclusions in this article would apply the same to at least *some* of the fact pattern exams used in upper-level courses. The difficulty, however, is that there is so much variance in the goals and objective of upper-level law school courses (and accompanying exams) that it is extremely difficult to make broadly-applicable legal conclusions as to the appropriateness of accommodations. As such, this article will simply address accommodations on first-year exams, which tend to be much more uniform (across different first year

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[46] *See* MICHAEL HUNTER SCHWARTZ, EXPERT LEARNING FOR LAW STUDENTS 222 (3d ed. 2018) ("Most professors design law school multiple-choice questions to test your knowledge and understanding of the rules . . . . For this reason, there are fewer 'tricks' to doing well at law school multiple choice tests.").

[47] *See Essay versus Multiple Choice Exams in Law School*, PROFESSORBAINBRIDGE (Jan. 10, 2008) (discussing the advantages of fact pattern exams over multiple choice questions).

[48] *See id.*

courses and across different schools) in terms of course objectives and the skills being tested on the exam.

M. This Is Not An Article About Exam Accommodations Other Than Extra Time

Law students who are given extra time accommodations will also usually receive additional accommodations, such as a separate testing room and the ability to take breaks.[49] These accommodations raise different legal issues than does the extra-time requirement. For instance: Whether separate testing rooms are a reasonable accommodation under federal law will depend, in part, on whether the school has enough physical capacity to provide separate rooms for all of the students requesting this accommodation. The legal question of whether an extra-time accommodation is required does not depend on issues such as physical capacity, but whether extra time is a fundamental alteration of the exam itself.

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After carving away what this article is *not* about, what remains is a singular, discrete issue: Is an extra-time accommodation legally required for a student with an ADHD diagnosis taking a first-year, fact-pattern law school exam?

The issue addressed in this article is admittedly very narrow. Is it worthwhile? The answer to this question is a resounding "yes," for two reasons: (1) the importance of first-year, law school grades and (2) the increasingly high number of students that receive an ADHD diagnosis.[50]

First-year law school grades (most of which are based on the type of fact-pattern exam discussed herein) can have a significant effect on the trajectory of a law student's career.[51] First-year grades are incredibly important to determining which students make prestigious law reviews,

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[49] *See* Meredith George & Wendy Newby, *Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design*, 69 U. PITT. L. REV. 475, 483 (2008) (stating that a separate room for law school exams cannot be considered an undue burden).

[50] *See* Elie Abdelnour, Madeline O. Jansen & Jessica A. Gold, *ADHD Diagnostic Trends: Increased Recognition or Overdiagnosis*, 119 MO. MED. 467, *passim* (2022).

[51] *See* Donald H. Stone, *What Law Schools are Doing to Accommodate Students with Learning Disabilities*, 42 S. TEX. L. REV. 19, 38 (2000) ("[T]he success on a law school exam has far reaching implications.").

which can have long-term career implications for the student.[52] First-year grades are considered by law firms in offering summer employment; the biggest law firms will usually only pursue students near the top of their law school class.[53] Judges hiring judicial clerks are even more dependent on first-year grades: Federal judges will usually extend clerkship offers at the beginning of a law student's second year, and most federal judges will only consider the very top students from each law school.[54] Simply put, the grades received during the first year of law school are incredibly important to the roughly 38,000 law students who enter law school each year.[55] It is not hyperbole to say that the students' career trajectory is at stake.[56]

Second, the question of extra time accommodations is important because of the sheer volume of students that are able to procure an ADHD diagnosis. At the undergraduate level, a 2022 survey of college students found that almost one in six purported to suffer from a disability.[57] The story is much the same within law schools. A 2022 Law School Survey on

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[52] *See* NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, LAW SCHOOL SURVIVAL MANUAL: FROM LSAT TO BAR EXAM 126 (2010) ("Many law schools permit a certain percentage of the students in the top X percent of their class (top 5 percent, top 10 percent, etc.) to 'grade on' to the primary law review, so law firms often use membership on the law review as a proxy for good grades.").

[53] *See* Elliot Hamlet, *"Over-Accommodation" in Higher Education: An ADA Sanctioned Injustice Exposed*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 491, 519 (2014) ("For most students that dream of securing a big law job through On Campus Interviews . . . 'the only measure these prospective employers will have is your first grades.'").

[54] *See* CRISTINA C. KNOLTON, LISA C. DENNIS & AUSTEN L. PARRISH, HARD-NOSED ADVICE FROM A CRANKY LAW PROFESSOR 100 (Carolina Academic Press 2010) ("A slate of straight As is also probably necessary to have any chance to clerk for a federal appellate court of the U.S. Supreme Court.").

[55] *Enrollment and Admission Standards*, LAWHUB, https://www.lawhub.org/trends/enrollment [https://perma.cc/KC2Y-G5NW].

[56] *See* HERBERT N. RAMY, SUCCEEDING IN LAW SCHOOL 30 (2020) ("[O]ffers from the highest paying and most prestigious legal employers are based heavily on first-year grades."); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 460 (2004) (conducting an empirical examination and concluding that "[i]t is clear enough that law school grades are quite important . . . in determining who gets what jobs").

[57] *See Students With Disabilities in Higher Education*, POSTSECONDARY NAT'L POL'Y INST. (Nov. 2023), https://pnpi.org/wp-content/uploads/2023/11/StudentswithDisabilities-Nov-2023.pdf [https://perma.cc/5KDX-X8TS] (finding that "21% of all enrolled undergraduates" in the 2019–20 academic year reported having a disability).

Student Engagement ("LSSSE") found that roughly one in five students purported to be disabled; among this roughly 20% of the student population, the largest disability was for "mental health conditions . . . with about 13% of law students having a condition such as anxiety, ADHD, or autism."[58] Anybody in academia can attest to the rising number of students claiming to suffer from ADHD; there is no indication that this trend will reverse anytime soon.

As the number of students with an ADHD diagnosis continues to rise, it becomes more and more imperative to correctly determine whether this ever-increasing cohort of students is entitled to extra time on first-year law school exams (which are graded on a curve). If one person in a fifty-student class receives an extra-time accommodation for which she was not eligible under existing law, the consequences of this erroneous legal conclusion are mostly negligible. Sure, the student who was erroneously granted the accommodation might have grades that overestimate that student's abilities vis-à-via the rest of the class. The odds that a non-accommodated student's grade is affected by the extra-time accommodation are relatively low. However, once seven students in a fifty-student class receive an extra-time accommodation for which they are not eligible,[59] the consequences are more dramatic. Now, not only are the grades for the seven erroneously-accommodated student no longer accurate, but it is almost mathematically certain that some non-accommodated students will have grades that have been affected by the erroneous accommodation.[60] Simply put, as the number of students claiming a particular disability increases, it becomes more and more important to correctly determine whether an accommodation is available for this class of individuals.

The grades that law students receive in the first year of law school are a serious matter. The number of law students claiming to be eligible for extra time on first-year exams because of an ADHD diagnosis continues to

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[58] *See* Jak Petzold, *New Questions Focusing on Law Students with Disabilities*, LSSE (Sep. 7, 2022), https://lssse.indiana.edu/blog/new-questions-focusing-on-law-students-with-disabilities/ [https://perma.cc/WVX7-PP2Z].

[59] Seven students in a fifty-person class is 14%, which is roughly in line with the available statistics as to the number of students at the law school level purporting to suffer from ADHD. For the purposes of this article, 14% is the number that I will be using.

[60] This is a consequence of the zero-sum curve that is mandated in first-year classes. This issue will be discussed in more detail *infra* Part IV.

rise.[61] Currently, these students are being awarded extra time to complete first-year exams based on an incorrect assessment of the controlling law. This is a mistake that is definitely worth correcting. That is the objective of this article.

III. BACKGROUND DISABILITY LAW

Disability rights are protected under federal law by a patchwork of statutes that occasionally overlap.[62] For present purposes, two of these statutes are relevant: The Rehabilitation Act of 1973 and the Americans with Disabilities Act ("ADA"). Fortunately, courts have interpreted these two statutes to essentially involve the same basic analysis, thus simplifying the law.[63]

A. Scope of Coverage

Modern disability law began with the passage of the Rehabilitation Act of 1973.[64] Title V of the Rehabilitation Act addresses the scope of the

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[61] McKenzie Osborne, *They Can't All Have ADHD: Law School Assessments in the Age of Extended Time*, 28 J. Gender, Race & Just. 115, 116 (2025).

[62] *See* Joe Dunman, *Harmonizing State and Federal Anti-Discrimination Law: The Problem of the ADAAA*, 61 U. LOUS. L. REV. 479, 481–86 (2023) (discussing the various federal laws providing rights for the disabled).

[63] *See* Derek Warden, *The Rehabilitation Act at Fifty*, 14 CAL. L. REV. 54, 58 (2023) (asserting that the Rehabilitation Act and the ADA "provide mostly the same rights and remedies"); Laura Rothstein, *Section 504 at Fifty: Disability Policy and Practice in Higher Education—Why 504 and the ADA Remain Relevant and Important*, 48 J.C. & U.L. 153, 163 (2023) (stating that the "basic substantive provisions are the same for both Section 504 [of the Rehabilitation Act] and the ADA"); Claire Raj & Crystal Grant, *Masks, Mayhem, and the Future of Disability Rights in Schools*, 25 N.Y.U. J. PUB. POL'Y, 247, 257 (2022) ("Because of these similarities, the ADA and Section 504 are nearly always read in concert."); Stephanie Berger, *Disability "Identity Theft," Unmasked: Exploring Recent False Claims of Disability, the Harm, and Potential Solutions*, 321 GEO. MAS. U. CIV. RTS. L.J. 361, 363 n.7 (2022) (stating that the Rehabilitation Act is "typically interpreted to provide the same coverage as the ADA").

[64] *See* Robyn M. Powell, *Beyond Disability Rights: A Way Forward After the 2020 Election*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 391, 400 (2022) ("In 1973, the disability rights movement achieved its first legislative success with the Rehabilitation Act . . . ."). The Rehabilitation Act can be traced to earlier, more limited federal statutes attempting to assist the disabled; Bianca G. Chamusco, *Revitalizing the Law that "Preceded the Movement": Associational Discrimination and the Rehabilitation Act of 1973*, 84 U. CHI. L. REV. 1285, 1288–91 (2017) (discussing the roots of the Rehabilitation Act in previous federal statutes).

statute's non-discrimination rule: Section 501 applies to employment by the federal government, Section 503 applies to employment with federal contractors, and Section 504 (which is not limited to the employment context) applies to recipients of federal financing assistance.[65]

The most comprehensive federal disability statute is the ADA, which was signed into law in 1990.[66] The scope of the ADA's non-discrimination rule is different than that of the Rehabilitation Act, creating different (and sometimes overlapping) coverage. Title I of the ADA applies to employment discrimination; Title II applies to discrimination by public entities, such as state and local governments (and instruments thereof); and Title III applies to places of public accommodations.[67]

All law schools are subject to the non-discrimination principles contained in either the Rehabilitation Act, the ADA, or both.[68] Title II of the ADA directly applies to state law schools.[69] Private law schools are "places of public accommodation" under Title III of the ADA.[70] Although Title III of the ADA specifically excludes religious institutions of higher education,[71] private religious law schools are subject to the Rehabilitation

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[65] Mark A. Rothstein, Serge A. Martinez, & W. Paul McKinney, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U.L.Q. 243, 245 (2002) (discussing the scope of Title V of the Rehabilitation Act).

[66] *See* Dunman, *supra* note 62, 481 (2023) (describing the "broader" scope of the ADA as compared to the Rehabilitation Act); Cary Lacheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 8 GEO. J. ON POV. & POL'Y, 1. 38 (2001) ("The ADA is extremely broad in scope."). Another part of the federal patchwork—but less relevant to the current discussion—is the Individuals with Disabilities Education Act, which became law (in its initial version) in 1975. *See* Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families With Means: Causes and Corrections From the Frontlines of Special Education Lawyering*, 20 AM U. J. GENDER, SOC. POL'Y AND LAW 107, 115–16 (2011) (discussing the history of the IDEA to its 1975 origins).

[67] *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAN. L. REV. 1807, 1808–09 (2005) (explaining the scope of the ADA).

[68] ABIGAIL A. GRABER & KYRIE E. DRAGOO, CONG. RSCH. SERV., R48068, THE RIGHTS OF STUDENTS WITH DISABILITIES UNDER IDEA, SECTION 504 AND THE ADA (2024).

[69] *State and Local Governments*, U.S. DEPT. JUST., https://www.ada.gov/topics/title-ii/ [https://perma.cc/62LE-K5ZK].

[70] Rothman v. Emory Univ., 828 F. Supp. 537, 541 (N.D. Ill. 1993).

[71] *See* Lynn M. Daggett, *"Minor Adjustments" and Other Not-So-Minor Obligations: Section 504, Private Religious K-12 Schools, and Students with Disabilities*, 52 U. LOUISVILLE L. REV. 301, 302 (2014) (explaining the religious exemption to Title III of the ADA).

Act if they receive federal funding.[72] The test for whether an institution of higher education has received federal funding is seemingly broad enough to cover all private, religious law schools.[73]

B. Who is Protected?

Both the Rehabilitation Act and the ADA have similar definitions as to the class of people protected by the statutes. The relevant protections of Section 504 of the Rehabilitation Act apply to those "with a disability."[74] The protections of Title II of the ADA similarly apply to those "with a disability."[75] Title III of the ADA protects "individual[s]" from being "discriminated against on the basis of disability."[76] The term "disability" is defined under the ADA as an individual with "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[77] For purposes of the type of accommodation considered by this Article, the Rehabilitation Act cross-references to the ADA definition of "disability."[78]

There is no question that a law student with ADHD could qualify as someone who has a "disability" because of "a mental impairment that substantially limits one or more major life activities."[79] According to language that was included in the ADA Amendment Act of 2008,[80] major

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[72] *See* Katherine Macfarlane, *Accommodation Discrimination*, 72 AM. U. L. REV. 1971, 1994 (2023) ("However, Section 504 of the Rehabilitation Act reaches all colleges and universities that receive federal funding, including religious institutions.").

[73] *See* Arlene S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does it Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291, 302 (2003) ("Federal grants to colleges and financial aid to individual students are sufficient to meet the federal financial assistance threshold requirement of the Rehabilitation Act.").

[74] 29 U.S.C. § 794.

[75] 42 U.S.C. § 12132.

[76] 42 U.S.C. § 12182.

[77] 42 U.S.C. § 12102(1).

[78] 29 U.S.C. § 705(9)(B).

[79] *ADHD Medical Documentation Guidelines*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mpre/test-accommodations/adhd-medical-documentation-guidelines [https://perma.cc/4JMA-QKAD].

[80] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3555.

life activities include "learning, reading, concentrating, [and] thinking."[81] Whether any *individual* student qualifies as having a "disability," of course, will depend upon an individualized assessment, but there is no doubt that ADHD can lead to this status.

In order for someone "with a disability" to be protected under the Rehabilitation Act, he or she must be an "otherwise qualified individual."[82] Title II of the ADA has similar language, providing protection to those who are "qualified individual[s]."[83] Title III, on the other hand, applies more broadly to prohibit discrimination on the basis of disability to all "individual[s]."[84] This slight difference in language probably relates to the different fields of coverage for each statute. Nevertheless, the complexity created by the omission of the "qualified" requirement in Title III need not be resolved here. In the context of law school accommodations, the "qualified" requirement is mostly relevant to admission and expulsion decisions. The argument in this article—which narrowly focuses on the question of extra time on first-year, fact-pattern law exams—does not rest on whether any individual student is "disabled" or "qualified." Students requesting (and receiving) extra time on law school exams are probably almost always "qualified" to be in law school (and to eventually be attorneys), but that point is irrelevant to the arguments advanced herein. Instead, the argument that will ultimately be advanced in this article is that extra time on first-year, fact-pattern exams is not a "reasonable accommodation" because it "fundamentally alters" the integrity of what the grades are purporting to measure—even if that student is a "qualified" student with a "disability."

C. What is Prohibited/Required?

The central objective of both the Rehabilitation Act and the ADA is the elimination of "discrimination" against the disabled.[85] But this purported objective is slightly misleading. As traditionally understood,

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[81] 42 U.S.C. § 12101(2)(B). The 2008 Amendments also clarify that the availability of medication to ameliorate a disability is irrelevant to the determination of whether an individual is disabled. *See* Jeannette Cox, *"Corrective" Surgery and the Americans with Disabilities Act*, 46 S.D. L. Rev. 113, 130–31 (2009) (explaining the 2008 Amendments).

[82] 29 U.S.C. § 794(a).

[83] 42 U.S.C. § 12132.

[84] 42 U.S.C. § 12182

[85] *See* 29 U.S.C. § 794(a); 42 U.S.C. §§ 12132, 12182 (all outlawing "discrimination" against the disabled); *see also* 42 U.S.C. § 12112(a) (prohibiting "discrimination" against the disabled in the employment context).

"discrimination" occurs when similarly-situated people are treated differently.[86] It is obvious, however, that both the Rehabilitation Act and the ADA go beyond this traditional understanding of "discrimination." Under each of these statutes, it might be *necessary* to treat a disabled person differently than a non-disabled person.[87]

The notion that the disabled might need to be treated differently than the non-disabled is evident from different sections of the Rehabilitation Act and the ADA. First, neither the Rehabilitation Act nor the ADA are limited solely to the elimination of "discrimination." The Rehabilitation Act states that the disabled shall not be "excluded from the participation in, or denied the benefits of, . . . any program or activity" receiving federal funding.[88] Title II of the ADA has nearly identical language.[89] Title III of the ADA achieves the same result by defining "discrimination" to include "a denial of the opportunity . . . to participate in or benefit from" whatever is offered by the place of public accommodation.[90]

The requirement that the disabled might need to be treated differently than the non-disabled has become known as the "reasonable accommodation" requirement.[91] Karla Gilbride has sharply captured this idea: "The concept of 'reasonable accommodation' has become the fulcrum around which much disability discrimination law turns . . . ."[92] Ironically, however, the phrase "reasonable accommodation" is absent from the text of the federal disability statutes that are relevant to the

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[86] Andrew Altman, *Discrimination*, STAN. ENCYCLOPEDIA PHIL. (Apr. 20, 2020), https://plato.stanford.edu/archives/win2020/entries/discrimination/ [https://perma.cc/C9GK-8SNB] ("Discrimination is necessarily comparative.").

[87] *See* Olmstead v. L.C, 527 U.S. 581, 598 (1999) ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA."); Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 598–99 (2004) (explaining that the new concept of discrimination went beyond simply "prohibiting unequal treatment of individuals with disabilities" towards the view that disabled people needed to be treated differently in the form of accommodations and alterations).

[88] *See* 29 U.S.C. § 794(a).

[89] *See* 42 U.S.C. § 12132.

[90] *See* 42 U.S.C. § 12182(b)(1)(A)(i).

[91] *See* ROTHSTEIN & IRZYK, *supra* note 19, at § 1:11 ("A major theme in all federal legislation [addressing disability law] is reasonable accommodation.").

[92] Karla Gilbride, *Evolving Beyond Reasonable Accomodations Towards "Off-the-shelf Accessible" Workplaces and Campuses*, 30 AM. U. J. GENDER, SOC. POL'Y & L., 297, 303 (2022).

question of accommodations for law students; neither Section 504 of the Rehabilitation Act, nor Title II of the ADA, nor Title III of the ADA contain the phrase "reasonable accommodation."[93] The statutory text of Title I of the ADA (applicable to employers) *does* use the phrase "reasonable accommodation"; discrimination under Title I is defined to include "not making reasonable accommodations" on behalf of the disabled.[94] The Rehabilitation Act incorporates the Title I standard by cross reference, but only in cases involving employment discrimination.[95]

Nevertheless, the "reasonable accommodation" test is routinely used by courts to analyze claims under Section 504 of the Rehabilitation Act,[96] Title II of the ADA,[97] and Title III of the ADA.[98] Similarly, commentators assume that each of these statutes requires "reasonable accommodations" on behalf of the disabled; usually the point is assumed with very little discussion.[99] The emergence of a uniform "reasonable accommodations"

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[93] *See* ROTHSTEIN & IRZYK, *supra* note 19, at § 4:20 (stating that the ADA does use the phrase "reasonable accommodation" but then citing only to Title I of the ADA).

[94] 42 U.S.C. § 12112(b)(5)(A)–(B) (2012).

[95] *See* 29 U.S.C. § 794(a); *see also* Richard Bales & Lindsay Mongenas, *Defining Independent Contractor Protection under the Rehabilitation Act*, 34 HAM L. REV. 435, 438–39 (2011) (describing the history of the 1994 amendments to the Rehabilitation Act).

[96] *See* Mark H. v. Hamamoto, 620 F.3d 1090, 1097–98 (9th Cir. 2010) (considering whether a "reasonable accommodation" occurred under the Rehabilitation Act).

[97] *See* Henrietta D. v. Bloomberg, 331 F.3d 261, 276 (2d Cir. 2003) (applying the "reasonable accommodation" standards in a Title II case).

[98] *See* Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1083 (9th Cir. 2004) ("Although Title III of the ADA uses the term 'reasonable modification' rather than 'reasonable accommodation,' these terms do not differ in the standards they create.").

[99] *See, e.g.*, Campbell Sode, *Unlocking Accommodations for Disabled Students in Private Religious Schools*, 116 NW. L. REV. 171, 175 (2021) (stating that both Title III of the ADA and the Rehabilitation Act requires schools to make "reasonable accommodations"); Derek Warden, *Ex Tenebris:* Buck v. Bell *and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 67 (2019) (stating that "the failure to make reasonable accommodations" is a recognized theory of discrimination under Title II of the ADA); Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L.. & EDUC. 31, 39 (1997) ("Rather than merely prohibiting disparate treatment of disabled individuals, the [Rehabilitation Act and the ADA], as interpreted by the United States Supreme Court, requires institutions to make 'reasonable accommodations' when necessary in order to allow qualified people with disabilities to

test for all federal disability law has, undoubtedly, been a welcome and positive development. The "reasonable accommodations" test nicely captures the spirit of all federal disability statutes,[100] even if this precise

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participate in and benefit from various educational programs."); *see also* ROTHSTEIN & IRZYK, *supra* note 19, at § 2:54.

[100] For instance, Title III of the ADA defines discrimination in public transportation services as present when they fail to provide a "reasonable modification." 42 U.S.C. § 12184(b)(1)–(2). Similarly, the ADA Title II definition of a "qualified individual" includes the phrase "with or without reasonable modifications." 42 U.S.C. § 12131(2). Moreover, Title V of the ADA, which broadly addresses issues relevant to claims under Title I, Title II, and Title III, says that a covered entity need not provide a "reasonable accommodation or . . . reasonable modification" to someone who is disabled only because they have been "regarded as having such an 'impairment.'" 42 U.S.C. § 12201(h). *See also* 42 U.S.C. § 12102(2)(C); Maureen E. Lally-Green, Annemarie Harr Eagle, & Bridget M. Green, *Doing the Right Thing, The Right Way, the First Time: Decision-Making in Public and Private Arenas Regarding the Use of Service Animals*, 45 U. ARK. LITTLE ROCK L. REV. 77, 91 (2022) ("Title V sets out miscellaneous provisions that are intended to apply broadly across all ADA Titles."); *cf.* Jeannette Cox, *Reasonable Accommodations and the ADA Amendments' Overlooked Potential*, 24 GEO. MASON L. REV. 147, 150–56 (2016) (precisely explaining how, after the ADA Amendments of 2008, "tier two plaintiffs" may not assert a reasonable accommodation claim under the ADA). Finally, it is worth noting that the regulations implementing the Rehabilitation Act and the ADA include the idea of a "reasonable accommodation" or a "reasonable modification." *See, e.g.*, 29 C.F.R. § 1613.203(d)(3) (discussing the "reasonable accommodations" required under the Rehabilitation Act); 28 C.F.R. § 35.130(b)(7) (2016) (requiring public entities to make "reasonable modifications"); *see also* Derek Warden, *A Helping Hand: Examining the Relationship Between (1) Title II of the ADA's Abrogation of Sovereign Immunity Cases and (2) the Doctrine of Qualified Immunity in § 1983 and* Bivens *Cases to Expand and Strengthen Sources of "Clearly Established Law" in Civil Rights Actions*, 29 GEO. MAS. U. CIV. RIGHTS L.J. 43, 61 (1997) ("Although Title II itself does not have a reasonable accommodation provision, its regulations do have a reasonable modification provision, and courts have universally used that regulation to apply the 'reasonable accommodation' provision of Title I into Title II."). The concept of a "reasonable accommodation" or "reasonable modification" thus permeates the statutes and implementing regulations. *See* Margo Schlanger, Elizabeth Jordan & Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability under the Americans with Disabilities Act and the Rehabilitation Act*, 17 HARV. L. & POL'Y REV. 231, 256 n.114 (2022) ("Reasonable modification is thus ADA Title II's (and Title III's) equivalent of the more familiar 'reasonable accommodation' requirement in Title I of the ADA, which addresses employment discrimination.").

phrase is absent from the text of most of the statutes. Moreover, by synthesizing the standard for all federal disability statutes into a uniform test, this area of the law becomes simpler and more defined. Courts routinely cite "reasonable accommodations" precedent from one statute when deciding a case under a different statute.[101]

Thus, it is clear that "reasonable accommodations" are required for the disabled under federal law, but what is meant by a "reasonable accommodation"? The place to start, of course, is the statutory language. Although the phrase "reasonable accommodation" does not appear in any of the statutes relevant to law school accommodations for law students, recall that the phrase does appear in Title I of the ADA (dealing with employment).[102] Not surprisingly, the Title I discussion of "reasonable accommodations" is tailored towards the employment context; it reads:

> The term "reasonable accommodation" may include—
>
> **(A)** making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> **(B)** job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[103]

Although employers are required to make reasonable accommodations under Title I, the employer is excused from this obligation if it would "impose an undue hardship on the operation of the business of

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[101] *See, e.g.*, Johnson v. Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997) (applying an analysis from an opinion in a Title I case to the Title III case before the court); Bolton v. Scrivner, 36 F.3d 939, 943 (10th Cir. 1994) ("Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA."); Michael D. Moberly, *The Disability History Mystery: Assessing the Employer's Reasonable Accommodation Obligation in "Record of Disability" Cases*, 35 PEPP. L. REV. 1, 28 (2007) (explaining that "claims arising under the two acts are typically analyzed in the same manner.").

[102] *See* 42 U.S.C. § 12112(b)(5)(A) (defining "discrimination against a qualified individual on the basis of disability" to include the failure to make "reasonable accommodations").

[103] 42 U.S.C. § 12111(9).

such covered entity."[104] The phrase "undue hardship" is also defined in Title I:

> (10) Undue hardship
>
> (A) In general
>
> The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
>
> (B) Factors to be considered
>
> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
>
> **(i)** the nature and cost of the accommodation needed under this chapter;
>
> **(ii)** the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> **(iii)** the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> **(iv)** the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[105]

There has been significant debate as to the relationship between "reasonable accommodation" and "undue hardship."[106] Under one view,

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[104] 42 U.S.C. § 12112(b)(5)(A).

[105] 42 U.S.C. § 12111(10).

[106] *See* Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 WASH. L. REV. 1039, 1086 N.296 (2015) ("There is disagreement among scholars about whether reasonableness and undue hardship are merely different

the two concepts are simply opposite sides of the same coin, meaning that an accommodation is reasonable only if it does not cause an undue hardship (and that an accommodation is *not* reasonable only if it *does* cause an undue hardship).[107] Under the other view, the two analyses are distinct, such that an accommodation may not be necessary even if it does not create an undue burden.[108]

Regardless of this debate (which need not be resolved here), there are two conclusions on which everyone appears to agree. First, it is abundantly clear from the Title I definitions of "reasonable accommodations" and

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recitations of the same obligation or separate requirements and, if the latter, what is the distinction between the two.").

[107] *See* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1148 (2010)

> The legislative sources make clear that reasonable accommodation and undue hardship are a single concept. The words form parts of a statutory sentence that links them together into the same statutory term. The duty to make reasonable accommodations exists up to the limit of undue hardship. At the point of undue hardship, the accommodation is no longer reasonable. It should be no surprise that the ADA merely gives examples of reasonable accommodation while providing a definition and relevant factors to consider in determining undue hardship. If undue hardship can be determined, there is no need to define what reasonable accommodation is. It is everything that is not undue hardship.

Id.

[108] *See* Jason Zarin, *Beyond the Bright Line: Consideration of Externalities, the Meaning of Undue Hardship, and the Allocation of the Burden of Proof under Title I of the Americans with Disabilities Act*, 7 S. CAL. INTERDISC. L.J. 511, 535 (1998) ("Reasonable accommodation and undue hardship are two separate tests.").

> I believe that there is *some* limitation to an employer's obligation to provide a reasonable accommodation besides the undue hardship limit. In other words, some accommodations are "unreasonable" even though they do not cause an undue hardship to the employer. For instance, employers should not have to monitor their employees' medications or pay for their employees' hearing aids, nor should employers be required to bump current employees out of their jobs in order to accommodate disabled employees. These accommodations are all "unreasonable."

Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 545–46 (2013)

"undue hardship" that the financial cost to the employer of a requested accommodation is a factor in determining whether an accommodation is required under Title I of the ADA.[109] Second, although the phrase "undue hardship" does not appear outside of Title I, the notion that the financial cost of a requested accommodation is a relevant legal consideration is widely recognized, regardless of whether the analysis is occurring under the Rehabilitation Act or the ADA.[110]

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[109] *See* Gary J. Simson et al., *It's Alright, Ma,, It's Life and Life Only: Have Universities Been Meeting Their Legal Obligations to High-Risk Faculty During the Pandemic*, 48 PEPP. L. REV. 649, 686 (2021) (explaining that "financial consequences . . . obviously lie at the heart of the" ADA analysis of reasonable accommodations/undue hardship). It is relatively easy to conclude that the financial cost to the employer is a relevant part of the analysis. It is much more difficult to determine exactly how those financial costs should bear in the ultimate analysis. *See* Cass R. Sunstein, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing and Stigmatic Harms*, 74 U. CHI. L. REV. 1895, 1895–1909 (2007) (pondering whether costs—including financial costs—should be balanced against the benefits of a requested accommodation and, if so, how those costs and benefits should be compared).

[110] Part of the statutory text of Title III recognizes the concept of an "undue burden." *See* 42 U.S.C. § 12182(b)(2)(A)(iii). The similarity of the phrase "undue burden" to "undue hardship" suggests a comparable analysis. *See* Erin Grewe, *Justice May be Blind, but There is No Justice for the Visually Disabled: A Guide to the Administration of a Format-Neutral Bar Examination*, 21 TEMP. POL. & CIV. RTS. L. REV. 543, 553 (2012) (asserting that the "'undue burden' test . . . is analogous to that of 'undue hardship' under Title I"). Title II of the ADA does not mention either an "undue hardship" or an "undue burden," but the regulations implementing Title II of the ADA recognize the concept. *See* 28 C.F.R. § 35.150(a) (clarifying that steps resulting in "undue financial and administrative burdens" are not required under Title II). Similarly, the Rehabilitation Act does not use the phrase "undue burden" or "undue hardship," but the regulations enforcing the Rehabilitation Act do use the phrase "undue burden." *See* 45 C.F.R. § 84.12(a); Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 409–11 (1995) (discussing the history of the Rehabilitation Act and the introduction of the "undue burden" concept in the regulations implementing the statute). In fact, the legislative history behind the ADA indicates a desire by Congress for courts to rely upon the "undue burden" concept found in the regulations enforcing the Rehabilitation Act. *See* Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1, 13–14 (1990) (discussing the history of the passage of the ADA and legislative history indicating a desire to rely upon previous interpretations of the "undue hardship" regulations enforcing the Rehabilitation Act). Despite the somewhat tangled web

Thus, when law schools are asked to make accommodations under federal law, the financial costs of the requested accommodation is definitely a factor in determining whether the accommodation is required. This concept, however, is mostly irrelevant to the question addressed in this article: Usually, there will be very little financial costs (perhaps none) associated with giving first-year law students with ADHD extra time on their examinations.

The problem with extra time on first-year law schools exams is not the financial costs associated with giving the accommodation, but rather the warping effect created by the accommodation. Although federal disability law requires reasonable accommodation, it does not require a "fundamental alteration."[111]

The text of Title III of the ADA expressly recognizes the "fundamental alteration" concept when it defines discrimination as:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would* ***fundamentally alter*** *the nature of such goods, services, facilities, privileges, advantages, or accommodations.*[112]

Although the text of the Rehabilitation Act and Title II of the ADA do not explicitly use the phrase "fundamental alteration," there is no question that this test is part of the relevant legal analysis under both statutes. The regulations enforcing Title II[113] include the "fundamental alteration"

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of phrases used in the statutes and implementing regulations, there is no doubt that the cost of a requested accommodation is a relevant factor in determining whether the accommodation is legally required.

[111] *See* Adam M. Schloss, *Web-Sight for Visually-Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?*, 35 COLUM. J.L & SOC. PROBS. 35, 50 (2001) ("The ADA does not require businesses to alter the fundamental nature of their goods or services.").

[112] 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added).

[113] *See* Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COL. L. REV. 157, 186 (2010). ("Acting pursuant to a specifically delegated authority, the Attorney General has issued regulations implementing Title II of the ADA.").

phrase.[114] Thus, it is usually assumed (without much discussion) that Title II does not require government entities to make fundamental alterations to their programs.[115]

The story is much the same with the Rehabilitation Act, which has been identified as the origin of the "fundamental alteration" concept.[116] Regulations enforcing the Rehabilitation Act generally embrace the "fundamental alteration" concept,[117] including regulations that directly address postsecondary education.[118] Most importantly, the Supreme Court,

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[114] *See* 28 C.F.R. § 35.130(b)(7)(i) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."); *see also* 28 C.F.R. § 35.164 ("This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.").

[115] *See, e.g.*, Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After* Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695, 723 (2001) (declaring (with no supporting citation) that "Title II does not require that fundamental alterations or unreasonable modifications be made to state programs."); *but see* LaCheen, *supra* note 66 at 71 (confirming Congressional intent for a 'fundamental alteration' defense in cases involving government 'programs, activities, and services,' suggesting that Congress might not have intended for the 'fundamental alteration' defense to apply outside of the 'program, activities, or services' context, but acknowledging that courts generally treat the 'fundamental alteration' defense as being applicable to all Title II contexts).

[116] *See* Smith & Calandrillo, *supra* note 115 ("The unreasonable modification/ fundamental alteration limitation to the ADA has its roots in Supreme Court precedent under the Rehabilitation Act.").

[117] *See, e.g.*, 45 C.F.R. § 85.3 (defining a "qualified individual with [a] handicap[]" as someone "who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature").

[118] *See* 34 C.F.R. § 104.44(a) (emphasis added) ("Academic requirements that the recipient can demonstrate are *essential to the instruction* being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.");

> In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will

in *Southeastern Community College v. Davis*,[119] used the "fundamental alteration" rationale to reject the Rehabilitation Act claim of an applicant denied admission to a nursing school: "Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires."[120] The *Davis* interpretation of the Rehabilitation Act was subsequently confirmed by the Supreme Court in in *Alexander v. Choate*.[121]

> best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (*except where such skills are the factors that the test purports to measure*).

34 C.F.R. § 104.44(c). Section 104.42 states that postsecondary schools receiving federal funding:

> Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (*except where those skills are the factors that the test purports to measure*).

34 C.F.R. § 104.42 (emphasis added).

[119] 442 U.S. 397 (1979). The *Davis* decision is often credited as the genesis of the "fundamental alteration" concept. *See* Darryl J. Liguori, *Fore! The Supreme Court Tees Off a Standard to Apply the Americans with Disabilities Act to Professional Sports in* PGA Tour, Inc. v. Martin, 12 WIDENER L.J. 185, 189 (2003) ("The 'fundamentally alters' exception stems from the Supreme Court's interpretation of the Rehabilitation Act in *Southeastern Community College v. Davis*."). There is empirical evidence supporting this assertion. *See infra* note 126 and accompanying text.

[120] *Davis*, 442 U.S. at 410.

[121] 469 U.S. 287, 300 (1984) (citing *Davis* for the proposition that the Rehabilitation Act does not require "'fundamental' or 'substantial' modifications to accommodate the handicapped"); *see also* ROTHSTEIN & IRZYK, *supra* note 19, at § 1:6 ("Fundamental alterations are not required [under the Rehabilitation Act] but reasonable accommodations are."); Dalia B. Taylor, *Communicating With Vegetative State Patients: The Role of Neuroimaging in American Disability Law*, 66 STAN. L. REV. 1451, 1464 n.88 (2014) ("Courts regularly apply the ADA's fundamental alteration and undue burden defenses in Rehabilitation Act cases."). Although Title I of the ADA—dealing with employment—is not directly related to the question considered in this Article, it is worth mentioning that the "fundamental alteration" concept also exists in that statute, albeit by a different name. Title

IV. FUNDAMENTAL ALTERATION

It is clear that federal law does not require an accommodation that involves a "fundamental alteration," but what constitutes a "fundamental alteration"? It is at this point that the legal analysis must depart from a discussion of statutory text and administrative regulations. There is no statutory definition of "fundamental alteration."[122] The Department of Justice has attempted to define the concept, but its "definition" mostly restates the term and is largely unhelpful.[123]

Thus, to discern what is meant by a "fundamental alteration," judicial caselaw must be consulted. There is no shortage of raw material. The multitude of cases that have discussed—and applied—the "fundamental alteration" concept is dizzying. As will be discussed below, the Supreme Court first recognized the "fundamental alteration" concept in its *Southeastern Community College v. Davis* opinion,[124] which was issued on

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I only protects "qualified individuals," which are those who "can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). The "essential functions" concept in Title I is analytically similar to the "fundamental alteration" analysis required by Title II and Title III of the ADA and the Rehabilitation Act. *See* 29 C.F.R. § 1630.2(n)(1) (emphasis added) (providing regulatory definition of "essential functions" to mean "the *fundamental* job duties of the employment position"); Wendy E. Parmet, Mark A. Gottlieb & Richard A. Daynard, *Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for Understanding the ADA*, 12 J.L. & HEALTH 1, 29–30 (1998) (noting the similarities between the "essential functions" concept and the "fundamental alteration" concept). Moreover, Title I recognizes that employers need not endure an "undue hardship," and this phrase is broad enough to include the "fundamental alteration" concept. *See* 42 U.S.C. § 12112(b)(5)(A); LaCheen, *supra* note 66, at 122 ("Although one might assume that 'fundamental alteration' refers to the nature of the modification and "undue burden" to the cost and inconvenience of implementing the modification, in practice courts treat these terms as interchangeable."); Bonnie Poitras Tucker & Joseph F. Smith, Jr., *Accommodating Law Faculty with Disabilities*, 46 J. LEGAL EDUC. 157, 173 (1996) ("The "undue burden" test is similar to the "undue hardship" test under ADA Title I, and the same factors are to be considered when determining whether the two tests are satisfied.").

[122] *See* Christopher Mullen, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 779 (2019) ("[N]o statutory definition is provided for 'fundamentally alter . . . .").

[123] *See* U.S. Dep't of Just., ADA Title III Technical Assistance Manual § III-4.3600 (1993), http://www.usdoj.gov/crt/ada/taman3.html [https://perma.cc/P5XJ-DCNL] (defining a "fundamental alteration" as a "modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages or accommodations offered").

[124] *Davis*, 442 U.S. at 410.

June 11, 1979.[125] Since that date, the term "fundamental alteration" has appeared in 1,721 judicial opinions.[126] The analysis employed by judges in determining whether a requested accommodation involves a "fundamental alteration" is often divergent, contradictory, muddled, and bewildering.[127] This disarray can probably be attributed to the tricky and elusive nature of the concept and also the wide array of fact patterns that must be analyzed under the term.[128] As noted by Professor Kerri Lynn Stone, whether "something has been 'fundamentally altered' presents a seemingly esoteric query—one with so many strands of reasoning and ways of being viewed as to seem intractable."[129]

Nevertheless, it is possible to ascertain from the caselaw some principles and parameters in determining whether a requested accommodation represents a "fundamental alteration." Particularly relevant are three Supreme Court cases wrestling with the "fundamental alteration"

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[125] *See id.* at 397.

[126] WESTLAW, "Fundamental Alteration", 1,721 results (Dec. 18, 2024) (on file with Capital University Law Review) (filtered by "Cases", "Federal"; "Date", "Date range", "6/11/1979–12/18/2024"). By contrast, "fundamental alteration" only appears in 25 judicial opinions before the *Davis* opinion, with the earliest appearance being the 1869 case of *Anderson v. Bank of Cape Fear*, 1 F. Cas. 838 (Cir. Ct. N.C. 1869). WESTLAW, "Fundamental Alteration", 25 results (Dec. 18, 2024) (on file with Capital University Law Review) (filtered by "Cases"; "Jurisdiction", "Federal"; "Date", "All dates before 6/11/1979") Thus, the term was used just 25 times by federal judges in the 110 years before *Davis*, and has been used 1,721 times by federal judges in the 45 years after *Davis*.

[127] *See* Todd A. Hentges, *Driving in the Fairways Incurs No Penalty:* Martin v. PGA Tour, Inc. *and Discriminatory Boundaries in the Americans with Disabilities Act*, 18 L. & INEQ. 131, 174 (2000) (observing that the "case law fails to answer the question with any clear legal guidelines").

[128] Recall that interpreting the Rehabilitation Act and Titles I, II, and III of the ADA to require the same essential analysis had the effect of simplifying the law. *See* discussion *supra* Part III. Yes, this "simplification" is partly to blame for the difficulty in synthesizing an established analytical framework for analyzing whether a "fundamental alteration" would occur. Simply put, applying the term to such a variety of settings has stretched it so thin so as to lose some of its analytical coherence.

[129] *See* Kerri Lynn Stone, *The Politics of Deference and Inclusion: Toward a Uniform Framework for the Analysis of "Fundamental Alteration" Under the ADA*, 58 HASTINGS L.J. 1241, 1258 (2007).

concept: *Southeastern Community College v. Davis*,[130] *Alexander v. Choate*,[131] and *PGA Tour, Inc. v. Martin*.[132]

A. Supreme Court Caselaw

1. Southeastern Community College v. Davis

The *Davis* case involved a suit commenced by the plaintiff after she was denied admission to defendant's Associate Degree Nursing program, the completion of which would have made her eligible for state certification as a registered nurse.[133] During the admissions process, the nursing school learned that the applicant was partially deaf.[134] The school eventually denied her admission to the program because of her disability; the school reasoned that her hearing impairment would make it difficult for her to complete the nursing program and also to ever function as a practicing nurse.[135]

The plaintiff brought suit alleging that the school had violated the Rehabilitation Act in denying her admission solely because of her disability.[136] After a bench trial, the district court entered a judgment on behalf of the school, finding that no violation of the Rehabilitation Act had occurred.[137] The district court reasoned that the plaintiff's hearing impairment (which frequently necessitated that the plaintiff resort to reading lips in order to understand oral communications)[138] would "prevent[] her from safely performing in both her training program and her proposed profession."[139] The plaintiff appealed to the Court of Appeals for the Fourth Circuit, which reversed the district court's judgment in favor of the school.[140] Relying heavily on regulations implementing the Rehabilitation Act,[141] the Fourth Circuit opined that the school was required to make modifications to its program to accommodate the plaintiff's hearing impairment, even though these modifications might be

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[130] 442 U.S. 397 (1979).

[131] 469 U.S. 287 (1985).

[132] 532 U.S. 661 (2001).

[133] *Davis*, 442 U.S. at 403.

[134] *Id.* at 400.

[135] *Id.* at 400–02.

[136] *Id.* at 402.

[137] *Id.* at 403.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 404.

[141] *Id.*

cumbersome and expensive.[142] According to the appellate court, the school engaged in illegal discrimination in denying plaintiff admission solely because of her hearing impairment.[143] The nursing school sought review at the Supreme Court, which granted certiorari.[144]

The Supreme Court determined that the school had not violated the Rehabilitation Act when it denied a deaf applicant admission to its nursing program.[145] The bulk of the Court's opinion wrestles with the plaintiff's argument that the school should modify its program to accommodate her hearing impairment.[146] In particular, the plaintiff asserted that the school could provide supervisors that would facilitate communication with patients in the clinical courses that required her to interact with real patients.[147] Also, the plaintiff argued that the school could (and should) absolve plaintiff from taking some courses in the curriculum.[148] According to the plaintiff, the school could train her for nursing duties that she could perform satisfactorily in the job market even with her hearing impairment.[149]

The Supreme Court acknowledged that the Rehabilitation Act will sometimes require modifications or accommodations on behalf of the disabled[150]: "Thus, situations may arise where a refusal to modify an

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[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 407.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 408.

[150] The Supreme Court somewhat clumsily articulated the accommodation requirement as a duty to engage in "affirmative action," which was criticized by some commentators. *See* Jamelia N. Morgan, *One Not Like the Other: An Examination of the Use of the Affirmative Action Analogy in Reasonable Accommodation Cases Under The Americans with Disabilities Act*, 46 CAP. U.L. REV. 191, 201 (2018) (discussing the different camps as to whether the accommodation requirement can be equated to an affirmative action requirement). The Supreme Court later acknowledged this criticism but insisted that the term "affirmative action" could easily be equated to the more familiar terminology of whether an accommodation is reasonable or, instead, involves a fundamental alteration. *See* Alexander v. Choate, 469 U.S. 287, 300 n.20 (1985).

existing program might become unreasonable and discriminatory."[151] The Court, however, concluded that this was not one of those instances.[152]

In reaching this conclusion, the Supreme Court displayed an obvious inclination to defer to the nursing school.[153] Although the Court acknowledged that the deaf plaintiff could potentially be licensed as a registered nurse and work at nursing tasks that did not require direct client interaction,[154] the Court explained that this was not the dispositive point.[155] The defendant nursing school had created its program such that its graduates "will be able to perform all normal roles of a registered nurse."[156] This decision by the school was entitled to deference: "Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program."[157]

Given the deference afforded the school in structuring the aims of its program, the Court concluded that the Rehabilitation Act did not require the school to make the adjustments requested by the plaintiff.[158] First, the Court noted how cumbersome it would be for the school to provide supervision in clinical classes so as to assist the plaintiff with client communication.[159] Second, although the Court acknowledged that the school could absolve the plaintiff from attending clinical classes, the Court noted that this would undermine the school's objective of graduating students who could safely perform all nursing tasks.[160] The Court did not believe that this result was required under federal law: "Such a

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[151] *Davis*, 442 U.S. at 412–13.

[152] *Id.* at 413.

[153] *Id.*

[154] *Id.* at 413 n.12.

[155] *Id.*

[156] *Id.* at 413, 413 n.12 ("[T]he purpose of its program was to train persons who could serve the nursing profession in all customary ways.").

[157] *Id.* at 414.

[158] *See id.* at 405.

[159] *Id.* at 409 ("Yet the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program.").

[160] *Id.* at 409–10 ("In light of respondent's inability to function in clinical courses without close supervision, Southeastern . . . could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives.").

fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires."[161]

2. Alexander v. Choate

The Supreme Court revisited the "fundamental alteration" concept in *Alexander v. Choate*.[162] The *Alexander* case dealt with a time limitation and the disproportionate effect this time limitation had on the disabled.[163] The Supreme Court in *Alexander* acknowledged that the disabled were uniquely affected by this time limitation, but nevertheless concluded that federal disability law was not violated.[164]

The time limitation involved in the *Alexander* case was a fourteen-day cap on the inpatient days covered annually by Tennessee's Medicaid program.[165] In response to a budget crisis, Tennessee had adjusted its former twenty-day cap down to fourteen days.[166] This change prompted litigation by a class of Tennessee Medicaid recipients; the plaintiffs' suit was based on (*inter alia*) the Rehabilitation Act.[167] According to the plaintiffs—and as acknowledged by the State of Tennessee—the fourteen-day cap would disproportionately affect the disabled.[168] Whereas 27.4% of Tennessee's disabled Medicaid recipients required more than fourteen days of care, only 7.8% of Tennessee's *non*-disabled Medicaid recipients required more than fourteen days of care.[169] The plaintiffs thus argued that Tennessee must either (1) apply a different time limitation for disabled Medicaid recipients[170] or (2) eliminate the time requirement altogether.[171]

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[161] *Id.* at 410.

[162] 469 U.S. 287 (1985).

[163] *See id.* at 289.

[164] *See id.* at 289–290.

[165] *Id.* at 289.

[166] *See id.*

[167] *Id.* at 289–290.

[168] *Id.* The *Alexander* opinion uses the term "handicapped" instead of "disabled." *See id.* at 289. I have substituted the modern term disabled.

[169] *Id.* at 289–290.

[170] It is somewhat unclear whether the plaintiffs were actually asking for a different time limitation to apply to the disabled, but the Court assumed that the plaintiffs were making this argument and thus responded to it in the Court's opinion. *Id.* at 302–03 ("To the extent respondents further suggest that their greater need for prolonged inpatient care means that, to provide meaningful access to Medicaid services, Tennessee must single out the handicapped for *more* than 14 days of coverage, the suggestion is simply unsound.").

[171] *Id.* at 290–91.

The Court rejected both of these contentions.[172] Although the Court did not dispute that disabled Tennessee residents might require longer hospital stays than non-disabled Tennessee residents,[173] the Court did not believe that federal disability law required Tennessee to account for this difference by adjusting the time limitation for the disabled.[174] The Court noted that the objective of the Tennessee Medicaid program was not "adequate health care" for all recipients; rather, Tennessee was free "to define the benefit it [was] providing."[175] As such, limitations on coverage—reflecting fiscal realities—were to be expected in the program.[176] That these limitations disproportionately (and negatively) affected the disabled did not constitute a violation of federal law: "The Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed."[177] In even more blunt terms, the Court diminished the notion that the disabled were entitled to the same effective health benefits than were the non-disabled: "Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users . . . . Tennessee is not obligated to reinstate its 20-day rule or to provide the handicapped with more than 14 days of inpatient coverage."[178]

The Court also rejected the plaintiffs' broader contention that Tennessee was flatly prohibited from using a time limitation that disproportionately affected the disabled.[179] According to the plaintiffs, Tennessee could have achieved its desired budgetary goals through measures other than a time limitation; these other restrictions (according to plaintiffs) would have equally affected the coverage of both the disabled and the non-disabled.[180] Thus, plaintiffs argued, Tennessee was required to achieve its budgetary goals through these other means.[181]

The Supreme Court forcefully rejected this argument: "[T]o require that the sort of broad-based distributive decision at issue in this case always be made in the way most favorable, or least disadvantageous, to the

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[172] *Id.* at 306, 308–309.

[173] *See id.* at 289–290.

[174] *Id.* at 306.

[175] *Id.* at 303.

[176] *See id.* at 303–304.

[177] *Id.* at 304.

[178] *Id.* at 306.

[179] *Id.* at 307–08.

[180] *Id.*at 306.

[181] *Id.*

handicapped . . . would be to impose a virtually unworkable requirement . . . ."[182] As in *Davis*, the Court seemed inclined to defer to Tennessee's judgment about the parameters and goals of its program.[183] Just as the nursing school in *Davis* could have—but was not legally compelled to—offer a different sort of nursing program, the state of Tennessee was not compelled to achieve its budgetary goals by something other than a time limitation—even though these other means were a possible and feasible way to achieve its budgetary objectives: "Tennessee need not redefine its Medicaid program to eliminate durational limitations on inpatient coverage, even if in doing so the State could achieve its immediate fiscal objectives in a way less harmful to the handicapped."[184]

3. PGA Tour, Inc. v. Martin

The Supreme Court again considered the "fundamental alteration" question in *PGA Tour, Inc. v. Martin*[185] in a dispute over the game of golf.

The plaintiff in *Martin* was Casey Martin, a professional golfer.[186] Martin suffered from Klippel–Trenaunay–Weber Syndrome, a circulatory disorder that severely inhibited the use of his right leg.[187] This made walking both difficult and dangerous for Martin; because of poor circulation, his right leg was susceptible to breaking.[188] When Martin played golf as an amateur at Stanford (alongside Tiger Woods),[189] both the Pac-12 Conference and the NCAA permitted him to use a golf cart during competitions rather than walk the golf course (as other players did).[190]

When Martin turned professional, he began the process of trying to qualify for either the PGA Tour or the Nike Tour by entering qualifying school, or "Q-School."[191] Q-School is the process by which players earn a

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[182] *Id.* at 308.

[183] *Id.* at 307; Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

[184] *Alexander*, 469 U.S. at 308–09.

[185] 532 U.S. 661 (2001).

[186] *Id.* at 661.

[187] *Id.* at 668.

[188] *Id.* In fact, eventually Martin's leg did break and required amputation. *See* Max Adler, *Casey Martin Lost a Leg, but He Hasn't Lost Hope*, GOLF DIGEST, https://www.golfdigest.com/story/rebuilding-casey-martin-suing-pga-tour-right-to-use-cart [https://perma.cc/6RRS-M76L].

[189] *Casey Martin, Tiger Woods and The PGA*, ABILITY MAG., https://abilitymagazine.com/casey-martin-tiger-woods-and-the-pga/ [https://perma.cc/6ZMG-BNEH].

[190] *Martin*, 532 U.S. 668–69.

[191] *Id.* at 669.

spot on either the PGA Tour or the Nike Tour;[192] Q-School is run by the PGA Tour, Inc. and is open to the public.[193] The process proceeds in three stages; during the first and second stages, a substantial percentage of the competitors are eliminated.[194] Those golfers who survive to the third stage are given a spot on either the PGA Tour (for those who score the best during the third stage) or the Nike Tour.[195]

During the first two stages of Q-School, Martin was allowed to use a golf cart pursuant to the rules applicable to those stages.[196] Martin advanced through these two stages to the third stage.[197] However, the rules governing the third stage of Q-School disallowed the use of carts, as did the rules applicable to the professional tournaments hosted by both the PGA Tour and the Nike Tour.[198] Martin requested a waiver to the walking rule, supported by voluminous documentation detailing his disability.[199] This request, however, was denied by the PGA Tour, Inc.[200] Martin then brought suit under Title III of the ADA, seeking an injunction against the PGA Tour, Inc. that would allow him to use a golf cart during Q-School and any tournament on the PGA Tour or the Nike Tour (both of which are also run by the PGA Tour, Inc.).[201]

At the district court, the PGA Tour, Inc. brought a summary judgment motion arguing that the dispute did not fall within Title III of the ADA because it did not involve a "place[] of 'public accommodation[s].'"[202] The

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[192] The Nike Tour functions essentially as a "minor league" for the PGA Tour. It has undergone various name changes over the decades since the Martin opinion. As of right now, it is called the Korn Ferry Tour. *See* Staff, *How It Works: 2023 PGA TOUR Q-School Presented by Korn Ferry*, PGA TOUR, https://www.pgatour.com/korn-ferry-tour/article/tours/pga-tour/news/latest/2023/06/01/how-it-works-2023-pga-tour-q-school-presented-by-korn-ferry-status-eligibility-stages-categories-faq [https://perma.cc/2V24-JY5N].

[193] Players must be over 18 years old, apply using a publicly available application, and pay the entry fee to be considered for Q-School. *2025 Qualifying Tournament: Procedures & Information*, PGA TOUR AMERICAS, https://qualifying.pgatourhq.com/static-assets/uploads/2025%20Mid-Season%20Q-School%201.pdf [https://perma.cc/8QAB-WSHS].

[194] PGA TOUR, *supra* note 192.

[195] *Id.*

[196] *Martin*, 532 U.S. at 669.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

district court rejected this argument, and the case proceeded to a bench trial.[203] At trial, the PGA Tour, Inc. conceded that Martin was legally disabled.[204] The PGA Tour, Inc., argued, however, that allowing Martin to ride a golf cart would result in a "fundamental alteration".[205] Thus, the PGA Tour, Inc. reasoned, it was not required to make this accommodation.[206] The district court disagreed and granted the injunction requested by Martin.[207] The PGA Tour, Inc. appealed and asserted to the Ninth Circuit its arguments that the dispute did not involve a "place of public accommodation" and that allowing Martin to ride a golf cart would constitute a "fundamental alteration."[208] The Ninth Circuit affirmed both decisions by the district court, leaving the injunction in place.[209]

The United States Supreme Court granted certiorari in the case.[210] At the Supreme Court, the PGA Tour, Inc. reasserted both basic arguments that it had made in the lower courts.[211] The Supreme Court—like the district court and the Ninth Circuit—rejected each of them in a majority opinion written by Justice Stevens.[212] Justice Scalia penned an engaging dissent, in which Justice Thomas joined.[213]

For present purposes, the Court's analysis as to whether the case fell within the scope of Title III is mostly irrelevant. At the Supreme Court level, the PGA Tour, Inc.'s argument had morphed into a slightly more sophisticated argument that acknowledged that PGA Tour events were "places of public accommodation" but insisted that only "clients and customers"—not participants like Martin—could benefit from the accommodation principle.[214] The Court rejected this argument.[215] Justice Scalia's dissent on this question raises some interesting points regarding the appropriate way to conceptualize the product involved in a PGA Tour event. For Scalia, the appropriate lens through which to view the PGA

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[203] *Id.* at 670.

[204] *Id.*

[205] *Id.*

[206] *Id.* at 670–71.

[207] *Id.* at 672.

[208] *Id.*

[209] *Id.* at 672–73.

[210] *Id.* at 674.

[211] *Id.* at 677–78.

[212] *Id.* at 681–91.

[213] *Id.* at 691–705 (Scalia, J., dissenting).

[214] *Id.* at 677–78.

[215] *Id.* at 679–80.

Tour was that of delivering a product for public consumption, with Martin and other golfers as being analogous to actors in a play.[216]

More relevant to the subject matter of this article is the Court's conclusion that allowing Martin to use a golf cart would not involve a "fundamental alteration." The Court's analysis of this question was considerable, careful, and enlightening.

The Court began its analysis with a discussion regarding the source of the "no carts rule."[217] The Court noted that this "rule" does not exist as an official rule under "The Rules of Golf."[218] Thus, for the millions of amateur golfers in the United States that are committed to adhering strictly to The Rules of Golf (which is, in my experience, a very, very small percentage), nothing in the official rules of golf would prohibit them from using a golf cart.[219] Nor would professional golfers be prohibited by The Rules of Golf from using a cart. The only mention in The Rules of Golf as to a walking requirement is in Appendix I, which lists a number of "'optional' conditions."[220] Walking during a golf round is listed as an "optional condition" which may be imposed for a competition.[221]

The Court then noted that the optional walking rule is not adhered to in all of the professional tournaments run by the PGA Tour, Inc.[222] The first two stages of Q-School permit the use of carts.[223] Moreover, specialized tournaments that allow players to qualify for specific PGA Tour

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[216] *Id.* at 695 (Scalia, J., dissenting). This characterization would undoubtedly be accurate for a scripted event such as a WWE wrestling match. But it is less obvious for something like professional golf, which has its roots to a time period before golf tournaments were broadcast on television (indeed, even before the advent of television).

[217] *Id.* at 664–65.

[218] *Id.* at 666. The Rules of Golf are a joint product of the United States Golf Association (USGA) and the Royal and Ancient Golf Club of Scotland. *See Rules of Golf*, USGA, https://www.usga.org/rules/rules-and-clarifications/rules-and-clarifications.html [https://perma.cc/6ZMG-BNEH].

[219] *Martin*, 532 U.S. at 666 n.3, (quoting U.S. GOLF ASS'N, RULES OF GOLF app. I. pt. C) ("Appendix I to the Rules of Golf lists a number of 'optional' conditions, among them one related to transportation: 'If it is desired to require players to walk in a competition, the following condition is suggested: "Players shall walk at all times during a stipulated round."'")

[220] *Id.*

[221] *Id.*

[222] *Id.* at 666–67.

[223] *See id.* at 669.

tournaments permit the use of carts.[224] Finally, all players participating in the Senior PGA Tour are allowed to ride a cart.[225]

Given the non-uniformity of the walking rule (even in professional tournaments), the Court next addressed what purpose the walking rule purported to serve. According to the defendant PGA Tour, Inc., the walking rule is designed "to inject fatigue into the skill of shot-making."[226] This conclusion was buttressed by the trial court testimony of many golfing legends, including Jack Nicklaus and Arnold Palmer.[227] Despite this testimony, however, the Court expressed doubt as to whether the fatigue factor was truly fundamental. The Supreme Court noted the trial testimony of a professor in physiology who estimated that only about 500 calories would be burned from walking the course.[228] Moreover, this walking would occur over a period of five hours, with ample time for rest.[229] According to the expert physiologist, the primary fatigue associated with tournament golf would not be physical fatigue but rather the psychological fatigue associated with stress and competition—indeed, walking might serve to alleviate this type of stress rather than exacerbate it.[230]

Having poked holes in the argument that the walking rule was "fundamental," the Court then teed up the question as to the gross effect of allowing Martin to ride in a golf cart because of his handicap.[231] Here, the Court stressed that the ADA required an "individualized inquiry" and that Martin's use of a cart would have very little overall effect on the competition.[232] The Court flatly rejected the PGA Tour, Inc.'s contention that adjusting the walking rule would "fundamentally alter the nature of petitioner's highest level tournaments even if he were the only person in the world who has both the talent to compete in those elite events and a disability sufficiently serious that he cannot do so without using a cart."[233] As the Court explained, allowing disabled competitors like Martin to use a cart would only create a "handful of requests."[234] Simply put, the Court did

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[224] *Id.* at 666–67.

[225] *Id.* at 667.

[226] *Id.* at 671.

[227] *Id.* at 670–71.

[228] *Id.* at 687.

[229] *Id.*

[230] *Id.* at 687–88.

[231] *Id.* at 688.

[232] *Id.* at 688–89.

[233] *Id.* at 686.

[234] *Id.* at 691.

not believe that allowing Casey Martin a cart would seriously jeopardize the qualities and attributes that tournament golf is supposed to measure.

Justice Scalia's spirited dissent is worth mentioning, as it is a nice analytical springboard to the synthesis of the "fundamental alteration" test which follows in the next section. For Justice Scalia, the question as to whether the walking rule was "fundamental" was both "incredibly difficult and incredibly silly."[235] Because golf is simply a game—unlike other tasks involving "the achievement of a certain object[ive]"—Justice Scalia believed that it would be impossible to try to discern what was fundamental or essential.[236] For Justice Scalia, the PGA Tour, Inc. had delineated the terms of a game, and those terms were necessarily arbitrary.[237] Given the arbitrary nature of the rules, Scalia believed that no one—including the Supreme Court of the United States—was in a position to second-guess the PGA Tour, Inc.'s position that these rules were "fundamental."[238] As such, Scalia believed the Court should "decline to answer" the question of whether the walking rule was "fundamental."[239]

Justice Scalia also attacked the majority's conclusion as to the "competitive effects" of allowing Martin to ride in a cart.[240] Here, Scalia noted that allowing Martin to ride in a cart "substantially improves this respondent's competitive prospects beyond a couple of strokes."[241] At the end of his opinion, Justice Scalia disclaims any personal opinion on the normative question as to what the PGA Tour, Inc. ought to do with Martin's accommodation request.[242] Nevertheless, Scalia seems to tip his hand regarding his personal beliefs by concluding his opinion with a twist on Kurt Vonnegut's opening line of Harrison Bergeron: "The year was 2001, and 'everybody was finally equal.'"[243]

B. Synthesis

Although the "fundamental alteration" analysis is undeniably slippery and elusive, there are principles—dispositive to the question considered in

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[235] *Id.* at 700 (Scalia, J., dissenting).

[236] *Id.* at 700–01.

[237] *Id.* at 701.

[238] *See id.* at 700–01.

[239] *Id.* at 700.

[240] *Id.* at 701.

[241] *Id.* at 702.

[242] *Id.* at 704.

[243] *Id.* at 705.

this Article—that can be gleamed from the trio of Supreme Court cases discussed above.[244]

The Supreme Court caselaw—particularly *Martin*—suggests that the inquiry can be broken down into two components. The first component is an analytical inquiry involving definition and line-drawing. This analytical inquiry can usefully be associated with the "fundamental" word. The second component is a numerical inquiry involving real-world consequences. This inquiry can usefully be associated with the "alteration" word.[245]

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[244] Given the frequency with which courts wrestle with the "fundamental alteration" question, there is a surprising paucity of academic attention thoroughly analyzing the issue. *See* Stone, *supra* note 8. That is not the purpose of this Article, which analyzes the "fundamental alteration" as a means to an end rather than as the ultimate object being studied. That said, I am hopeful that more academics will devote careful attention to the "fundamental alteration" analysis and, when they do, the insights from this Article will prove to be helpful.

[245] In distinguishing between the importance of the interest being pursued by the defendant and the effect that the plaintiff's requested remedy would have on this interest, the "fundamental alteration" analysis can be loosely analogized to the Supreme Court "strict scrutiny" test. *See* David Ferleger, *The Constitutional Right to Community Services*, 26 GA. ST. U. L. REV. 763, 789–90 (2010) ("A number of commentators have argued with force that the ADA itself . . . compels courts to employ a 'strict scrutiny' or 'compelling state interest' test."). However, as will be explained below, the "alteration" analysis is conceptually distinguishable from the "least restrictive means" question that must be asked and answered under a strict scrutiny analysis. *See* John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOK. L. REV. 1, 3 (2023); *but cf.* Robert Lumpkin, *The Stolen Valor Act: Why It Should Be Revised to Better Protect the Honor of Our Armed Forces*, 13 LOY. J. PUB. INT. L. 551, 560–64 (2012) (portraying the "least restrictive means" and "narrowly tailored" tests as each independent inquiries within the strict scrutiny analysis). Also, of course, there is a major difference as to when the fundamental alteration and strict scrutiny analyses are triggered. A strict scrutiny analysis is often triggered when the government differentiates between groups of people. *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 136–37 (2011) ("Laws that facially discriminate against a 'suspect class,' however, are subject to 'strict scrutiny.'"). Under the ADA, however, the plaintiff's claim is often based on the defendant's failure to differentiate between the disabled and the non-disabled. *See* Megan I. Brennan, *Need I Prove More: Why An Adverse Employment Action Prong Has No Place in a Failure to Accommodate Disability Claim*, 36 HAMLINE L. REV. 497, 499 (2013).

1. "Fundamental-ness"

To determine whether there has been a "fundamental alteration," it is necessary to consider the importance of *what it is that is being altered*.

The word "fundamental" can be used as either a noun or an adjective.[246] As a noun, it is defined by the Oxford dictionary as "a central or primary rule or principle on which something is based."[247] As an adjective (which is probably closer to its use in the "fundamental alteration" inquiry), it is defined as "so basic as to be hard to alter, resolve, or overcome."[248]

What is clear from each of these definitions is that, to determine whether there has been a "fundamental alteration," it is necessary to establish the end or goal trying to be accomplished.[249] This insight was recognized by Justice Scalia in his dissent in *Martin*: "To say that something is 'essential' is ordinarily to say that it is necessary to the achievement of a certain object."[250]

The starting point, of course, for identifying the objective or purpose is what the decision-maker *says* is its objective or purpose. By "decision-maker," I mean the person or entity that has denied a requested modification or accommodation and consequently been sued; this will be the defendant in disability litigation. Thus, when a defendant asserts a "fundamental alteration" argument, and when the court is tasked with analyzing this "defense," the starting point will be for the defendant to articulate the end or goal that it is trying to accomplish in the decision, policy, rule, or practice that it has refused to modify or provide an accommodation for.

A court must then choose to accept or reject the defendant's definition of its objective. Here, a court can either be deferential to the defendant (such as in *Davis*, where the Court was extremely deferential to the nursing

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[246] *See Fundamental*, MERRIAM-WEBSTER, **Error! Hyperlink reference not valid.**https://www.merriam-webster.com/dictionary/ fundamental [https://perma.cc/6HRT-YTFQ].

[247] *Fundamental*, OXFORD DICTIONARY (2024).

[248] *See id.*

[249] *See* Mary Kate Kearney, *The ADA, Respiratory Disabilities and Smoking: Can Smokers at Burger King Really Have it Their Way?*, 50 SYRACUSE L. REV. 1, 20 (2000) ("As in *Davis*, the core issue in these cases is the effect of the modification on the program's essential purpose.").

[250] PGA Tour, Inc. v. Martin, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting). (Justice Scalia uses the term "essential" to refer to the concept that I am associating with "fundamental.")

school) or not.[251] But a court can never *completely* defer to a defendant's definition of its objective or purpose because this would deprive the "fundamental alteration" inquiry of any real substance and effectively insulate defendants from the mandates of federal law.[252]

Justice Scalia made this analytical error in his *Martin* dissent, in which he seemed inclined to allow the PGA Tour, Inc. complete latitude to define the fundamental aspects of the golf tournaments it organized.[253] As the majority opinion by Justice Stevens recognized, completely deferring to the PGA Tour, Inc.'s characterization of the walking rule as "fundamental" would effectively insulate it from judicial review: "Therefore, petitioner's claim that all the substantive rules for its 'highest-level' competitions are sacrosanct and cannot be modified under any circumstances is effectively a contention that it is exempt from Title III's reasonable modification requirement."[254] Indeed, even Justice Scalia appears (later in his dissent) to acknowledge that the courts have *some* role in reviewing a defendant's definition of its goals or purposes. In a concession that owes much to both (later) Wittgenstein[255] and H.L.A. Hart,[256] Scalia acknowledges that:

> [T]here is some point at which the rules of a well-known game are changed to such a degree that no reasonable person would call it the same game. If the PGA TOUR competitors were required to dribble a large, inflated ball

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[251] The question of deference—a very important part of the inquiry—will be fully addressed in the next section.

[252] *Cf.* Joshua D. Blecher-Cohen, *Disability Law and HIV Criminalization*, 130 YALE L.J. 1560, 1598 (2021) ("Indeed, if the fundamental alteration exception were applicable in cases involving facial discrimination, public entities 'could easily evade the strictures of the ADA by making statutes expressly discriminatory'—and then arguing that invalidating a law or policy would necessarily work a fundamental alteration.").

[253] *Martin*, 532 U.S. at 700.

[254] *Id.* at 689.

[255] *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS para. 43, (G. E. M. Anscombe trans., 3rd ed.) (1953) (In most cases, "the meaning of a word is its use in the language.").

[256] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) ("If we are to communicate with each other at all, . . . then the general words we use . . . must have some standard instance in which no doubts are felt about it application."); *see also* KARL LLEWELLYN, BRAMBLE BUSH 41 (1930) ("The life of words is in the using of them . . . .").

> and put it through a round hoop, the game could no longer reasonably be called golf.[257]

Thus, a court might defer to a decision-maker's framing of its objectives and purposes, but this deference cannot be absolute because the defendant could articulate its purpose in such a way as to nullify the plaintiff's claim. Consider, for instance, a slight variation on the *Martin* fact pattern: Suppose a golfer with a particular type of color-blindness is playing the Masters Golf Tournament, hosted by Augusta National Golf Club ("Augusta National"). Augusta National (famously) uses yellow flags on the pins that demarcate the location of the hole on the greens. Because of his color-blindness, however, our hypothetical golfer has trouble delineating the flag from the background of patrons watching the tournament. The color-blind golfer briefly considers asking Augusta National to change the color of all of its flags to red but considers this modification to be too much of an imposition. Thus, a narrower accommodation is requested: While his playing group is preparing to hit approach shots to a green, a volunteer[258] could simply switch the yellow pin with a red pin. Then, after his group has finished putting on the green, a volunteer could switch back to the yellow pin. Suppose that Augusta National refuses this accommodation, and the color-blind golfer sues. In defending against the suit, Augusta National frames its objective as a desire to measure "shot-making to yellow pins." Under this framing, of course, Augusta National would seem to have insulated itself from liability: Changing the pins from yellow to red undermines what it is purporting to measure. But a court cannot completely defer to Augusta National's framing of its objective—allowing a defendant's framing of its purpose or objective to always control the analysis would have the effect of severely undermining federal disability law.

Thinking about how federal disability law applies to games and sports is extremely useful for appreciating the line-drawing and framing surrounding the "fundamental alteration" question. On one hand, sports are just games. In that sense, they can be thought of not as a means to an end but as an end in and of themselves. But that end must be defined by rules or parameters—the "rules of the game." And determining which rules are

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[257] *Martin*, 532 U.S. at 701.

[258] There are hundreds of volunteers who donate their time simply to be part of The Masters event. *See Volunteering at the Masters: Become a Volunteer at the Masters Golf*, GLENMUIR 1891 (March 24, 2022), https://www.glenmuir.com/news/volunteer-at-the-masters?srsltid=AfmBOopzb-JlYkOb2v0e8orGiS-2qTdBgPf0JtuSouraISciK8Ad6lHR [https://perma.cc/7PET-UWDW].

"essential" invites discussion about what is "pure" or "true." This process demonstrates how the "fundamental alteration" question depends on whether the game is measuring "shot-making," "shot-making while fatigued," or "shot-making to yellow pins." The malleable nature of the "purpose" of the game makes it easy to see that the process of determining "objectives" is an exercise in defining and line drawing. In the "real world"—that is, outside of the context of games—identifying a purpose or objective being pursued by the decision-maker often might be much easier.[259] (More on this later.)

The most enlightening portion of the *Martin* opinion is the Court's analysis as to why the PGA Tour, Inc.'s framing of its purpose—to measure shot making under fatigue—was not controlling in the case.[260] The Court made several points rejecting this framing. The Court noted that the Rules of Golf do not prohibit the use of carts.[261] The Court observed that, within the amateur game, "[golf carts] are everywhere."[262] The Court also reasoned that the effort and fatigue associated with walking a golf course (while a caddy carried the clubs) is minimal—roughly only 500 calories.[263]

Most damaging to the PGA Tour, Inc.'s position, however, was its uneven enforcement of the walking rule. As the *Martin* Court explained in great detail, carts were permitted to all golfers in the first two stages of Q-School.[264] The walking rule only appears in the third stage of Q-School, but every golfer who makes it to the third stage of Q-School will qualify for some professional tour.[265] Thus, the PGA Tour, Inc.'s assertion that it was attempting to measure shot-making under fatigue was flatly inconsistent with the way that it determined *who had qualified for its professional tours*.[266] Proclaiming that you are measuring "shot-making under fatigue" rings hollow if the methods you use for determining who is eligible to join the ranks does not include the fatigue that comes from walking the golf course.

In short, the PGA Tour's own conduct dramatically undermined the arguments it asserted in *Martin*. Thus, even though the *Martin* case was a

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[260] *Martin*, 532 U.S. at 687.

[261] *Id.* at 666.

[262] *Id.* at 685.

[263] *Id.* at 687.

[264] *Id.* at 685.

[265] *Id.* at 666 ("Around 168 players survive the second stage and advance to the final one . . . . Of those finalists, about a fourth qualify for membership in the PGA TOUR, and the rest gain membership in the NIKE TOUR.").

[266] *Id.* at 671.

case about a game—which necessarily depends upon an authority establishing the parameters of the competition—it was easy for the Court not to defer to the PGA Tour's own purported objectives. Because the PGA Tour, Inc. did not actually treat shot-making under fatigue as a metric for determining who could join the PGA Tour, the Supreme Court was ill-inclined to defer to the PGA Tour, Inc. when it adopted this position in litigation.[267] The PGA Tour, Inc.'s actual conduct belied its litigation position. Going back to the hypothetical posed above: If you maintain that "shot-making to yellow flags" is your objective when a color-blind golfer asks for a red flag, you better not use red flags when determining who can participate in the tournament.

The Court's reluctance to defer in *Martin* is dramatically different than the deferential tone used by the Supreme Court in *Davis*. In *Davis*, the defendant nursing school asserted in litigation that its purpose "was to train persons who could serve the nursing profession in all customary ways."[268] The Court accepted this framing; indeed, there was no reason to doubt the school's assertion (unlike in *Martin*, where the PGA Tour, Inc.'s own conduct was inconsistent with its stated purpose).[269] Moreover, because the *Davis* case involved a "real world" case (and not merely a game), the Court could evaluate whether the school's purpose made some sense as a means to a larger end.[270] And, of course, it did: Although a nursing school need not take the position that *all* of its graduates could "serve the nursing profession in all customary ways," the nursing school in *Davis* was free to carve out its own market niche and produce graduates that prospective employers would know were qualified for all "customary" nursing positions.[271]

To summarize: a "fundamental alteration" analysis requires consideration of the purpose or objective being pursued by the decision-maker. When a decision-maker has denied a requested modification or accommodation on behalf of the disabled, and the plaintiff has brought suit, the defendant will need to articulate its purpose or objective.[272] The court might defer to the defendant's framing, but a court cannot defer

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[267] *Id.*

[268] Se. Cmty. Coll. v. Davis, 442 U.S. 397, 398 (1979).

[269] *Id.* at 414.

[270] This is the "Alice in Wonderland" point made by Justice Scalia in *Martin*—because a game is an end to itself, it is necessarily arbitrary and difficult to measure as a means to a larger end. *Martin*, 532 U.S. at 705 (Scalia, J., dissenting).

[271] *Davis*, 442 U.S. at 398.

[272] *Martin*, 532 U.S. at 671.

completely because this would strip federal disability law of its teeth. If a defendant's own conduct belies its litigation position as to its objectives—as in *Martin*—the Court will reject the defendant's articulation of its objectives.[273] However, when a defendant acts consistently with its purported objectives, and when its stated purpose can be seen as serving a larger end (such as the desire of the nursing school in *Davis* to produce nurses who could be employed in any nursing position), the defendant's framing as to what is fundamental might be determinative in the litigation.[274]

2. Alteration

Under the Court's analysis in *Martin*, a defendant is not insulated from the ADA (or the Rehabilitation Act) merely by showing that its goals or objectives are "fundamental."[275] Instead, the defendant must also show that granting the accommodation request would result in an "alteration."[276] Here, the inquiry changes from (1) the importance of the goal being pursued by the defendant ("fundamental-ness") to (2) the way that this goal would be undermined by accommodating the plaintiff ("alteration").

In *Martin*, the "alteration" inquiry meant that the Court needed to address "the competitive effects of waiving" the walking requirement.[277] In concluding that Martin's request would not result in an alteration inconsistent with the goals of the ADA, the Court stressed that there had been—and presumably would be in the future—very few golfers who would be eligible for an exemption from the walking rule.[278] This is an incredibly important point for the question considered by this Article. What is implicit from the Court's reasoning is that its conclusion as to whether there had been an "alteration" might have changed if there were more people in Martin's position. If, for instance, 15-20% of the golfers on the PGA Tour qualified as "disabled," granting this larger cohort an exemption from the walking rule would be more likely to result in a "competitive effect" that qualified as an "alteration."

The *Martin* analysis illustrates that the "alteration" analysis must consider the consequences of a remedy on those *other than the disabled*

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[273] *Id.*

[274] *Davis*, 442 U.S. at 407.

[275] *Martin*, 532 U.S. at 663.

[276] *Id.* at 683.

[277] *Id.* at 701 (Scalia, J., dissenting).

[278] *Id.* at 690–91.

individual.[279] There are two aspects of this analysis. First, a court must consider how many people have disabilities similar to the plaintiff's disability.[280] Second, a court considers how the non-disabled will be affected by granting the disabled cohort (either big or small) an accommodation.[281]

Outside the context of a zero-sum situation, an accommodation is less likely to result in an alteration. Allowing a visually-impaired student to sit at the front of the classroom has no effect on other students, who can receive the same classroom experience and instruction from somewhere other than the first row.

But when there is an accommodation in a zero-sum competition (like a golf tournament or forced-curve examination), an alteration is much more likely to occur. Allowing Martin (and similarly-situated golfers) to compete with a cart makes it more likely that Martin (and other disabled golfers) will win a particular tournament (or place highly in the tournament); but the flip side of this coin is that all of the *other, non-accommodated* golfers now have a slightly *diminished* chance at success.

The *Martin* Court understood this "zero-sum competition" point. Ultimately, however, the Court doubted that the effect on other golfers was big enough to count as an "alteration," given that Martin's request for an accommodation would probably lead only to a "handful of requests" from other golfers seeking an exemption from the walking rule.[282] In short, because Martin's cohort group was small, the consequences on the rest of the field did not rise to the level of an "alteration." Dozens of appellate courts have used this rationale to conclude that an "alteration" would occur because of the consequences of the plaintiff's request on others.[283]

Another aspect of the "alteration" analysis is worth noting: To the extent that the plaintiff's requested remedy must be evaluated in terms of the effect on the defendant's goals/objectives, this analysis will depend on

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[279] *Id.* at 686–87.

[280] *See id.* at 682–83.

[281] *Id.*

[282] *Id.* at 691.

[283] *See e.g.*, Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587 (7th Cir. 2018) (proposed accommodations by disabled high school runner were rejected as fundamental alterations to the high school track program because they lowered competitive standards and guaranteed the disabled runner the results he desired); *ex rel.* A.L. v. Walt Disney Parks & Resorts U.S., 50 F.4th 1097, 1111 (11th Cir. 2022) ("Disney satisfied that burden by proving that the requested accommodation would have to be offered to many more guests other than [the plaintiff] and that the aggregate effect would fundamentally alter Disney's services.").

what it is that the plaintiff is ultimately seeking in the litigation. Small, minor requests are less likely to result in an "alteration" than are major, significant requests.

On this point, some scholars have helpfully distinguished between "accommodations" and "modifications." Professor Leslie Francis has described this difference:

> [A]ccommodations are adjustments or aids needed for an individual to perform capably, whereas modifications are changes to existing programs, policies, or structures. Accommodations are particularized and specific to the individuals needing them . . . . Modifications change constructed or policy environments that exclude people with disabilities.[284]

The *Alexander v. Choate* opinion nicely demonstrates the difference between a request for an accommodation and a modification, as the plaintiffs in that case had requested both types of relief.[285] Recall that *Alexander* involved Tennessee's newly-enacted 14-day limitation on the amount of inpatient days covered annually by the state's Medicaid program.[286] The plaintiffs in *Alexander* argued that this time limitation needed to be modified.[287] The time limitation advanced the budgetary goals of Tennessee, but the plaintiffs noted that these budgetary goals could be realized through measures other than the 14-day limitations.[288] These other routes to achieve Tennessee's fiscal goals were required, according to the plaintiffs, because they would not have a disproportionate impact on the disabled.[289] Thus, plaintiffs argued, the entire Tennessee program needed to be modified.[290] The Court, however, summarily rejected this argument,[291] despite acknowledging that the "State could achieve its immediate fiscal objectives in a way less harmful to the handicapped."[292] As the Court's analysis in *Alexander* makes clear, the "alteration" analysis is thus clearly distinguishable from the Supreme Court's Constitutional strict scrutiny test, which requires that an interest be pursued in the "least restrictive

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[284] Leslie Francis, *Debilitating* Southeastern Community College v. Davis*: Achieving the Promise of Disability Civil Rights*, 23 U.D.C.L. REV. 183, 184 (2020).

[285] Alexander v. Choate, 469 U.S. 287, 290 (1985).

[286] *Id.* at 289.

[287] *See id.*at 291.

[288] *Id.*

[289] *Id.*

[290] *Id.* at 306.

[291] *Id.* at 309.

[292] *Id.*

means" available to the actor.[293] Under the *Alexander* fact pattern, Tennessee would have failed a "strict scrutiny" analysis (it had other means by which to pursue its fiscal objectives), but it nevertheless passed the Court's fundamental alteration analysis.

The plaintiffs in *Alexander* also asked for an accommodation remedy.[294] According to the plaintiffs, Tennessee could—and should—apply a different time limitation for the disabled to reflect the reality that disabled Medicaid patients statistically require longer hospital visits.[295] Under this more narrow relief, Tennessee would not need to abandon ("modify") its durational limitations; rather, it would just need to apply it differently to the disabled. The Court rejected this extended-time accommodation, reasoning that equal results for the disabled and the non-disabled were not compelled under federal law.[296]

In *Martin*, the plaintiff did not request a "modification" but asked only for an "accommodation."[297] Had Martin asked the Court to compel the PGA Tour, Inc. to completely abandon its walking rule, the Court's conclusion in Martin that there had not been an "alteration" would seemingly change.[298] At the very least, the Court's analysis would need to be different: The Court's explanation that the remedy requested by Martin would have very limited actual effect is simply much tougher to accept if what the court is being asked to do is to eviscerate the walking rule for *all* participants.

The "alteration" question thus has an inverse relationship to the remedy requested by the plaintiff: The more dramatic the remedy requested by the plaintiff, the more likely it will be for a court to conclude that it would lead to an "alteration." Because modifications are a more dramatic remedy than are accommodations, modifications are more likely to result in a fundamental alteration. Stated differently: A court is more likely to accept a plaintiff's claim if it is based on an accommodation rather than a

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[293] *See* Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 289 (2017) (describing the "least restrictive [means]" analysis as one of the three prongs of strict scrutiny).

[294] *Alexander*, 469 U.S. at 290.

[295] *Id.* at 290.

[296] *Id.* at 302–03.

[297] PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001).

[298] Indeed, the *Martin* Court stated that a modification of hole diameter would fundamentally alter the game even though it affected all competitors equally. *Id.*

modification because a modification is more likely to result in a fundamental alteration.[299]

V. APPLICATION

> And time waits for no man, and it won't wait for me
> Yes, time waits for no one, and it won't wait for thee[300]

At the outset, it is worth noting how each of the three Supreme Court cases discussed above touches on an aspect of the question of accommodations on fact-pattern, first-year law school exams. In *Davis*, the Supreme Court deferred to the nursing school in finding that it need not make accommodations on behalf of a disabled applicant.[301] Law schools—like nursing schools—are professional schools training their students for a specialized field. The *Alexander* case deals with a time limitation. In *Alexander*, the Court determined that the defendant need not provide extra time under federal disability law,[302] even though the Court accepted the assertion that the defendant's time limitation had a disproportionate effect

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[299] The difference between a plaintiff's request for an individualized accommodation as opposed to a major modification can be roughly equated to the difference between as-applied and facial challenges. Professor Catherine Gage O'Grady has offered this valuable explanation as to the difference between as-applied and facial challenges:

> Under this "remedy-centered" approach, if a statute's challenger seeks to void the statute in its entirety against circumstances beyond the challenger's individual case—rather than simply as the statute is applied to their circumstances—the attack on the statute would be defined at the outset as "facial." . . . Thus, in a facial challenge, the plaintiff targets the statute in applications beyond the plaintiff's own case and generally seeks to invalidate the statute in its entirety with respect to those applications. In contrast, an "as-applied" challenge targets the constitutionality of the statute as it is applied in the particular context of the case, and seeks to invalidate it only as applied to those circumstances.

Catherine Gage O'Grady, *The Role of Speculation in Facial Challenges*, 53 ARI. L. REV. 867, 872–73 (2011).

[300] THE ROLLING STONES, *Time Waits for No One*, *on* IT'S ONLY ROCK 'N ROLL (Rolling Stones Records/Virgin Records 1974).

[301] Se. Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979).

[302] Alexander v. Choate, 469 U.S. 287, 303 (1985). In addition to rejecting the plaintiffs' request for an extra-time accommodation on behalf of the disabled, the *Alexander* Court also rejected the plaintiffs' proposed modification that would have prevented Tennessee from using time limitations at all in structuring its Medicaid program. *Id.*

on the disabled.[303] The accommodation considered by this article—extra time—is the exact accommodation rejected by the Court in *Alexander*.[304] Finally, *Martin* involves the game of golf—more specifically, it involves competition in golf tournaments.[305] First-year law school exams are like golf tournaments in that they are both zero-sum competitions in which participants are measured on a comparative (relative) basis.[306] (As will be explained later, however, first-year law school exams are definitely not a game.)

Determining whether extra-time for students with ADHD on fact-pattern, first-year law school exams is required under federal disability law depends on whether giving this accommodation would constitute a "fundamental alteration."[307] Whether there is a "fundamental alteration" must be analyzed according to the principles established in the trio of Supreme Court cases discussed above. This inquiry can be broken down into two components: (1) An evaluation of the importance of time pressure on first-year exams ("fundamental-ness") and (2) The effect this accommodation would have ("alteration") on the objectives served by the time pressure. These two questions are addressed below.

A. "Fundamental-ness"

As discussed above, the starting point for determining whether an accommodation involves a "fundamental" matter is to ascertain the purpose/objective being pursued by the decision-maker. But who is the decision-maker for law school exams?

1. Law Professor, Not Law School

Across all law schools, law professors are given wide latitude to determine almost all aspects of their courses and examinations.[308] A law

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[303] *Id.*

[304] *Id.*

[305] PGA Tour, Inc. v. Martin, 532 U.S. 661, 669 (2001) (Martin did not need an injunction to take his cart and play a round of golf at his local course; Martin needed an injunction because he wanted to use that cart in PGA Tour tournaments.).

[306] *See* Kellinne R. Linton, *Scholastic Steroids: Is Generation Rx Cognitively Cheating?*, 39 PEPP. L. REV. 989, 1035 (2012) (describing law school as a "zero sum" competition).

[307] *Alexander*, 469 U.S. at 300; *Martin*, 532 U.S. at 688; Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979).

[308] ANN M. BURKHART & ROBERT A. STEIN, LAW SCHOOL SUCCESS: A GUIDE TO STUDYING LAW AND TAKING LAW SCHOOL EXAMS 59–60 (3rd. ed. 2017) ("The specific content of each of the broad substantive courses varies depending on the casebook used and the specific subjects in which the professor is most interested and knowledgeable."); cf.

school will assign a course to a professor; it is generally understood that the course will cover common topics associated with that course. Thus, for instance, a Torts class would be expected to cover the negligence cause of action; a Property course would be expected to cover easements and adverse possession. A professor that decided to teach easements in Torts would probably be advised to cut this material.[309]

These basic parameters regarding subject matter are the only real limitations on a law professor's academic discretion. Law professors can pick their book and supplemental materials; they decide whether to lecture or use the Socratic method; they decide the pace of the class; they decide whether to cold call or warn students when they are on call; they decide if and how to incorporate technology into the class; they decide whether the environment will be relaxed or intense.

With regard to testing, the discretion given to law professors is near absolute. Law professors can generally use any method of testing that they prefer.[310] In some schools, there might be an informal tradition or expectation associated with particular courses. For instance, the use of multiple choice questions on first-year exams seems to be disfavored and discouraged at many schools. But I am not aware of any school that compels a professor to adopt a particular format for course examinations.

The individualized, professorial decision-making involved with law school exams should be contrasted with the admissions decision made by the nursing school in *Davis*. In *Davis*, the decision not to admit the disabled applicant was made by the school at large.[311] Because the decision

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ANDREW J. MCCLURG, 1L OF A RIDE: A WELL-TRAVELED PROFESSOR'S ROADMAP TO SUCCESS IN THE FIRST YEAR OF LAW SCHOOL 136 (3rd ed. 2017) ("Seriously, law professors can dress as they wish, say what they want to whomever they want, and come and go pretty much as they please. They enjoy more or less complete autonomy over their lives, a luxury enjoyed by few other workers.").

[309] *See* Frank S. Ravitch, *Intelligent Design in Public University Science Departments: Academic Freedom or Establishment of Religion*, 16 WM. & MARY BILL RTS. J. 1061, 1081 (2008) (discussing a hypothetical in which a law school is able to prevent a law professor from using a class on "agriculture and the law" to teach exclusively about seed biology); *see also* Rebecca Flanagan, *Better by Design: Implementing Meaningful Change for the Next Generation of Law Students*, 71 ME. L. REV. 103, 120 (2018) (discussing the "uniformity of the first-year curriculum across the majority of American law schools").

[310] *See* Kevin H. Smith, *"X-File" Law School Pedagogy: Keeping the Truth Out There*, 30 LOY. U. CHI. L.J. 27, 64–70 (1998) (giving advice to new law professors about how to exercise their substantial discretion regarding law school exams).

[311] *See Davis*, 442 U.S. at 400–02.

was made by the nursing school itself, the Court's analysis in *Davis* logically delved into the purposes or objectives being pursued by the school as an entity.[312]

Because law schools—as entities—do not make decisions regarding the style or format of law school exams, it does not make sense to ask whether the objectives or purposes being pursued by a *law school* are "fundamental." Law professors are the decision-makers with regard to exam format; thus, it is *the law professor's* objectives or goals which are relevant in determining whether an accommodation would constitute a fundamental alteration.

Asking about the objectives or goals of each individual law professor might seem like a tedious exercise. That said, the Supreme Court has consistently stressed that federal disability law requires an "individualized inquiry."[313] Admittedly, this concept is usually applied to the "disability" issue: Does an individual qualify as "disabled" for purposes of federal law?[314] But there is no logical reason why this "individualized inquiry" principle should be limited to the disability question. To the extent that the "fundamental alteration" question requires an inquiry into the purpose or objective being pursued by the decision-maker, the analysis must comport to the level at which the decision is being made. Individual law professors make decisions regarding the structure and format of their exams, so it is individual law professors whose objectives and goals must be considered. In *Davis*, *Alexander*, and *Martin*, it was organizations whose objectives and goals were considered by the Supreme Court, but that is because it was organizations who were the decision-makers in each of those three cases.[315]

This individualized inquiry might appear to preclude the generic legal conclusion that this article is building towards. But this is not the case. First, although I will explain the objectives and rationales behind *my* first-year law school exams, I do not believe that I am an outlier. Law professors that use time-pressured, fact pattern exams (the predominant way of testing in the first year of law school for approximately the last

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[312] *Id.* at 413.

[313] *See* Bragon v. Abbott, 524 U.S. 624, 657 (1998) (Rehnquist, C.J., concurring in part) ("It is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry.").

[314] *See, e.g.*, Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 354 (2010) (remarking that "the determination of whether an individual has a disability must be based on an individualized inquiry").

[315] *Davis*, 442 U.S. at 400; Alexander v. Choate, 469 U.S. 287, 289 (1985); PGA Tour, Inc. v. Martin, 532 U.S. 661, 665 (2001).

century[316]) tend to do so for the same reasons. Thus, although an individualized inquiry might be the appropriate level of analysis, if the individuals are pursuing the same objectives and goals, a general conclusion with regard to these exams/professors is possible.[317]

Of course, nothing *compels* a law professor to use fact-pattern exams or to impose time pressure. Thus, although this article concludes that federal law does not require law professors to give an extra-time accommodation on their first-year exams, nothing herein precludes professors from doing so (perhaps because their exam format and objectives are different than the format and objectives considered in this article)[318]. This article speaks only to those—like myself (and many, perhaps most, others)—who write fact-pattern law school exams and intend to place the students under time pressure for pedagogical reasons.

Because some law professors choose *not* to use time-pressured, fact-pattern exams in the first year, it is tempting to conclude that time pressure cannot be a "fundamental" part of any first-year exam. This line of thought is mistaken for two reasons. First, it ignores the distinction between an accommodation and a modification. Second, it forgets that law professors are given near absolute discretion to construct exams that measure the

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[316] *See* Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV. 657, 671–82 (1997) (tracing the development of the fact-pattern exam format to Christopher Columbus Langdell's introduction of the case method of instruction in the 1870s).

[317] BURKHART & STEIN, *supra* note 308, at 59–60. Given the discretion that law professors have in structuring their exams, it might seem somewhat surprising that so many of first-year professors use the same basic format. This coalescence suggests that these professors are pursuing common objectives which they all believe are advanced by time-pressured, first-year exams.

[318] What about a law professor who gives fact-pattern, first-year law school exams, intending to employ time pressure for the reasons explained in this article, but who prefers to give ADHD students extra time? A law professor might do that for one of these three reasons: (1) Because the law professor is pressured (or forced to) from law school or university administrators; (2) Because the law professor disagrees with the legal conclusions in this article; (3) Because the law professor agrees with the descriptive legal conclusions in this article, but normatively believes that accommodations should be required in this scenario (in other words, the professor thinks that Congress should have drafted more expansive disability laws). Assuming that this article correctly interprets federal law, these three scenarios raise a very interesting question: What is the legal liability for those giving an accommodation that is not required under federal law? Who has standing to bring such a suit? These topics will be explored in a future article.

attributes the professor chooses to stress; thus, what is fundamental to any particular exam cannot be answered by reference to the exam created by a different professor. These two points are fleshed out below.

Recall the difference between a modification and an accommodation. A modification asks that a defendant completely change its program or activity.[319] An accommodation asks that a defendant apply its program or activity differently for the disabled.[320] In *Alexander*, the plaintiffs asserted both a modification and an accommodation argument: The plaintiffs argued (1) that Tennessee should modify its program to eliminate the use of time restrictions or (2) that Tennessee should provide an accommodation for the disabled such that they were subject to different time restrictions.[321]

With regard to law school exams, it is possible to argue that federal disability law requires a modification such that professors are completely precluded from using fact-pattern, time-pressured exams.[322] On *this* claim, it might be relevant that some law professors currently give first-year exams that do not involve time pressure. If you are asking a defendant to completely modify what it is doing, it seems logical to consider that others are doing what the plaintiff is asking the court to order the defendant to do. Nevertheless, as applied to law school exams, a modification claim would almost surely be a losing argument. The *Alexander* Court rejected the modification argument asserted by the plaintiffs in that case; indeed, the Court appeared almost to ridicule the notion.[323] Thus, there is little support for the notion that law school professors are prevented from using time-pressured, fact-pattern exams. Indeed, it is nearly impossible to imagine a judge ever writing an opinion forbidding law school professors from using time-pressured, fact-pattern exams (an exam format that the judge undoubtedly experienced in law school).

In any event, no plaintiff (to my knowledge) has ever asked for this dramatic modification. Thus, there seems to be little debate as to whether law professors can give this type of exam. The only question is whether *accommodations* on behalf of the disabled are compelled under federal law

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[319] *See supra* text accompanying note 52.

[320] *See supra* text accompanying note 52.

[321] Alexander v. Choate, 469 U.S. 287, 291 (1985).

[322] *Cf.* Ruth Colker, *Test Validity: Faster is Not Necessarily Better*, 49 SETON HALL. L. REV. 679, 686 (2019) ("Because speeded exams cause a disparate impact on the basis of disability, entities should not be permitted to use such exams for admissions or selection purposes . . . .").

[323] *Alexander*, 469 U.S. at 290–92.

for this type of exam. That said, it is important to appreciate the difference between a modification and an accommodation. Blurring the line between the two invites the tempting (but incorrect) conclusion that *accommodations* are required because a *modification* to the exam structure is possible (although not mandated under federal law).

What this erroneous logic misses, of course, is the individual freedom that law professors have in defining the parameters of their exam and the metrics that each professor wants to measure. I choose to inject time pressure into my exam because it comports with what I am trying to measure and accomplish. Some other law professors have a different view and take a different approach. But nobody is asserting that federal law forces me to modify my exam to adopt the testing parameters that some of my colleagues employ.[324] (And I am definitely not asserting that all of my colleagues must employ my methodologies and practices.)

The pertinent question under federal disability law is not whether everyone must use the same format and structure when testing law students; the question is whether accommodations are warranted when a law professor *chooses* to employ a fact-pattern, time-pressured exam. What is fundamental to my exam thus depends upon how I have exercised the discretion given to me: What are the objectives and goals that I am pursuing and how do these objectives and goals comport with the format I have chosen? This individualized analysis is a necessary byproduct of the individual freedom that professors have in designing their own course and structuring their own examinations.

2. Time-Pressured in Fact?

In *Martin*, the PGA Tour, Inc. argued that the objective of its tournaments was to measure shot-making under fatigue.[325] But the Supreme Court ultimately concluded that fatigue (or, at least, the fatigue associated with walking eighteen holes) was not a fundamental aspect of tournaments on the PGA Tour.[326] The Court noted that the energy required to walk eighteen holes of golf—which was the rule for which Martin sought an accommodation—was minimal.[327] More damning to the PGA Tour, Inc.'s position, however, was the fact that it did not impose a walking requirement in the qualifying tournaments that determined who

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[325] PGA Tour, Inc. v. Martin, 532 U.S. 661, 686 (2001).

[326] *Id.* at 690.

[327] *Id.* at 687.

was eligible to be a professional golfer on the PGA Tour.[328] The big picture that emerges from *Martin* is this: A court is disinclined to defer to a defendant's argument that something is "fundamental" if the record evidence—including the defendant's own conduct—undermines this litigation position.[329]

In this article, I am asserting that time-pressure is a fundamental aspect of my (and many others') first-year law school exams. The *Martin* opinion teaches that, at the very least, this assertion better not be undermined by the available evidence. Ideally, however, there will be empirical data addressing the question.

I devised an examination methodology that would directly prove how important time was to law school exams.[330] I worked through the

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[328] *Id.* at 685–86.

[329] *See id.* at 671.

[330] Under my methodology, I would give students two midterm exams. For the first midterm, half the class would get 40 minutes to complete the exam and the other half would get 60 minutes. (Students having accommodation approval would get their ccommodation; thus, a student with time-and-half in the 60 minute cohort would get 90 minutes). For the second midterm, the times would be flipped for each cohort. I would grade each midterm using the exact same grading rubric, but completely blind as to how much time each student had to answer the question. The results would have demonstrated how much student answers improved when more time was given. Because I was teaching both Torts and Property this year, I was going to employ this methodology for both classes, so as to demonstrate that the benefits of additional time were not limited to one subject matter. (An added benefit was that the students in my Torts and Property classes are mostly different; of the 64 students in Property and the 88 students in Torts, only 15 were in both classes. Thus, the methodology would have involved data from two sets with almost completely different students, thus adding to the validity of the results.).

Because this format used real students taking real exams for real grades, I was extremely careful to construct this proposal to make sure that this methodology would not alter the grades that students would otherwise get under "normal" testing conditions. Most importantly, I wanted to ensure that the scores for each cohort could be mathematically normalized, because I knew that the cohort receiving 60 minutes would score higher than the cohort receiving 40 minutes. On this front, I consulted with an expert with a Pd.D in biostatistics whose primary research involves collaborative projects in many different fields and disciplines. After consultations and discussions, I was assured that the scores could be mathematically normalized and the students treated fairly (even if, for instance, one midterm was more time pressured than the other and there were dissimilar distribution curves for each cohort on the two exams).

Institutional Review Board process at my university and received approval for my testing method; I was prepared to use it in my Fall 2024 Property II class and my Winter 2024-25 Torts II class. Unfortunately, university higher-ups later informed me that I must not proceed. This was a disappointing result.

That said, there is existing data that speaks to the importance of time pressure and speed on law school exams. In 2004, Professor William Henderson of the University of Indiana School of Law—Bloomington published the results of an empirical assessment that addresses the importance of time and speed on law school exams. Professor Henderson's analysis shows that while the LSAT is a strong predictor of how law students will perform on in-class, timed law school exams, it is not a strong predictor of student grades on take-home exams and papers.[331] The reason, Henderson posits, is that both the LSAT and in-class law school exams are fundamentally time-pressured exams and reward student speed.[332] Because time is not fundamental to take-home exams and papers, the LSAT loses much of its predictive power with regard to these forms of student assessment.[333] In short, the LSAT and in-class, timed law exams are correlated because of the importance of speed to both exams.[334]

Professor Henderson's paper is the best data on the importance of time to law school exams. But this empirical evidence merely supports what I believe every law professor, law student, lawyer, and judge knows to be true: Time pressure is a fundamental aspect of first-year law school exams.[335]

I took other steps in my proposal to ensure fairness and to validate the empirical results. For instance, the two cohorts would be based on a "snake draft" from the final results of the first quarter of the class. (I was going to use this methodology for Property II and Torts II.) Thus, the student who received the top score for Property I would be placed in the first cohort, students who received the second and third top scores in Property I would be placed in the second cohort, etc. Moreover, for each course, one of the midterms was to be a recycled question that I had used before so as to insulate me against the criticism that I was "gaming" the process by intentionally creating exams with fundamental time pressure.

[331] *See* William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 1016 (2004).

[332] *Id.*

[333] *See id.*

[334] *See id.*

[335] *See id.* at 980 ("Similarly, within the legal academy, it is widely acknowledged that the typical law school exam is given under significant time pressure."); Philip C. Kissam, *Law*

Whether first-year exams *should be* time pressured is a different question, of course; this topic will be addressed in the next section of this paper. But as to whether these exams are, in fact, time pressured, there seems to be widespread recognition of this reality. This aspect of first-year law school exams is often stressed in self-help books that attempt to prepare students for first-year law school exams.[336] Moreover, those within the academy itself frequently acknowledge this aspect of law school exams: "Although this issue has not been a topic of systematic investigation, there appears be a general consensus among law professors that time pressure is a standard component of most law school exams."[337]

School Examinations, 42 VAND. L. REV. 433, 438 (1989) (noting that "the concept of a time constraint is the most widely shared characteristic of law school exams"); *see also* Sam Bagenstos, *On Timed Exams*, PRAWFSBLAWG (May 14, 2012), https://prawfsblawg.blogs.com/prawfsblawg/2012/05/on-timed-exams.html [https://perma.cc/4K55-26TP] ("First of all, I think it's clear that on most law school exams, everyone would benefit from extra time.").

[336] MCCLURG, *supra* note 308, at 248 ("Although some professors give take-home exams, most exams are held within strict time limits . . . ."); *Id.* at 273 ("Because time is scarce on most law school exams, it's crucial that you effectively allocate your time . . . ."); ALEX SCHIMEL, LAW SCHOOL EXAMS A GUIDE TO BETTER GRADES 73 (3rd ed. 2022) ("You must budget your time well during an exam."); IAN E. SCOTT, LAW SCHOOL LOWDOWN 122 (2013) ("Another key to law school success is time management on exams."). Many first-year law student self-help books stress the use of time constraints when discussing exam preparation techniques. *See, e.g.*, RAMY, *supra* note 56 ("Be sure to mimic exam conditions whenever answering a sample exam. . . . this means taking the exam under time constraints."); KIMM ALAYNE WALTON & LAZAR EMANUEL, STRATEGIES & TACTICS FOR THE FIRST YEAR LAW STUDENT: MAXIMIZE YOUR GRADES 107 (2010) ("Poor time management skills are the downfall of many students, and practicing with old exams under time pressure is the best way to improve those skills.").

[337] *See* Henderson, *supra* note 331 at 994; *See also* Sandra L. Simpson, *Law Students Left Behind: Law Schools' Role in Remedying the Devastating Effects of Federal Education Policy*, 107 MINN. L. REV. 2561, 2609 (2023) (acknowledging the existence of—and criticizing—time pressured law school exams); R. MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS 244 (1999) (asserting that "[m]ost law school exams are time-pressured, some quite drastically so"); HELEN S. SHAPO & MARSHALL S. SHAPO, LAW SCHOOL WITHOUT FEAR: STRATEGIES FOR SUCCESS 171 (1996) (proclaiming that success on law school exams depends not on the ability to write "the best answer[]" but rather the "best answer[] you can write in three hours"); Kissam, *supra* note 335, at 438 ("[T]he concept of a time constraint is the most widely shared characteristic of law school exams . . . .").

I hope that somebody is able to perform the type of testing methodology I wanted to pursue for this paper. My research would have verified that time was important to performance on law school exams; it would also have offered an assessment of *how important* time was. I believe the results would have been dramatic and eye-opening.

Nevertheless, the absence of this precise empirical data does not undermine the conclusion that time is, in fact, fundamental to first-year, fact pattern law school exams. In *Martin*, the PGA Tour, Inc. asserted that shot-making while fatigued was fundamental to its tournaments, but the record evidence (including the PGA Tour, Inc.'s own behavior) contradicted this assertion.[338] I am asserting that time pressure is fundamental to my law school exams (and those of many others);[339] all of the available evidence supports this assertion.

3. Time-Pressured, Justified

That first-year, fact pattern law school exams are time pressured in fact is not the end of the "fundamental-ness" inquiry. The objective being pursued must also be considered.

As Justice Scalia appreciated in *Martin*, determining whether something is "fundamental" is to measure its importance to the achievement of a particular objective.[340] To know what is "fundamental," then, it is necessary to identify the end goal being pursued. This is what made the *Martin* analysis particularly difficult. Because golf is simply a game, it is difficult to think of it in terms of being a means to an end. In some sense, all games—and the rules which are necessary for a game to function—are essentially arbitrary. Football in America[341] is played on 100-yard fields, but is that rule really "fundamental" when football in Canada is played on 110-yard fields?[342] Rules must exist for the game to be played, yet it is somewhat nonsensical to think of any of them as "fundamental" when there is no larger objective or goal being pursued.

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[338] PGA Tour, Inc. v. Martin, 532 U.S. 661, 686–87 (2001).

[339] To further buttress the claim that time is fundamental to law school exams, I have attached some samples of exam questions I have used in the past (including exams from before this article was even conceived) with the corresponding amount of time allotted for each question. *See infra* Appendix A.

[340] *See Martin*, at 700 (Scalia, J., dissenting) ("To say that something is 'essential' is ordinarily to say that it is necessary to the achievement of a certain object.").

[341] By this I mean "American football," i.e., not "fútbol."

[342] *CFL Field Dimensions*, SCOUTING ACADEMY, https://scoutingacademy.com/wp-content/uploads/2021/09/CFL-Field.pdf [https://perma.cc/NZ48-BKUT].

Outside the context of games, however, the "fundamental-ness" inquiry necessarily must consider what objectives the defendant is trying to achieve. This is exactly what the Court did in both the *Davis* and *Alexander* cases. In *Davis*, the Court deferred to the decision of the nursing school to refuse admittance to a deaf student because the school's objective "was to train persons who could serve the nursing profession in all customary ways."[343] In *Alexander*, the Court approved of Tennessee's time restriction for Medicaid hospital stays because it served the larger objective of the State's budgetary objectives.[344]

Thus, in determining whether time pressure is "fundamental" to a law professor's exam, it is necessary to wrestle with this question: What is the end being served, and how do the means selected by the defendant advance this end? In other words: *Why* do law professors use time pressure on their law-school exams?

a. Law Professors Are Entitled To Deference

Before considering the reasons that law professors use time pressure on law school exams, it is imperative to appreciate the deferential approach that is warranted for this inquiry.

Supreme Court case law leaves no doubt that academics are entitled to deference when making academic decisions. This principle was applied in *Davis*, when the Supreme Court deferred to the nursing school's explanation that admitting a deaf nursing student would undermine its objective of having graduates who could perform all customary nursing tasks.[345] The deference afforded to academics is not just an ADA concept; the notion that academics are entitled to deference has been applied in a variety of contexts.[346] The principle applies with particular force when academics are making *purely* academic decisions, as the Court has explained: "Courts are particularly ill-equipped to evaluate academic

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[343] Se. Cmty. Coll. v. Davis, 442 U.S. 398, 410 (1979).

[344] Alexander v. Choate, 469 U.S. 287, 308 (1985).

[345] *Davis*, 442 U.S. at 398.

[346] See Joseph M. Flanders, *Academic Student Dismissals at Public Institutions of Higher Education: When is Academic Deference Not an Issue*, 34 J.C. & U.L. 21, 24 (2007) ("Consequently, the notion of 'academic' or 'judicial' deference has become an accepted maxim of both the American judiciary and institutions of higher education."); Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J.C. & U.L. 505, 524 (2006) ("There is a tradition of Supreme Court deference to higher education authorities' academic judgments.").

performance."[347] In even more forceful language, the Supreme Court has clarified that courts should be extremely reluctant to doubt the rationales motivating an academic decision:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[348]

Not surprisingly, lower courts have consistently referenced this deference principle in the slew of cases rejecting ADA claims brought against academic institutions.[349]

The deference afforded academics when making academic decisions means that there is a very low bar in justifying the use of time pressure on first-year law school exams. Thus, it is probably sufficient—legally speaking—to (1) demonstrate that time is an important component of what is being tested (which was addressed in the section above) and then to (2) demonstrate that many first-year professors employ the same methodology. Recall that a court may not "override [an academic decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[350] Administering time-pressured, first-year law school exams is not a "substantial departure from accepted academic norms." In fact, it is just the opposite: Many (probably most) first-year law school exams are time pressured.[351] Given this academic norm, the deference required under Supreme Court caselaw seems to compel courts to assume that there must be good reasons as to why so many law professors employ time pressure on law school exams. Indeed, a court could probably end the legal analysis of "fundamental-ness" with this point.

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[347] Bd. of Curators v. Horowitz, 435 U.S. 78, 92 (1978) (Powell, J., concurring).

[348] Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

[349] *See, e.g.*, ROTHSTEIN & IRZYK, *supra* note 19 at § 3:27.

[350] *See Ewing*, 474 U.S. at 225.

[351] *See* Joan M. Rocklin, *Exam-Writing Instruction in a Classroom Near You: Why It Should Be Done and How To Do It*, 22 J. LEGAL. WRITING. INST. 189, 206 (2018) ("[A]t most law schools, time-compressed exams dominate the first year of law school . . . .").

Nevertheless, this article will proceed to justify the use of time pressure on first-year exams. But, in offering this explanation, it is critical to remember the legal deference to which academics are entitled. Thus, the question is not whether first-year professors administering time-pressured exams have adopted the "right" objectives or are using the best means by which to achieve these objectives. Instead, the legal question is (at most) this: Is there a sensible rationale behind the common practice of using time pressure on first-year law school exams?

b. The Justification for Time Pressure on First-Year Law School Exams

The starting point for understanding why law professors use time pressure on their first-year law school exams is appreciating how first-year law school grades are used by prospective employers. This information is somewhat common knowledge for "insiders"—law students, law professors, lawyers, and judges. But given that ADA accommodation decisions are frequently being made by those without direct familiarity with the intricacies of law school, it is imperative to document the importance of law school grades and how this information is used by prospective employers.

Law school grades—particularly first-year law school grades—are more important than grades at other professional schools. For instance, medical school grades have been described as "not [] as important as you think."[352] Indeed, many medical schools have abandoned grades (either partially or completely) in favor of a pass-fail system.[353] Obviously, then, medical schools play a different role in the process by which students eventually become employed as doctors. In the medical field, the most important factors in determining where a student will complete a residency

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[352] *See* Bill Gossman, *How Important are Medical School Grades to Getting into a Residency?*, STATPEARLS (Mar. 3, 2021), https://www.statpearls.com/ExamPrep/medical-student-resources/how-important-are-medical-school-grades-to-getting-into-a-residency [https://perma.cc/897K-Z25W]

[353] *See Pass Fail Medical Schools*, NEXT GRADUATE, https://nextgraduate.org/colleges/pass-fail-medical-schools/ [https://perma.cc/63AZ-9XCY] ("An exact count of medical schools using the pass/fail grading system remains elusive, but it's estimated that over 79 institutions use this system for pre-clinical years, the majority being AAMC and MD medical schools."); *Grading Systems Used in Medical Schools*, AAMC, https://www.aamc.org/data-reports/curriculum-reports/data/grading-systems-used-medical-school-programs [https://perma.cc/7AQL-ZPKC] (documenting the momentum in favor of pass-fail grading).

program (where a student is "matched") are (1) how a student performs on the standardized medical boards, (2) letters of recommendation, and (3) a Dean's letter.[354] This is not to say that what is covered in medical school classes is not important; a student that does well in medical school classes is more likely to do well on the all-important medical board exams.[355] But medical school grades are not an important sorting metric.

It is the opposite for law school grades, particularly first-year law school grades. Most large law firms will refuse to consider students for important summer clerkships (usually the first step towards receiving a full employment offer) unless the student satisfies the firm's grade cutoff.[356] Thus, for instance, a large law firm might have a policy that they will only interview Penn law students that are in the top 25% of their class and only interview Pittsburgh law students that are in the top 5% of their class. The reliance on law school grades is most acute with large law firms hiring summer clerks, but the same phenomenon occurs even outside of "big law." Smaller firms might refuse to consider candidates for a summer clerkship that are not, at least, in the top half of their law school class. Interviews for summer clerkships are usually conducted at the beginning of a student's second year in law school, which means that the class rank "cut-off" is based on how a student has done in the first year of courses.[357]

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[354] *See How to Land the Medical Residency You Want: 7 Criteria You'll Be Evaluated On*, SGU (July 19, 2022), https://www.sgu.edu/blog/medical/how-to-land-the-medical-residency-you-want/ [https://perma.cc/6YUZ-82FR]

[355] *See* Yasin Ibrahim et al., *Predictors of Performance on USMLE Step 1*, SW. RESPIRATORY & CRITICAL CARE CHRONS. (Apr. 3, 2021), https://pulmonarychronicles.com/index.php/pulmonarychronicles/article/view/813/1825 [https://perma.cc/8L3Z-ZR98] ("Other researchers found that performance in pre-clinical classes was a much stronger predictor of USMLE step 1 performance than pre-admission variables such as MCAT scores.").

[356] *See* Joe Pollak & Derek Meeker, *4 Truths about On-Campus Interviews ("OCI") that Law School Applicants Should Know*, SPIVEY CONSULTING (Aug. 6, 2019), https://www.spiveyconsulting.com/blog-post/4-truths-about-on-campus-interviews-oci/ [https://perma.cc/32QV-XDMZ] ("All legal employers have a certain minimum GPA or class rank that they are looking for [when hiring for summer clerkships.]").

[357] *See Don't Believe the Hype: First-Year Grades are NOT the Most Important Ones You'll Earn*, BARBRI (Mar. 2, 2023), https://lawpreview.barbri.com/first-year-grades-are-not-the-most-important/ [https://perma.cc/XCM6-4GG8] ("The vast majority of law firm recruiting takes place during the fall semester of law students' 2L year. At that time, 1L grades, and honors like Law Review membership, are all that employers have at their disposal when deciding who to interview for a coveted 2L Summer Associate slot.").

Even beyond summer clerkships at law firms, grades are often a very important factor in determining whether a law student is a good candidate for full employment.[358] A judge hiring a judicial clerk, or a school hiring a law professor, would usually not even consider a candidate with poor law school grades.[359] Similarly, a business considering whether to hire a candidate for an in-house counsel position might pass over a candidate who finished in the bottom of her law school class. In short, law school grades—particularly first-year law school grades—play an important role in the complicated process that sorts law students to different types of legal employers.

It is thus fair to say that law schools and medical schools serve different market needs. Whereas the primary medical school objective—and outcome—is the acquisition of knowledge, law schools are not limited to this role. Of course, law schools do impart knowledge and instruction on lawyering skills, but law schools also serve the function of sorting students. At a macro level, this makes sense. Whereas medicine is a collaborative endeavor in which a doctor is helping a patient against an illness or disease (cancer, heart disease, broken bone), the law (particularly litigation) is a field in which a lawyer is often helping a client in a dispute with another person, who is also represented by a lawyer. Thus, whereas medical school needs to train a doctor to help a patient fight cancer, law school needs to train a lawyer to do battle with another lawyer. The practice of law is, by its nature, often cut-throat and zero-sum. Thus, what the legal market generally wants in prospective lawyers is not lawyers who are "good" or "smart," but lawyers who are *better than* the lawyers with

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[358] *See* DONNA GERSON, ASKED & ANSWERED: YOUR GUIDE TO LAW SCHOOL SUCCESS 110 (2008) ("Many lawyers are interested in your academic history and will inquire about your grades."); Leah Bensen Lipskar, *Learning Disabilities and the ADA: A Guide for Successful Learning Disabled Students Considering a Career in the Law*, 3 U. PA. J. LAB. & EMP. L. 647, 660 (2001) ("Legal employers seem to consider law school academic performance to be the best indicator of future success as a lawyer.").

[359] *See* Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 762 (2004) ("Law professors are a self-perpetuating elite, chosen in overwhelming part for a single skill: the ability to do well consistently on law school examinations, primarily those taken as 1L's . . . ."); *General Qualifications*, UNIV. TEX. AT AUS. SCH. L., https://law.utexas.edu/judicial-clerkships/qualifications/ [https://perma.cc/S39H-6JN7] ("Each judge selects candidates according to factors they have personally identified, the most common of which is usually GPA and law school.").

whom they will battle in practice.[360] The practice of medicine is a collaborative win-win; the practice of law is (often) Darwinian win-lose.

Given the cut-throat nature of the legal profession and the market for employment, it is obvious why law schools implement a mandatory curve in first-year classes.[361] What a legal employer really needs to know is how good a first-year student is compared to other students in the class. The forced-curve facilitates this comparison.[362] If half of the class maintained a 4.0 GPA during the first year of law school, a large law firm (looking to hire, perhaps, only three or four summer associates from a particular school) would not have the information it desired as to the relative abilities of the candidates. Simply put, the forced first-year curve is a byproduct of the cut-throat legal profession and the information desired by employers as to the relative abilities of the prospective employees.[363] The current structure did not develop by accident.[364]

The fact that legal employers make actual use of the grades earned on time-pressured, fact pattern law school exams is alone sufficient to justify

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[360] Cheryl Rich Heisler, *Don't Let Law School Grades Determine Whether You Make the Grade*, ABA (Sep. 30, 2021), https://www.americanbar.org/groups/law_students/resources/student-lawyer/student-essentials/dont-let-law-school-grades-determine-whether-you-make-the-grade/ [https://perma.cc/FH4T-68DN].

[361] This is one arena in which law professors do not have discretion: At almost all law schools, the school imposes a mandatory curve to which law professors must adhere. *See* STEVEN R. SEDBERRY, LAW SCHOOL LABYRINTH 147 (2009) ("Your law school professors grade exams on a curve. There are a predetermined number of A grades, B grades, and so on."). With regard to first-year law school grades, the curve is more tightly dictated, meaning law professors have even less discretion in the grades they can give. *See* CHRISTENSEN, *supra* note 42 at 11–12.

[362] *See* Bruce Pardy, *Head Starts and Extra Time: Academic Accommodation on Post-secondary Exams and Assignments for Students with Cognitive and Mental Disabilities*, 25 EDUC. & L.J. 192, 199 (2016) ("The competitive nature of assessment is especially acute where professors are subject to a mandatory grade curve.").

[363] *See* CHRISTENSEN, *supra* note 42, at 11–12 ("I believe that the job market, in part, keeps the curve in place in legal education . . . . But the competition in law school is caused, in part, by the job market . . . . In order for law firms (and other legal employers) to determine who they will hire, legal education has created a hierarchy.").

[364] *See* Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience*, 70 ARK. L. REV. 959, 981 (2018) (internal quotations omitted) ("Grades are a necessary feature of the academic environment, and neither the focus on grades and rankings in the hiring process or the need for giving grades in the academic setting is going to change any time soon . . . .").

this type of exam format. As mentioned above, it was probably sufficient to simply proclaim that academics are entitled to deference on academic matters and then to note the fact that many (probably most) law professors choose to use time-pressured, fact-pattern exams for first-year classes.[365] That said, the analysis has pushed deeper towards a discussion of how those first-year exams are used in the "real world" by real employers. These time-pressured first-year exams are serving a purpose, as demonstrated by the fact that employers make important employment decisions based on the sorting that occurs in first-year exams.[366] The proof, so to say, is in the pudding.

The analysis could stop there, but it is possible to keep digging deeper, and this article will do so:[367] Why does the law school sorting process desired by employers typically involve time-pressured, fact-pattern exams? Would exams administered without time pressure (such as multiple choice exams or take-home exams) be just as valuable of a sorting mechanism? The answer to this question is—in my belief—"no." Time-pressured, fact-pattern exams most closely measure the skills valuable to prospective employers.[368] It is not happenstance that the format for first-year law school exams has remained roughly constant for decades.

First, let's remove the "time-pressured" aspect of first-year exams and focus instead on the "fact-pattern" aspect. These types of exams test a student's ability to perform a "legal analysis" that involves taking a given set of facts and applying legal rules or principles to those facts.[369] Obviously, to perform this legal analysis, the student must "know" and understand the rules.[370] But knowing the law is only the beginning. Indeed,

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[365] *See* discussion *supra* Section V.A.3.

[366] Heisler, *supra* note 360.

[367] University administrators, who are often making the decisions regarding law school accommodations, will often be clueless as to the real-world consequences of first-year grades and thus might require further explanation.

[368] Pardy, *supra* note 362, at 199.

[369] *See* JOHN C. DERNBACH, WRITING ESSAY EXAMS TO SUCCESS IN LAW SCHOOL (NOT JUST SURVIVE) 2 (3rd ed. 2010) (discussing the requirement that a student apply the law on a fact-pattern exam).

[370] *See* Dr. Chance Meyer & Nicole Noël, *The Gray Box of Legal Analysis: Disentangling Knowledge and Skill*, 101 U. DET. MERCY L. REV. 287, 308–09 (2024) ("Issue-spotting is thought to be "one of the fundamental lawyering skills," trainable through practice. But no amount of practice will produce inferences only knowledge can supply."). Dr. Meyer and Ms. Noël argue that the relatively recent emphasis on skill practice has undermined the fundamental importance of knowledge acquisition, to the

in most law schools, the first-year students will be well-versed in "the law." That is, they will have memorized the rules and be familiar with the cases applying those rules.[371] Knowledge of the law is usually not where the sorting occurs.[372]

Instead, on most exams, the primary sorting occurs in the "application" stage.[373] This is the step where the given facts are analyzed under the law. I like to call this skill "law doing," to be distinguished from "law knowing." Although it is impossible to perform a legal analysis—"law doing"—without knowledge of the law, "law knowing" is not sufficient. The process of performing a legal analysis is a skill that is tricky to teach; indeed, much of the first year of law school is designed to help students get better at legal analysis.[374] That said, like any skill—swinging a golf club, playing a piano, delivering a speech—it needs to be practiced. I can watch Phil Mickelson swing a golf club all day, but until I start swinging a club myself I will not have dramatic improvement.[375]

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detriment of students; they recommend a renewed emphasis on outlining to correct this problem. *See id.* at 325–31.

[371] *See* SCOTT, *supra* note 336, at 133 ("Remember that almost everyone in your class knows the rule or law, so the application of the facts is the only way to test whether a student truly understands the material.").

[372] *See* MCCLURG, *supra* note 308, at 261 ("Students spend tons of time memorizing the law and too little time learning and practicing the *process* of law school exam-taking. Many students know all the law there is to know, but still don't excel on exams because they never learned how to take a law school exam.").

[373] *See* DERNBACH, *supra* note 369, at 1–2 ("If you don't know the legal rules, the exam will be impossible, but your knowledge of the legal rules is only a starting point . . . . You need to be able to apply that law to specific factual situations; that's the most important part of the exam.").

[374] *See* Christos D. Strubakos, *What can Computational Nueroscience Teach Us About Cognition, Legal Reasoning, and Legal Pedegogy?*, 101 U. Det. Mercy L. Rev. 357, 373 (2024) (discussing tactics that can be used to get first-year law students to "think like lawyers").

[375] *See* LLEWELLYN, *supra* note 256, at 57.

> For it is not by watching him juggle the balls that you will learn. It is by matching his results against your own, by criticizing the process you have gone through in the light of the process he is going through. Indeed if you have not tried the game yourself, *you will not follow him*. The man who sees line-play in the football game is the man who once tried playing on the line himself.

Id.

The "law-doing" skill that is measured on first-year law school exams is often unappreciated or, at least, underappreciated. Thus, for instance, a university administrator making a determination as to whether a student with ADHD is entitled to extra time on a law school exam might equate a law school exam to a biology exam: "You either know the parts of a flower or not, and you either know Property law or not." This is a mistake. A law student who gets an "A" in Property might have the exact same "knowledge" of Property rules as does a student who gets a "C," it is just that the "A" student is better able to *use* that substantive knowledge to perform a higher-quality legal analysis. Law students—particularly green law students new to law school—are prone to these same misconceptions. Thus, they will often be inclined to apply the same study techniques that they used in undergraduate classes, where the task truly was simple knowledge acquisition. They sit in their library carrel, memorizing the elements of a cause of action and rereading the commercial outlines they purchased, resistant to the advice they have received from their first-year professors, which is that they need to practice legal analysis by talking about concepts within their study group, doing practice exams, and debating issues with classmates. It usually takes a round of exams for students to even start appreciating that law knowledge is not sufficient—albeit definitely necessary—for a good legal analysis.

Most first-year law professors are trying to measure this elusive skill of legal analysis—of "thinking like a lawyer."[376] This is why most law professors overwhelmingly use fact-pattern exams in first-year classes. Fact-pattern exams are a good—in my opinion, the best—way to measure legal analysis.[377] Multiple choice exams can measure law knowledge, but it is somewhat difficult to write multiple choice questions that test law application. Issue spotting—also an important component of "thinking like a lawyer"—is extremely hard to measure in multiple choice exams.

When young associates begin practice, they will generally not be performing tasks that resemble a multiple choice question. But lawyers

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[376] *See* BURKHART & STEIN, *supra* note 308, at 73 ("You continually should keep in mind that the primary objective of the first year of law school is to learn the skill of legal analysis—of 'thinking like a lawyer.'"); *see* Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 413–14 (attempting to dissect the various cognitive and practical components of "thinking like a lawyer").

[377] *See* DERNBACH, *supra* note 369, at xx ("Law school essay exams thus reflect, in important ways, the practice of law . . . . They are intended to provide a basis for evaluating your ability to 'think like a lawyer.'").

very frequently have to engage in tasks that replicate the process of taking a fact-pattern exam. When law firms hire young associates out of law school (particularly the types of firms that travel to law school campuses to conduct interviews), they will depend on these young associates to perform legal analysis. Legal analysis is what lawyers do. Therefore, employers are naturally interested in knowing how good the prospective employees are at this skill. Law schools perform this sorting function ("add value"), and the fact-pattern exam is crucial to this process.[378] The fact pattern exam resembles the legal analysis that lawyers have to perform.

Of course, legal analysis is not the only thing that lawyers do. Most lawyers will need to have many other skills in order to handle the day-to-day tasks associated with their job. But these other skills are not what is being taught—and tested on—in the first year of law school. The primacy of legal analysis within the first year of law school corresponds to the primacy of legal analysis to most legal positions. Some lawyers are primarily engaged in legal analysis (appellate attorneys, appellate judges, tax attorneys, bankruptcy attorneys) while others engage in legal analysis less frequently (prosecutors, trial attorneys, sports agents), but all attorneys at least occasionally have to perform a legal analysis as part of their job. Legal analysis is the core of lawyering; it is no accident, then, that it is the core of the first-year law school curriculum. Law schools need to teach students how to do legal analysis; law schools also need to measure how good students are at legal analysis because that information is desired by legal employers (particularly those who are hiring for positions in which the primary skill required is legal analysis). Fact-pattern exams are the best way to measure how well a student can perform a legal analysis.

This explains the use of fact-pattern exams, but what about the time pressure aspect of first-year law school exams? Law schools use fact-pattern exams because those exams test a skill valued by legal employers. Do legal employers also want information as to the ability of students to perform a legal analysis within time restraints? Stated differently: Do employers have a preference for speed?

Occasionally, a truth can be so fundamental and obvious that it eludes perception. This has sometimes been my experience in discussing the relevance of speed to a legal analysis. It would seem that the preference for speed might be obvious to *a profession that often bills by the hour*. If numerous lawyers measure their value by the time spent on a project or task, it stands to reason that it is important to know how much an attorney

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[378] *See* CHRISTENSEN, *supra* note 42, at 11–12.

can accomplish in an hour. Sadly, however, this reality is sometimes not appreciated.[379]

Often times, the failure to recognize the importance of speed is because the wrong question is being considered. For instance, one might argue that speed is not important for all legal jobs. This premise is questionable (more on this later);[380] in any event, this line of thinking is misguided. Professors need not limit their tests to attributes desired by all prospective employers; indeed, this would probably be impossible to do. Rather, professors and schools are given discretion to test on what they view as important or needed. This is abundantly clear from the Court's analysis in *Davis*, where the Court gave the nursing school freedom to define what skills it wanted its students to possess.[381]

The question is thus not whether all legal employers value speed but instead whether some employers value speed such that law professors are justified in using time pressure as a component of their first-year exams.[382] To ask this question is to answer it.

In a market, faster is better, all other things being equal. Time is an essential variable.[383] Henry Ford understood this, and made cars more

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[379] Occasionally, my extensive conversations about this issue have led me to conclude that some might appreciate this reality, but they simply do not like it. They *wish* that legal analysis could be performed free from the pesky time pressures compelled by the real world (clients, bosses, rules, etc.). But refusing to accept a reality does not change it. A descriptive legal analysis—such as this article—must be based on the world as it exists. In determining whether there is a "fundamental alteration" under the ADA, it is the realities a defendant must confront in its industry or market that is controlling—not the ideal world imagined by some. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001).

[380] *See* Michael T. Snyder, *An Examination of the New York State Board of Law Examiners' Policy Towards Individuals with Learning Disabilities*, FREE LIBR. https://www.thefreelibrary.com/An+examination+of+the+New+York+State+Board+of+Law+Examiners%27+policy...-a054152848 [https://perma.cc/PMQ3-KWLY]. (discussing Jason Millman's conclusion that performing legal analysis under time constraints is a valuable skill for a practicing attorney).

[381] *See* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 413–14 (1979) (deferring to the admission decision of the school).

[382] *See* CHARLES CALLEROS, LAW SCHOOL EXAMS: PREPARING AND WRITING TO WIN 95 (2nd ed. 2013) ("Time pressure on an exam also helps the professor measure skills of quick thinking and efficient writing, which some professors believe are important to the practice of law.").

[383] The concept is not limited to markets, of course. Much of Darwinian evolution is associated with superior speed; the fastest cheetah catches more antelopes (and mates); the

quickly (and more cheaply) than his competitors.[384] Amazon understands this, thus its obsession with the speed with which it delivers its products to customers.[385]

These governing market dynamics apply to professionals as well. A doctor who can treat 10 patients in a day is more valuable than a doctor who can treat 5 patients in a day. The same concept applies to lawyers.

The notion that "faster is better" can sometimes be obscured by a concern for quality, particularly when dealing with professional work. If I have cancer, I will want to get "the best" medical treatment available. Thus, as a customer of medical services, I definitely prefer quality over speed. The same concept applies to employers of medical professionals. Although a hospital might usually prefer a doctor who treats 10 patients per day over a doctor who treats 5 patients per day, if the doctor who treats 10 patients per day regularly commits malpractice, the employer might prefer the slower—but more accurate—physician, who will not expose the employer to a malpractice claim. The same concept applies to other professionals. A plumber who can fix 10 busted pipes in a day is preferable to a plumber who can fix 5, but if speed involves a decrease in quality, it might not be worth it.

The preference for quality also exists within the legal profession. If I am facing criminal prosecution and a potential lifetime prison sentence, I am going to want to find the "best" criminal defense attorney, with the expectation that I will gladly pay whatever it costs for my defense attorney to secure the necessary "not guilty" verdict. This is true even if my attorney is "slow" and bills me more hours to accomplish tasks that other attorneys could complete more quickly.

These examples show that a preference for professional speed can never be absolute; other factors—such as quality—also matter (of course). This is true even in professions in which speed is obviously very important. Take, for instance, American football. Famous Oakland Raider owner Al Davis is attributed with the following observation about speed in

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faster rabbit escapes the coyote. Speed, of course, is simply a measure of the ability to perform a task within time parameters. *See* MARINE CORPS, WARFIGHTING 2–19 (1997).

[384] *Ford's Assembly Line Starts Rolling*, HISTORY (Jan. 31, 2025), https://www.history.com/this-day-in-history/december-1/fords-assembly-line-starts-rolling [https://perma.cc/MQ54-HYXY].

[385] Haleluya Hadero, *Amazon says Prime Deliveries Reached Their Fastest Speeds Ever Last Year*, AP NEWS (Jan. 30, 2024, at 11:17 AM), https://apnews.com/article/amazon-prime-delivery-fast-shipping-92fde83b689060a48965003e7c5db5f3 [https://perma.cc/5SFX-C6AV].

football: "Speed kills."[386] But even here, speed is not the only thing that matters. The fastest football player is not the best football player if he is always tackled on first contact, or fumbles, or cannot catch, or cannot remember the plays, or cannot tackle, etc.[387] This is why NFL teams do not consist entirely of track stars.

Thus, to say that speed is important to professionals (like lawyers) is not to say that speed is the only thing that matters. Speed is absolutely preferred if all other qualities and attributes are held equal; this is a truth that generally applies to all segments of an economy. But qualities and attributes besides speed are not, in the real world, held equal. Thus, speed is a component of what makes a professional valuable, but it will hardly ever be the only attribute that is important.

But notice that time-pressured, fact-pattern law school exams do not *only* measure speed. I have never heard of this type of first-year legal exam: The professor hands out the exam, the students work through the problem, and once they arrive at the "correct" answer they turn in their exam. Points are awarded (and thus the curve is set) based on how quickly the student turned in his or her correct answer.

This ridiculous hypothetical is based on a distorted view of the end result of a legal analysis. Under this distortion, the fact pattern on a first-year exam is a problem that must be "solved," like a mathematical proof. But lawyers (and judges) know that this is not the reality of our profession. Although many legal questions do have definite, clear answers, these tend not to be the questions on which lawyers spend the majority of their time. Instead, lawyers wallow in the gray areas and ambiguities. For these problems, the most that can be done—under even the "best" legal analysis—is to spot the issues and to make the best arguments. As my favorite law professor—Bill Powers—put it, "Isn't this wonderful? Aren't

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[386] *See* Dan Solomon, *Last thoughts on Al Davis: The American Speed Addiction and the NFL*, CULTUREMAP AUS. (Oct. 10, 2011, at 1:23 PM), https://austin.culturemap.com/news/sports/10-10-11-00-19-the-american-speed-addiction-and-the-nfl-remembering-al-davis [https://perma.cc/D9QC-DYWV].

[387] Speed is not the only thing that matters to playing professional football, but a player's speed is an important metric that his potential employers will want to know in deciding whether to hire him. This is why speed is measured at the NFL combine. *See 2025 NFL Combine 40-Yard Dash*, NFL, https://www.nfl.com/combine/tracker/live-results/40-yard-dash/all-positions/all-colleges/ [https://perma.cc/VW3T-LXAV].

you looking forward to being in a profession where there isn't a recipe book to look up the answer?"[388]

Legal problems (that is, the hard ones that will occupy most of a lawyer's time) do not usually reduce to a definite answer. Thus, it is a mistake to assume that legal analysis is akin to a race in which there is a finish line. This is why nobody uses the hypothetical method of testing proposed above, in which students are "graded" based on how quickly they arrive at the correct answer (that is, cross the finish line).

Rather than a race with a starting gun and a finish line, the more accurate analogy is of a race with a (1) starting gun, (2) no finish line, and (3) a stopping gun. By imposing both a starting time and an ending time, the professor is not determining who crossed the finish line—there is no finish line. Instead, the professor is measuring "how far" the student got; of all of the available issues and arguments, how many was a student able to wrestle with within a particular time period?[389]

This format rewards speed, but not at the expense of quality. Although there is a correlation between the number of words a student writes and a student's score,[390] it would be a colossal simplification to assume that more words on an exam equals more points.[391] Every professor knows this to be true, even if it takes some students a few terms in law school to figure this

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[388] *See* CAL ALUMNI ASSOCIATION, *2014 Alumnus of the Year–William Powers Jr. '67*, YOUTUBE (Mar. 23, 2014), https://www.youtube.com/watch?v=Z_fgdedCiyU [https://perma.cc/VF7S-C74R].

[389] *See* ALBERT J. MOORE & DAVID A. BINDER, DEMYSTIFYING THE FIRST YEAR OF LAW SCHOOL: A GUIDE TO THE 1L EXPERIENCE 12 (2010) ("To perform well on such questions, you frequently must be able to break legal rules into categories, spot issues, and **make arguments 'both ways,'** that is, make arguments that the legal category has been satisfied and argumenets that the legal category has not been satisfied.").

[390] *See* Kif Augustine-Adams, Candace Berrett & James R. Rasband, *Speed Matters*, 61 HOW. L. J. 239, 257–58 (2018) (describing an empirical experiment that showed a strong (0.415) correlation between exam answer length and course grades on first-year law school fact pattern exams).

[391] *See id.* at 244 ("Certainly, 5,000 words strung together in random sentences or 5,000 words transcribing an irrelevant text would not merit the same grade as 5,000 words specifically addressing the questions presented in the final examination."); *see also id.* at 267 ("In sum, our results suggest, on average, faster typing speeds do not result in better grades."). *Cf.* RICHARD DAWKINS, THE BLIND WATCHMAKER 46–47 (1986) (calculating the odds that a monkey with a typewriter could replicate the phrase "Methinks it is like a weasel" from *Hamlet*).

out. Quality matters. But, of course, quantity (speed) matters, too: More of a good thing is preferrable to less of a good thing.

The difficult legal problems that occupy a disproportionate amount of a lawyer's time cannot be "solved" in a manner akin to a physics formula. Given unlimited time (and resources), a lawyer can always keep increasing her understanding and mastery of a difficult legal matter. But at a certain point, the return on this additional time starts to decrease. That is, the primary issues and arguments have been spotted, even if further understanding, sophistication, and nuance is possible. The diminishing marginal returns mean that the extra time is more valuable for some students than it is others.[392]

Thus, an exam with relaxed (or no) time pressure might not achieve the objective (desired by employers) of sorting students. The same can be said of exam questions that are *too* time pressured. (I have made this mistake before.). If you give students insufficient time to work out a problem, the students' analyses (and thus scores) are jumbled together because not even the "best" students have time to work through the legal analysis in the abbreviated time that was given.

Thus, the most successful fact-pattern exams are the ones that give the sharpest students sufficient time to spot the major legal issues in the fact pattern and work through the primary arguments, but not enough time to allow the less adept students to "catch up." Professors are attempting to construct exams in this "sweet spot" (somewhat comparable to the famous

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[392] These concepts speak to the phenomenon in which new associates at big firms are billed out to clients at $750/hour while new associates outside of "big law" might be billed out for something like $100/hour. *Cf.* Debra Cassens Weiss, *Nearly $1,000 an hour is rate for second-year associates at these BigLaw firms*, ABA J. (Apr. 3, 2023, at 9:20 AM), https://www.abajournal.com/news/article/nearly-1000-an-hour-is-rate-for-second-year-associate-at-these-biglaw-firms [https://perma.cc/7GHU-7P89]. The impression created by these dispersed billing rates is that the $750/hour lawyer is "better" in the sense that he/she can arrive at legal arguments/conclusions that the $100/hour lawyer could not. Undoubtedly, this sometimes occurs. Just like other physicists could never replicate Einstein's $E=mc^2$, even given unlimited time, there are some legal arguments/insights that only top attorneys can achieve. But most of the problems that lawyers work on are not equivalent to $E=mc^2$. Instead, they are like the fact pattern in my Property 2 exam question, in which most (even all) attorneys could spot the main issues and articulate the primary arguments, if given enough time. For this type of legal problem, the $750/hour associate is more valuable not because she can get to a conclusion that the $100/hour is incapable of arriving at but instead because the $750/hour associate can get there more quickly. (And then move on to the next legal problem).

"Laffer Curve" in economics).[393] An exam that finds this spot will achieve the necessary sorting desired by the legal employers who are consumers of law school grades.

To those unfamiliar with the law school universe, this entire process can seem bewildering: There is no "right" answer to law school exams, and yet some answers are better than others. Most law students could achieve an analysis approaching that produced by the "best" students if they were given enough time to do so—but they are not given that time. By placing students under time restraints, sorting occurs that would not be present (or would at least be reduced) if there were no time restraints.

Strange as it may seem, however, this process essentially replicates the realities of law practice and the legal market. The practice of law does not occur removed from time pressure, at least for many (perhaps most) attorneys.[394] This reality is reinforced by the billable hour, the standard way in which attorneys charge their clients. But even for attorneys that do not bill by the hour, time constraints are a reality of the legal market. A prosecutor that needs 50% more time to handle the same caseload as other prosecutors is less valuable to the district attorney's office. And any prosecutor can tell you that it is simply not credible to suppose that the "slow" prosecutor will just have to "catch up" by working longer hours so that she can maintain the same caseload. There are only so many hours in the day, and some of it must be devoted to eating, sleeping, etc. In markets, time is a limited quantity, and this is true for legal markets as well. Faster is better.

Perhaps the best way to appreciate the importance of speed to the legal *market* is to remember that the legal market does not just consist of one lawyer serving one client, any more than the market for plumbing services consists of one plumber fixing one toilet. There are thousands of clients, and they are looking for legal representation. There are thousands of lawyers competing to land these clients. Lawyers aggregate and form firms; these firms also compete with each other (and individual lawyers)

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[393] *See* Adam Hayes, *Laffer Curve: History and Critque*, INVESTOPEDIA (May 31, 2024), https://www.investopedia.com/terms/l/laffercurve.asp [https://perma.cc/C2KZ-U4HD].

[394] *See* Sabrina DeFabritiis & Kathleen Elliott Vinson, *Under Pressure: How Incorporating Time-Pressured Performance Tests Prepares Students for the Bar Exam and Practice*, 122 W. VA. L. REV. 107, 121 (2019) ("Time is a luxury that lawyers often do not have."); Hunsicker, *supra* note 28, at 14 ("Speed in reading cases and in responding to clients is not only a component of intelligence, it is part of modern practice. In our age of faxes and e-mails, a consumer of the legal profession expects his lawyer to be able to read the relevant documents and legal material and to respond in a relatively prompt manner.").

for clients. Like any healthy market, there is abundant competition between the participants. In this competition, speed is a commodity (with lawyers and with plumbers). If the law firm Arthur, Brown, and Klein bill their attorneys out at $1000/hour, and law firm Bishop, Cooper, and Gramatica bill their attorneys out at $1000/hour, but one firm can resolve a legal dispute in 20 billable hours while the other would require 30 billable hours, the faster firm has an advantage in the market and is more attractive to clients. In the legal market—as in the broader market generally—speed is an attribute.

Therefore, it is no surprise that speed is one metric by which law students are tested; speed is a component of the legal market into which they are entering. Time-pressured, first-year exams are an important part of the complicated process by which students are sorted to legal jobs that correspond to their abilities (and in which they are billed out based on those abilities).

B. Alteration

The Supreme Court's analysis in *Martin* suggests that a defendant is not excused from making an accommodation simply because the matter involved is "fundamental"; instead, the defendant must also prove that there would be an "alteration."[395] This inquiry was present in both the *Davis* and *Alexander* decisions, but it was somewhat opaque and tougher to recognize. The analysis of the issue is much sharper and developed in *Martin*. There, the Court concluded that excusing Martin from the walking rule would not constitute an alteration, even assuming that the walking rule itself was fundamental.[396] Thus, it is the *Martin* opinion which must serve as the blueprint for the alteration analysis.

In *Martin*, the Court reasoned that allowing a disabled golfer like Martin to use a cart would—in the grand scheme of things—do very little to the PGA Tour's stated objective of measuring shot-making under fatigue

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[395] *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 669 (2001) (explaining both the "fundamental" and "alteration" aspects of the doctrine and concluding that neither was present. Logically speaking, however, it would seem that a defendant resisting an ADA accommodation must prove both aspects. In other words, it is a conjunctive test and the Supreme Court could have reached this result by showing that walking was not "fundamental" or by showing that an accommodation would not involve an "alteration."). *But see* Brennan, *supra* note 245, at 501 ("The dispute and confusion is attributable, at least in part, to parties and courts failing to clearly differentiate between disparate treatment and failure to accommodate claims.").

[396] *See Martin*, 532 U.S. at 690.

in its tournaments.[397] First, the Court noted very few golfers in the world would ever qualify as disabled under the ADA while simultaneously being good enough to qualify as a professional golfer.[398] As such, what was at stake in the case was whether Casey Martin—and perhaps a handful of other golfers in the world—could use a cart in PGA Tour tournaments. Second, the Court explained that allowing Martin a cart would do very little to affect the ultimate outcome of a tournament, which often times depended as much on a lucky bounce or a favorable draw as it did "skill."[399]

The Court's analysis in *Martin* makes clear that an "alteration" analysis can look at how an accommodation might affect the non-disabled. Lower courts have embraced this logic, as there are dozens of lower court cases that have been resolved against a disabled litigant because the accommodation requested would have too great of an impact on others.[400] Of course, that was not the conclusion that the Supreme Court reached in the *Martin* case. That said, this *type* of inquiry is clearly sanctioned by the *Martin* opinion.

Turning to the present matter: As mentioned above, golf tournaments are analogous to first-year law school exams because both are zero-sum affairs. My success thwarts your chances of success, and vice-versa. That said, there are dramatic differences between giving Casey Martin a cart and allowing all students with ADHD extra time on a first-year, law school exam.

Whereas Martin was disabled in a way that few (if any) other professional golfers are disabled, the same cannot be said for students with ADHD. As mentioned earlier, the number of students who receive a diagnosis of ADHD continues to rise each year.[401] Although the numbers vary, it seems that most estimates peg ADHD rates amongst undergraduate and law students to be around 10-15%.[402]

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[397] *Id.* at 671.

[398] *Id.* at 690–91.

[399] *Id.* at 686–87.

[400] *See* ROTHSTEIN & IRZYK, *supra* note 19 at § 5:5.

[401] Dyane L. O'Leary, *Flipped Out, Plugged In, and Wired Up: Fostering Success for Law Students with ADHD in the New Digital Law School*, 45 CAP. U. L. REV. 289, 306 (2017).

[402] *See* POSTSECONDARY NAT'L POL'Y INST., *supra* note 57; Petzold, *supra* note 58; *Disability, Engagement, and Belonging in Law School: Insights from LSSSE Survey*, ABA (Jan. 6, 2026) https://www.americanbar.org/groups/diversity/disabilityrights/news/disability-engagement-belonging-law-school/ [https://perma.cc/G2NA-9GFX].

This staggering difference between Martin (who was (nearly) one of a kind) and students with ADHD (who are 10-15% of the law school population) matters greatly to the alteration analysis. In my experience, however, this point is often resisted by those making decisions regarding accommodations in higher education. Usually, this is because of a misunderstanding of *why* the disability rate matters, with responses such as "Just because a lot of them have ADHD doesn't mean they aren't disabled" or "All disabilities need to be treated the same." These responses miss the point. The pertinent question is not whether students "really" have ADHD or whether ADHD is "really a disability" under the ADA. Rather, the question is whether providing an accommodation for these students would result in a "fundamental alteration." And, as the *Martin* case (and numerous lower court opinions) make clear, whether there is an "alteration" can depend on the effect of the accommodation on the non-accommodated.[403] As the ranks of the accommodated swell, the effect on the non-accommodated can become more and more dramatic. For the purpose of determining whether there is an alteration, the ratio between accommodated and non-accommodated matters, particularly in a situation involving zero-sum competitions (like *Martin* and law school exams).

The difference between allowing Martin to use a cart and giving all disabled students with ADHD extra time is best appreciated by comparing the two within the context of a professional golf tournament. Most PGA Tour events have roughly 150 players.[404] The accommodation given to Martin thus affected merely one player out of 150. But with ADHD rates being between 10% and 15%, this contemplates that approximately 15-25 golfers in a 150-player field would be given an accommodation. As the number of participants seeking an accommodation in the zero-sum

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[403] *See Martin*, 532 U.S. at 682–83; *See also* Chapman v. Pier 1 Imps. (U.S.), Inc. 631 F.3d 939, 947 (9th Cir. 2011) ("We recognize that an encountered barrier must interfere with the particular plaintiff's full and equal enjoyment of the facility, making his use of the facility more difficult than a nondisabled individual's."); *see also* Rodriguez v. Barrita, Inc. 10 F.Supp. 3d 1062, 1080 (Cal. N.D. 2014) ("[T]he [ADA] requires the concept of 'usability' to be read broadly to include any changes that affects the usability of the facility, not simply changes that relate directly to access by individuals with disabilities.").

[404] *See PGA Tour Policy Board approves eligibility, field size changes*, REUTERS, https://www.reuters.com/sports/golf/pga-tour-policy-board-approves-eligibility-field-size-changes-2024-11-19/ [https://perma.cc/VV8W-M7ZC] (Nov. 18, 2024 at 11:02 PM) (explaining how this number was accurate at the time the Martin case was decided. The PGA Tour—in response to the reduced field sizes on the new LIV Tour—has recently moved towards more events with reduced fields).

competition gets bigger and bigger, it becomes much harder to conclude that granting this accommodation is not having an appreciable effect on those who are *not* receiving the accommodation.

There is another aspect to the Court's "alteration" analysis in *Martin*. In the opinion, the Court seems to express doubt that granting Martin a cart would actually alter Martin's score.[405] (And, of course, if Martin's score is not affected, then there is no alteration on others in the tournament.) At various points in the opinion, the Court seems to assume that the primary benefit to Martin of not having to walk is not a lower score but simply the avoidance of pain and/or dramatic injury. But, as previously addressed in this article, giving students more time to complete the exam unquestionably results in better performance. Thus, whereas giving Martin a cart may (or may not) improve his score (but will undoubtedly improve his comfort and prospects for avoiding injury), giving students additional time to complete an exam will absolutely improve their performance.[406]

Let's assume that Martin's use of a cart benefitted him "a couple of strokes"[407] over a four-day tournament. Martin played the 2000 season on the PGA Tour with the use of a cart (the result of his victories in the lower courts). One of his more successful tournaments was the Kemper Insurance Open, in which he finished in a tie for 47th out of 154 participants.[408] Now, consider what happens to Martin's finish if two strokes are added to

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[405] *See Martin*, 532 U.S. at 690. This proposition could be tested empirically by comparing Martin's performance (during this time) in rounds where he was forced to walk against rounds where he was allowed to use a cart, but I am not aware of any attempt to quantify this metric.

[406] *See id.* This is, in essence, what it means to say that time is "fundamental" to law school exams. Although this article distinguished between the "fundamental" and "alteration" concepts, burrowing down into each reveals that they begin to merge at a fundamental level. Like a subterranean cave with two surface entrances, you end up in the same place (regardless of where you enter), provided that you keep pushing to a certain depth.

[407] *Id.* at 702 (Scalia, J., dissenting). This phrase comes from Justice Scalia's dissenting opinion in Martin, where he is refuting the Court's "empiricism." So, although the majority does not address how Martin's use of a cart improves his overall tournament score, the "couple of shots" view that Justice Scalia attacks appears to be his perception as to the empirical assumptions behind the Court's conclusion. In other words, Scalia thought that the majority believed that the accommodation was worth "a couple of shots" to Martin.

[408] *See 2000 Kemper Open Results*, ESPN (May 17, 2001, at 7:05 PM), https://www.espn.com/golf/story?id=1200840 [https://perma.cc/K4QK-CZQ5].

Martin's four-day total: Martin drops from a tie for 47th place to a tie for 51st place.[409]

The affect on other golfers of Martin receiving an accommodation (and thus improving his score by a "couple of strokes") was minimal. For golfers who finished above Martin (46 golfers overall), they were not affected one bit.[410] Consider Justin Leonard, who finished in a tie for second at the 2000 Kemper Insurance Open; Leonard's finish is unaffected by whether Martin finishes 47th or 51st.[411] The same is true for golfers who finished 52nd or worse. Consider Trevor Dodd, who finished 152nd in the field; like Leonard, Dodd is completely unaffected by whether Martin finishes 47th or 51st.[412] In turns out that only nine golfers in the 154-player Kemper Insurance Open field would have been affected by adding two strokes to Martin's tournament score, and in only a minimal way: Each of these nine golfers would move up one spot in the rankings. Thus, Jason Buha finished in a tie for 52nd in the 2000 Kemper Insurance Open; if you add two strokes to Martin's tournament score, Buda finishes in a tie for 51st.[413]

Assuming that Martin's accommodation was worth a "couple of shots," there is a negligible impact on the 2000 Kemper Insurance Open. But what happens if we increase the number of golfers using carts to an amount that is equivalent to the number of students now getting accommodations on law school exams (roughly 15%). This means that instead of *one* golfer (Martin) getting an accommodation, there will be *twenty three* golfers getting an accommodation. Obviously, this is going to have a much more dramatic alteration on the rank order of golfers. And this assumes that getting a time accommodation on a law school exam is the equivalent of a couple of strokes over a four-day, 72-hole golf tournament. In my estimation (and as touched on earlier in the article),

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[409] *See id.* The comparison is complicated somewhat by the fact that most PGA Tour events involve a "cut" in which roughly half of the field is eliminated after the first two rounds. For the 2000 Kemper Insurance Open, Martin made the cut with room to spare, so even adding "a couple of strokes" to his two-day tournament score would not have affected who made (and missed) the cut.

[410] *See id.*

[411] *Id.*

[412] *Id.*

[413] *Id.*

getting time-and-a-half to complete a law school exam is worth much more than the equivalent of a couple of strokes in a four-day golf tournament.[414]

In terms of an "alteration," there is one final difference between extra time accommodations on law school exams and Casey Martin getting to ride a cart at a professional golf tournament. As mentioned earlier, golf tournaments and law school exams are both similar in that they are zero-sum competitions in which the participants are competing against each other. But golf tournament involve the game of golf which, at the end of the day, is just . . . a game. As discussed previously, all games are essentially arbitrary in the sense that they are not a means to a larger purpose. The game is an end to itself. This is true for horseshoes, cornhole, basketball, tiddlywinks, and golf (no matter how seriously golfers take themselves). Granting an accommodation in a game cannot alter a larger purpose or objective because there is no larger purpose or objective being served.[415]

Law school exams—particularly first-year law school exams—are no game. The stakes are high. The career trajectory for a student begins to take shape as the first-year grades are received. At the margins, students may get—or not get—career-defining opportunities based on their class rank. The difference between being within the top 20% of your law school class and the top 30% of your law school class can matter greatly; occasionally, the difference may result in a completely different career trajectory.

When one golfer gets an accommodation, this might have some minor effect on the place in which other golfers finish. But that is the end of it. Altering the complicated process by which law students are sorted to different jobs has much more profound effects. Some students will miss out on opportunities for which they are best suited. When this occurs, the effect is not limited to the direct participants in the zero-sum competition. Instead, the consequences trickle down to the employers and clients that

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[414] *See supra* Section V.A.2. Had I been allowed to proceed with my controlled examination methodology, there would be empirical evidence quantifying just how valuable the extra time was on law school exams.

[415] I am aware, of course, that professional golfers play for prize money. But this perspective supports—rather than refutes—the notion that Martin's cart use did not cause an "alteration." *See 2000 Kemper Open Results*, *supra* note 408. Consider again the 2000 Kemper Insurance Open, in which Jason Buha finished in a tie for 52nd. As a result of this finish, Buha received $6,480. If you add two strokes to Martin's tournament score and thus push Buha up to a tie for 51st, he would have received only an additional $117 in prize money. *Id.*

depend upon the integrity of law school sorting to get students to the "right" job—that is, the job for which they are best suited given their skills and attributes. Altering this process can result in a serious alteration of the career trajectory of law students. But it can also have serious consequences for the consumers of law school grades—legal employers and the clients they serve.

VI. EXPLAINING THE STATUS QUO

The legal conclusion established above—that law students with ADHD are not entitled to an extra-time accommodation on their time-pressured, fact-pattern, first-year exams—leads to a riddle: Why is this accommodation routinely received as a matter of course? Resolving this question is akin to taking a crash course in both neoclassical economic theory and behavioral economics. The short answer is this: Law professors are not the ones making the decisions regarding accommodations.[416] The decision-makers—usually university administrators—frequently do not understand law school exams and the function they serve. Moreover, the decision-makers are subject to pressures beyond the correct application of the law; they are also completely removed and insulated from those who are harmed when an unwarranted accommodation is granted. Finally, an irrational—yet powerful—herding effect has developed around the issue.

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As described previously, law professors are given almost complete discretion involving testing. Professors determine what is tested and how it is tested. The grades they award will need to comply with a school's mandated curve; other than that, however, law professors are on their own.

Ironically, however, law professors are not the ones making decisions when it comes to accommodations on their exams.[417] This process itself—by which law professors are essentially shunted aside—is inconsistent with federal disability law. Neither the ADA nor the Rehabilitation Act require an accommodation that involves a "fundamental alteration," and determining whether there has been a fundamental alteration of an exam

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[416] *See e.g. Registering with Accessibility Services*, CAP. UNIV. https://www.capital.edu/about/accessibility-services/registration-process/ [https://perma.cc/PAJ4-YYNR] (explaining Accessibility services grants or denies students accommodations); *Division of Student Affairs Disability Resources*, CASE W. RSRV. UNIV. https://case.edu/studentlife/disability/getting-started [https://perma.cc/9CZU-ANXK] (explaining the Disability Resources department is the only department that determines eligibility for accommodations).

[417] *See* sources cited *supra* note 416.

necessarily requires an understanding of the reasons and purposes behind the exam format that a professor has chosen.[418]

If law professors are not the decision-maker regarding exam accommodations, who is? The specifics of the decision-making process will vary from one university to another. Nevertheless, most universities will operate using a bureaucracy that is—for present purposes—essentially identical. These bureaucracies are impaired by the same deficiencies and biases, leading one university after the other to reach the wrong legal conclusion regarding extra-time accommodations on first-year law school exams.

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Most universities will have an office that is dedicated solely (or primarily) to resolving accommodation requests.[419] These offices usually serve the entire university, which means that all accommodation requests (including those involving law schools) are processed using the same facility and personnel.[420] The logic behind this "hub" approach is easy to

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[418] *See* 28 C.F.R. § 35.130(b)(7)(i) (2024) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."); 28 C.F.R. § 35.164 (2024) ("This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."); Taylor, *supra* note 121, at 1464 n.88 ("Courts regularly apply the ADA's fundamental alteration and undue burden defenses in Rehabilitation Act cases.").

[419] *See* Suzanne E. Rowe, *Learning Disabilities and the Americans with Disabilities Act: The Conundrum of Dyslexia and Time*, 15 J. LEGAL WRITING INST. 165, 172 n.35 (2005) ("Many schools have offices dedicated to disability issues."). These offices will go by different names. *See, e.g.*, *Student Access Center*, KAN. STATE UNIV., https://www.k-state.edu/ accesscenter/ [https://perma.cc/RR72-KSXC] (Student Access Center); S*tudent Disability Services*, TEX. TECH UNIV., https://www.depts.ttu.edu/sds/ [https://perma.cc/B9EP-Q4LL] (Student Disability Services); *Access and Success Disability Services*, DRAKE UNIV., https://www.drake.edu/access-success/disability-services/ [https://perma.cc/VV8W-M7ZC] (Access and Success); *Weingarten Center Academic Accomodations*, UNIV. PA., https://weingartencenter.universitylife.upenn.edu/ academic-accommodations/. [https://perma.cc/47K7-LC85] (Weingarten Center).

[420] *See e.g.*, *Accessible Education and Disability Accommodations*, UC BERKELEY L. https://www.law.berkeley.edu/students/student-support-services/students-disabilities/ [https://perma.cc/MZE8-JNHQ] ("Berkeley Law collaborates with UC Berkeley's Disabled Students' Program (DSP) on main campus to assess and implement these accommodations and services.").

appreciate: By creating an "agency" or office with a singular focus on accommodations, employees with specific training and expertise can more quickly and efficiently process accommodation requests.[421] Ideally, this frees up other university employees (faculty members and the administration within particular colleges or schools) from having to spend time on the accommodation issue.

By all accounts, these disability offices are incredibly busy.[422] The number of accommodation requests continues to grow each year.[423] Each of these requests must be processed and resolved. Often times this will require documentation from medical experts.[424] Occasionally, individual testing and evaluation of students might be conducted within the office facilities.[425] After a decision is made, it must be communicated to both the student and the relevant university employees (professors, registrars, dorm hall advisors, etc.). Logistically speaking, processing all of these accommodation requests is no small feat.

But specialization and efficiency have their costs, of course. Despite the fact that federal law mandates an individualized process, it appears that this rarely occurs. Instead, the process is somewhat automated, akin to an assembly line. Although disabilities usually exist across a spectrum, their treatment within university disability offices is formulaic. The office will first ensure that the student has procured the necessary medical

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[421] The need to quickly resolve accommodation requests thus explains (at least partially) the creation of these offices. Speed, it seems, matters to this market.

[422] *See* Alan Levinovitz, *Are Colleges Getting Disability Accommodations All Wrong?*, CHRON. HIGHER EDUC. (Sep. 25, 2024), https://www.chronicle.com/article/do-colleges-provide-too-many-disability-accommodations [https://perma.cc/3QBZ-3GSQ] ("Despite increased staff and resources, disability-service providers are overwhelmed, and it's common for a single staff member to be tasked with serving 500 students.").

[423] *See id.* ("Disability accommodations in American higher education are skyrocketing. In the past decade, the proportion of colleges with more than 10 percent of students registered as disabled has quintupled, and accommodation requests have followed the same pattern.").

[424] *See Disability and Access Division of Student Affairs Physical or Medical Documentation Guidelines*, UNIV. TEX. AUS., https://disability.utexas.edu/physical-or-medical/ [https://perma.cc/AX8F-8RP3] ("A physician, or other medical specialist with experience and expertise in the area related to the student's disability, should make the diagnosis.").

[425] *See Disability Resources Division of Student Affairs Evaluators*, TEX. A&M UNIV., https://disability.tamu.edu/resources/evaluators/ [https://perma.cc/VDE9-L72P]. ("Current students that have not yet been formally diagnosed with a learning disability or ADHD, may want to first set-up an appointment at University Health Services to have an ADHD/Learning Disability screening completed prior contacting an evaluator for a formal assessment.").

documentation.[426] Once the paperwork is secured, the office will announce the required accommodations. With regard to extra time, time-and-a-half appears to be the almost automatic outcome, with some students occasionally getting double-time.[427] There is little room for nuance or subtleties in this process. Professors are not consulted as a matter of course; instead, they are informed of the accommodation decision.[428]

Most of the employees of these offices almost surely do not understand the complicated pedagogical objectives of first-year law school exams, nor do they appreciate the important sorting that occurs as a result of the mandated law school curve. This is understandable. The primary

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[426] *See e.g.*, *Disability Resource Center*, RICE UNIV., https://drc.rice.edu/students [https://perma.cc/A45W-LBUA] ("Once the DRC has reviewed the documentation [from a physician] an appointment will be set to meet with the director of the DRC to discuss the student's accommodation needs.").

[427] *See* Helia Garrido Hull, *Equal Access to Post-Secondary Education: The Sisyphean Impact of Flagging Test Scores of Persons With Disabilities*, 55 CLEV. ST. L. REV. 15, 32 (2007) ("Moreover, as discussed below, studies on score comparability demonstrate that testing entities typically provide time accommodations based on some multiple of the standard time period, e.g., time and one-half or double time, rather than providing an amount of time appropriate for the individual as urged by the Standards."); Levinovitz, *supra* note 422 ("There are no methods in place to determine exactly how much time a certain student needs, or which specific circumstances require a note taker. In North America it's 50 percent extra time, [] it's not based on any research."); *ADA Accommodations*, STRUM COLL. L., https://www.law.du.edu/resources/current-students/student-handbook/examinations-and-grading [https://perma.cc/JMG8-TQZM] ("If the exam is 1–12 hours, the student will receive 50% more time (time and a half)"); *see also* Ali A. Aalaei, *The Americans with Disabilities Act and Law School Accommodations: Test Modifications Despite Anonymity*, 40 SUFFOLK U. L. REV. 419, 431 (2007) ("Law schools will usually grant time-and-a-half accommodations to students claiming learning disabilities.").

[428] *See* Stone, *supra* note 51, at 34 ("In a significant majority of cases, professors have no input in the decision to provide an exam accommodation.").

> ***The Law School does not determine or approve accommodations.*** Students needing accommodations must register . . . with Stanford's Office of Accessible Education . . . (OAE), provide supporting documentation justifying the need, and meet with an OAE staff member who will determine appropriate accommodations after reviewing required documentation. The Law School Office of Student Affairs implements accommodations approved by OAE.

Support Resources, STAN. L. SCH., https://law.stanford.edu/office-of-student-affairs/problem-solving/ [https://perma.cc/CN3Q-E36E].

accommodation request that is processed by these offices involves undergraduate courses. Undergraduate courses—and their exams—are completely different than law school courses and exams.[429] Whereas law school exams measure the skill (and speed) of a student in *doing* the law, almost all undergraduate exams test a student's knowledge of a particular topic. These undergraduate exams are usually "you know it or you don't" type of affairs. Getting time-and-a-half to explain the importance of the Battle of Bunker Hill will not help you unless you actually know the importance of the Battle of Bunker Hill. The extra time might, however, allow undergraduate students with a disability the necessary time to demonstrate their knowledge. To the extent that an undergraduate test has a time limit, this is usually to serve no more than the practical reality that neither the professor nor the students are likely to be able to sit in the testing room for too long. The time limits on a biology exam are definitely not trying to replicate a market preference for professional speed. Moreover, undergraduate courses are rarely curved based on rank order like law school courses.

Thus, the typical course and exam which these university officials are accustomed to dealing with is much different than a law school exam. Of course, if disability offices were amenable to extended and detailed discussions with law professors, these nuances could be explained. But the process does not usually involve professors as a matter of course. Thus, the decision-makers within these disability offices mistakenly assume that the accommodation that is appropriate for a biology exam is also appropriate for a contracts exam.

Even if a disability office employee *did* grasp the complicated niceties of law school exams, there would probably be an inherent reluctance to treat them differently. Indeed, it might be viewed as opening a can of worms for an office that serves the entire university. If law students do not get extra time on law school exams, does this "special treatment" for law school exams also apply to medical school exams? CPA courses? MBA courses? The engineering professor who insists that speed is a component of his Engineering Physics test?

From an administrative perspective, a one-size-fits-all approach is nice, tidy, and easy. The same goes for the generic time-and-a-half accommodation; giving some students 129% extra time and others 164% and others 149% is a lot more work than rubber-stamping the standard

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[429] *See* SCHIMEL, *supra* note 336, at 90 ("The worst misjudgment you can make as a law student is treating law school like undergraduate college. The only 100% guarantee I can make is that your old study habits will not suffice.").

150% accommodation. It also practically invites students to angle and argue for more or less time and then to complain when their accommodation is less than that given to other classmates. And remember that each of these offices has hundreds (perhaps thousands) of requests to process. If you have a lot of work to do, the last thing you want to do is to open a can of worms.

The implication in the above paragraph is that university disability offices might be influenced by factors other than simply strict compliance with the law. This should not be a controversial assertion, and I do not mean to disparage. But the reality, of course, is that self-interest and motivation is always a relevant factor in understanding the decisions of people.[430] An agency (or office) is, of course, comprised of people, so it should be no surprise that an agency will develop its own values, biases, and agenda.[431] To say that a university disability office might be disinclined to give law schools different treatment regarding accommodations is simply to say that an agency (and the people with which it is comprised) will usually prefer less work than more work, particularly when the "less work" option still keeps everyone plenty busy.[432]

I think there are probably additional biases that exist in many university disability offices. One does not seek out employment in a disability office motivated by the desire to limit accommodations only to those required by federal law, just as one does not seek employment within the EPA so as to ensure that the environment is not protected more than what is mandated by federal law.[433] Most employees of university disability offices are "true believers" who personally identify with the objective of giving accommodations to the disabled.[434] This does not mean that these employees are merely "pushing an agenda" without regard to the content

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[430] *See* Richard H. Thaler, *Behavioral Economics*, *in* NBER REP. 9, 9–10 (Fall 1995) (describing self-interest as the basis of neo-classical economics and describing its utility as a predictive tool if quasi-rational behavior patterns were taken into account).

[431] *See* Richard Chalmers, Angela Marras & Grace D. Brannan, *Organizational Culture*, NAT'L LIBR. MED. (Feb. 17, 2025) https://www.ncbi.nlm.nih.gov/books/NBK560543/ [https://perma.cc/X9QB-6YE5].

[432] Time and speed, it seems, are important factors in the work of disability offices.

[433] *See* Craig S. Lerner, *"Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?*, 57 VAND. L. REV. 1043, 1065–66 (2004) (providing that "common characteristics" for learning disabilities listed by university disability offices "stray well beyond simple and old-fashioned items").

[434] *See id.*

of federal law (although there are undoubtedly some of those within the ranks), but it does mean that they probably approach the accommodation issue with an implicit bias.[435] The tendency, then, would be skepticism when others within the university push back against their recommended accommodation. For the disability office employees, receiving pushback not only represents a potential can of worms injected into their already busy day, but it might be coming from the "enemy" whose non-accommodating views necessitated the ADA in the first place.

There is another important, inherent bias that exists within university disability offices: The consequences of a decision as to whether to grant an accommodation request are not symmetrical. Simply put, it is easier for the office to grant a requested accommodation; rejecting the accommodation request is much risker and much harder. This important concept applies to every party involved with a law school accommodation decision: professors, disability office employees, law students, law school administration, university administration, and university general council.

When an accommodation request is denied, the person seeking the accommodation is likely to be upset and disappointed. She may argue, complain, or even try to get other people involved. She is motivated to challenge this decision because the consequences of not receiving the accommodation are borne directly by her. Thus, it is worth her time to "litigate" the issue. The disappointed accommodation-seeker thus represents a risk to the decision-maker: Denying the request invites potential additional work and grief in having to defend the decision against the disappointed accommodation-seeker.

Notice, however, that this risk is eliminated by granting the request. The person most directly affected by the accommodation is happy, and therefore has no reason to further litigate the matter. The case is resolved when the accommodation is granted.

Of course, there is the potentiality that *others* might be unhappy with the decision to grant an accommodation. This seems unlikely in most undergraduate courses, in which the exam is based on knowledge of subject matter and grades are not a relative matter. If Tyler's grade in a political science class depends solely on his ability to explain Montesquieu's views of separation of government powers, why does it matter to him that Marla gets an additional twenty minutes to demonstrate her knowledge?

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[435] *See id.* at 1065 ("[V]irtually all major colleges have 'offices' devoted to catering to the needs of the learning disabled, and their elaborate websites advertise for customers . . . .").

Law school is different, of course. Exam answers get better when law students are given more time.[436] Plus, because grades are assigned based on a forced curve, the extra time that Marla gets to complete her analysis harms Tyler—Marla and Tyler are in direct competition for grades in a zero-sum competition.

Despite this, Tyler is unlikely to weigh on the minds of the disability office employees when they are considering Marla's accommodation request.

First, there is an asymmetry regarding proximity. Marla has already made contact with the disability office, provided the requested documents, and (probably) spoken to an office employee. Because the disability office employees know Marla, her potential disappointment regarding an accommodation rejection looms larger in their mind.

But Tyler is essentially invisible to the disability office employees. Tyler has never been to the office. They do not know Tyler, and Tyler does not know them. Tyler is out of sight and thus mostly out of mind. The law students negatively affected by the decision to grant Marla an accommodation are mostly off the radar of the employees of the disability office.

It is possible that Tyler could make his existence felt. Tyler could voice his displeasure with the decision to grant Marla an extra-time accommodation. But this is unlikely to occur (and, to my knowledge, does not occur). The reason that Tyler is unlikely to voice his displeasure is that the negative consequences of Marla's accommodation are borne by everyone in the class, not just Tyler. It is a tragedy of the commons type of situation.[437]

The concept is easily demonstrated by assigning numerical values to represent the consequences of Marla's requested accommodation. Suppose that the effect of Marla's accommodation request is worth 100 "units," meaning that Marla is 100 units better off if she is granted the accommodation. If the accommodation is denied, and Marla is 100 units worse off, Marla is motivated to push back and fight against this result: 100 units is worth Marla's time.

Because law school grades are zero-sum, however, the 100 units of value that Marla receives from her accommodation (assuming it is granted) must come from somewhere. When Marla is granted an accommodation, it comes at the expense of Tyler, her classmate taking the same exam. But it is not just Tyler who is affected—it is Robert and Angel and everyone else

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[436] *See supra* Section IV(B)(2).

[437] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 *passim* (1968).

in the class. The "downside" to Marla's accommodation is borne by every student against whom Marla is competing. If we assume that there are 50 students in the class besides Marla, the 100 "negative" units must be dispersed amongst all of them. Thus, Tyler (and every student besides Marla) is only individually affected to the tune of 2 "negative" units.

This dispersion of the negative consequences of Marla's accommodation creates the asymmetry that can create bias within the disability office. The decision to deny Marla an accommodation results in a negative effect to Marla that is borne entirely by her. As such, it is worth Marla's time to fight for the accommodation. By granting Marla's accommodation request, the disability office avoids this potential blowback. The squeaky wheel gets the oil. Granting Marla's accommodation request on a law school exam comes at the expense of Tyler (and everyone else in the class). Tyler does not like the result, but he is a rational person and thus does a cost-benefit analysis as to whether it is worth it to fight the issue. But his conclusion is different than that reached by Marla; two "negative" units is probably not worth the time and effort in pushing back against the disability office. His time is probably better spent on other endeavors (such as studying). Robert and Angel make the same decision, as does the rest of the class. Tyler (and Robert and Angel) concludes that it is not worth his time to protest because most of the benefits of his efforts—if he is successful—would inure to the benefit of his classmates (who might be in the library studying while Tyler did their bidding).

The law solves this problem of the dispersed—but small—negative effect through the class action device. By aggregating the claims of a large cohort with a small harm, the case suddenly becomes worth a lawyer's time. There are several people who *could* serve as the "class action lawyer" for Tyler, Robert, and the rest of the class, thereby pushing back against Marla's accommodation request and making sure that the opposing viewpoint is represented to the disability office.

The obvious candidate is the law professor whose exam is the subject of Marla's accommodation request. The law professor has the necessary knowledge; he or she understands law school exams and the sorting function served by the law school curve. The law professor is also in the best position to explain the rationales and objectives behind his or her time-pressured exam. (Recall that federal law mandates an individualized inquiry regarding an accommodation request.)[438] Moreover, the law professor has a personal relationship with Tyler, Robert, and the other

[438] PGA Tour, Inc. v. Martin, 532 U.S. 661, 688–89 (2001).

students who are harmed by Marla's accommodation. For the law professor, Tyler and Robert are not nameless and unidentifiable victims of Marla's accommodation.

The law professor is thus the best candidate to represent the interests of non-accommodated students, but will he or she be willing to take up the issue with the disability office? There are several factors that might dissuade the law professor from injecting himself or herself into the process on behalf of Tyler and the other non-accommodated students.

First, of course, is the work involved. Like the disability office, the law professor (we can call him Kingsfield) has a preference for less work rather than more work. The time spent pushing back against the disability office's inclination to grant Marla's accommodation request[439] is time that Professor Kingsfield could use to write an article, prepare for class, grade exams, or even play golf.[440]

Professor Kingsfield—like Marla and Tyler—is also a rational person. He knows that the benefits of engaging in battle with the disability office will accrue to Tyler and the other non-accommodated students. It makes little personal difference to Professor Kingsfield as to how the grades are distributed and what employment opportunities are available to each of the students. Kingsfield's paycheck will arrive on time so long as he keeps his head down, teaches his class, and gets his grading done.

Moreover, although Professor Kingsfield has a direct connection with Tyler and Robert, he also has a direct connection with Marla. This means that Kingsfield is subject to some of the same dynamics as the disability office. Weighing in on behalf of Tyler and Robert will raise the ire of

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[439] *See e.g.*, *Division of Student Affairs Center for Student Support and Care Law School Academic Accommodations Process*, UNIV. NOTRE DAME, https://supportandcare.nd.edu/for-students/current-students/accessibility-support/policies-and-procedures/law-school-academic-accommodations-process/ [https://perma.cc/JN8Z-UV36].

> If the instructor believes any requested testing accommodation will fundamentally alter the nature of the course, the instructor should discuss those concerns with the Sara Bea Staff. If the situation remains unresolved and the instructor wishes to deny the accommodation, the instructor must provide reasons for denying the request, in writing, to the instructor's Dean (or Dean's designee) within five (5) class days of the instructor's receipt of the request for testing accommodations from the Designee.

Id.

[440] Kingsfield will undoubtedly be riding—like Casey Martin—in a golf cart.

Marla, who cares more deeply about her accommodation request than does anyone else. Fighting Marla's accommodation request means that Professor Kingsfield might receive pushback from Marla. Marla has probably received extra-time accommodations for most of her life, and she has come to view this extra time as something to which she is entitled. Marla is now getting ready to take perhaps the most consequential exams of her life. Losing this benefit is something that will affect Marla personally and profoundly in a way that is different than the effect on Tyler, Robert, and the rest of the class.[441] Going along with the accommodation request avoids Marla's displeasure. And, of course, Tyler and Robert are less likely to push back against the law professor for the same reason that they were less likely than Marla to push back against the disability office; not only is the issue less personal to them, but they are each affected in a more diminished way than is Marla.

Thus, going along with the accommodation is the path of least resistance and easiest route for the professor to take. Engaging in conversations (and perhaps battles) with a disability office is a time-consuming endeavor for the professor who—like all lawyers—lives in a world with limited time. Moreover, the benefits from this fight (if successful) will accrue to others.

And that is not all. There are other potential costs to the law professor in resisting an accommodation request beyond just the time and energy that comes with such resistance. There are professional risks in going against the grain.

An industry custom has arisen within universities and law schools such that students with disabilities (including ADHD) are assumed to be entitled to an extra-time accommodation.[442] With law schools, the custom probably started with a trickle: One student in a large law school class requests an extra-time accommodation. The disability office (not fully understanding law school and law school exams, and maybe also suffering from bias) grants the accommodation (the office has already been granting extra time on biology exams for years). Nobody from the law school community pushes back against this conclusion; after all, the consequences of *one*

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[441] Behavioral economics has well-documented people's general (and irrational) aversion to loss. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 *passim* (1979) (developing the concept of prospect theory).

[442] Nicolette White, *Law School Students With Disabilities: What to Know*, U.S. NEWS (Feb.17, 2023, at 9:14 AM). https://www.usnews.com/education/articles/law-school-students-with-disabilities-what-to-know [https://perma.cc/FM2U-SVDP].

student getting an accommodation are not that great. But a precedent has now been established. Slowly, the trickle becomes a steady drip; eventually it becomes a deluge. The professor who sat on his hands when it was one student receiving extra time is now in a tough position when he wants to speak up because 25% of the class is receiving extra time and warping the integrity of his exam grades. As the custom gains traction, a herding effect also occurs. A professor at Stanford who might be inclined to resist the extra-time accommodation will be much less likely to do so if she hears that law students at Berkeley are receiving the extra-time accommodations. As the custom grows, the herding effect becomes stronger, making resistance even less likely.

With this custom and herding now in full effect, any professor (or administrator, or student) who *now* dissents will likely be accused of hatred or animus towards the disabled, as if he or she was parking in handicap spots. I know this to be true. The issue is emotionally charged, particularly for those seeking an accommodation. This herding effect and political pressure is enough to chill those who might otherwise be inclined to stick their neck out and dissent on the issue.[443]

Make no mistake, these dissenting viewpoints do exist. In fact, these "dissenting" positions might be the majority view. In my informal conversations with practicing attorneys and judges, they overwhelmingly reject the notion that the extra-time accommodation is appropriate for students with ADHD. Law students freely express the "dissenting" viewpoint on Reddit message boards, where they are protected by the guarantee of anonymity.[444] The same is true for many law professors, who will privately agree that the extra-time accommodations constitute a fundamental alteration, but who apparently calculate that this viewpoint might not be welcome within the university community; they thus remain silent.

Despite these dissenting viewpoints, very few are willing to go against the grain by challenging the industry custom that has arisen. This is an unfortunate situation. The industry custom that has arisen is, in part, a byproduct of an unhealthy culture existing within many universities in which the good faith exchange of ideas is discouraged and dissenting viewpoints are chilled. Recall that the only judicial authority on the matter

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[443] *See, e.g.*, Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCH. MONOGRAPHS: GEN. & APPLIED 1, 1–3 (1956).

[444] *See* discussion posted by u/Alfiechild, REDDIT (r/LawSchool), *The Accommodations Rant No One Asked For* (2024), https://www.reddit.com/r/LawSchool/comments/1c9yqb2/the_accommodations_rant_no_one_asked_for/ [https://perma.cc/CC5Z-Q8NN]

suggests that extra-time accommodations for students with ADHD are not required under the law.[445] If *law professors* can be dissuaded from articulating the position that extra time constitutes a fundamental alteration on a law school exam—*when there is caselaw precedent supporting this position*—this is a canary in the coal mine regarding the health of the academic culture on campuses across the country.[446] I am extremely grateful to be at a university that has listened to my viewpoint and supported me in writing this article, but I know that the situation might be different at other institutions.

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A few other aspects have contributed to the development of the current status quo, in which students with ADHD are given an extra-time accommodation to complete their first-year exams.

The general counsel at most universities will almost surely side with a disability office's decision to grant an extra-time accommodation on first-year exams, even if the general counsel is aware of the *Oser* case.[447]

The advice provided by university general counsel is almost always directed toward one goal: keeping the university out of litigation, particularly costly litigation.[448] This goal is jeopardized if Marla's extra-time accommodation request is denied. As discussed above, Marla will be greatly disappointed if her accommodation is denied; the issue is personal to Marla, and she has probably received the accommodation for all of her undergraduate studies. Marla might be motivated enough to sue the university. Moreover, Marla's legal path is clear and unambiguous: Both the ADA and the Rehabilitation Act provide a direct cause of action for

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[445] Oser v. Cap. Univ. L. Sch., No. 2:09-cv-709, 2009 WL 2913919 (S.D. Ohio Sep. 8, 2009).

[446] *Cf.* Levinovitz, *supra* note 422 ("While researching this piece [about accommodations at institutes of higher learning], multiple people refused to speak with me about their misgivings on the record. There is a chilling effect at work, resulting in a lopsided discussion that leaves educators, students, and the public poorly informed.).

[447] 2009 WL 2913919.

[448] *See* Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORD. L. REV. 983, 1058 (2005) (describing the advice of general counsel as "typically risk-adverse"); *see also* Sally Gunz & Marianne M. Jennings, *University Legal Counsel: The Role and Its Challenges*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 177, 204 (2019) (discussing the substantial power wielded by university general counsel and attributing this influence to "the inclusion of general counsel as an active participant in the most senior strategic decision-making processes of the university").

private parties like Marla.[449] If Marla wins her lawsuit, she will probably be entitled to—at least—injunctive relief and the costs of her attorneys fees.[450] She might also be entitled to compensatory damages.[451] It is also possible that Marla's suit could turn into a class action, which would raise the litigation stakes for the university.[452]

But Marla's private suit is not the lawsuit that general counsel is most concerned about. The Department of Justice ("DOJ") is granted authority to bring suits to enforce federal disability law, including the pursuit of civil fines.[453] This is exactly what the DOJ did in litigation involving an extra-time accommodation on the Law School Admittance Test ("LSAT").[454]

The LSAT is a test that is used by law schools in making admissions decisions. The test is created and administered by the Law School Admission Council, Inc. ("LSAC").[455] Currently LSAC gives extra-time accommodations on the LSAT for those test takers who have obtained an ADHD diagnosis; moreover, these test-takers' scores are not "flagged" such that law schools know that the student received extra time.[456] But LSAC has had some prodding in reaching the current state of affairs.

LSAC was sued by the State of California and LSAT takers whose accommodation requests had been denied by LSAC; the United States intervened in the litigation on behalf of the Plaintiffs.[457] The lawsuit alleged

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[449] 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. §§ 12131–12134 (Title II of the ADA); 42 U.S.C. §§ 12181–12189 (Title III of the ADA).

[450] *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 672 (2001).

[451] 29 U.S.C. § 794.

[452] *E.g.*, Nat'l Ass'n of the Deaf v. Harvard Univ., 377 F. Supp. 3d 49 (D. Mass. 2019).

[453] *Disability Rights Section*, U.S. DEP'T. OF JUST. https://www.justice.gov/crt/disability-rights-section [https://perma.cc/V8JZ-6BHZ].

[454] *Justice Department Intervenes in Lawsuit Against Law School Admissions Council on Behalf of Test Takers with Disabilities*, U.S. DEP'T OF JUST. (Oct. 18, 2012) https://www.justice.gov/archives/opa/pr/justice-department-intervenes-lawsuit-against-law-school-admission-council-behalf-test-takers [https://perma.cc/H65F-3U6W].

[455] *See* Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, 38 CUMB. L. REV. 33, 34 (2007–2008) ("LSAC owns the LSAT and administers the test each year to over 1400 aspiring lawyers.").

[456] *See* Lilly Weidhaas, *How to Apply for Accomodations on the LSAT*, BLUEPRINT (Feb. 19, 2024) https://blog.blueprintprep.com/lsat/applying-for-accommodations-on-the-lsat/ [https://perma.cc/JZV2-F2V3].

[457] U.S. DEP'T OF JUST., *supra* note 454; Dep't of Fair Emp. & Hous. v. Law Sch. Admission Council, No. 12-cv-01830-JCS, 2018 WL 1156605 (N.D. Cal. Mar. 5, 2018).

LSAC violated federal law.[458] Some of these alleged violations were based on LSAC determinations denying accommodations for specific individuals (including those claiming an ADHD disability).[459] In addition, the lawsuit challenged the "flagging" practice then used by LSAC.[460]

No judicial determination on the merits of the lawsuit ever occurred; instead, the lawsuit was settled by consent decree.[461] In the lawsuit, LSAC admitted no liability; however, LSAC agreed to stop "flagging" the scores of accommodated test-takers.[462] In addition, LSAC agreed to new, more lenient procedures for determining whether an individual qualified as disabled under federal law.[463]

Most importantly, the consent decree required LSAC to pay $7.73 million.[464] Because no judicial conclusions were made in this litigation, it does nothing to clarify the substance and content of federal disability law. But the decision of the United States to intervene on behalf of the plaintiffs provides a clear signal that the United States is (or, at least, was) ready to throw its considerable weight against an entity that *may* have been violating federal law.

Courts, of course, are the entities that ultimately decide and resolve disputed questions of law. This is not the constitutional role of the Department of Justice. But the decision of the DOJ to aggressively intervene in private litigation can have a serious chilling effect on entities who are unsure whether an accommodation is required under existing law. The LSAC consent decree demonstrates this effect. LSAC had valid, statistical reasons for wanting to "flag" the LSAT scores of test takers who had been given additional time.[465] Moreover, "flagging" on the United

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[458] U.S. DEP'T OF JUST., *supra* note 454.

[459] *Id.*

[460] *Id.*

[461] *Law School Admission Council Agrees to Systemic Reforms and $7.73 Million Payment to Settle Justice Department's Nationwide Disability Discrimination Lawsuit*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice [https://perma.cc/46VG-H6JL].

[462] *Id.*

[463] *See* Peter Blanck, *Thirty Years of the Americans with Disabilities Act: Law Students and Lawyers as Plaintiffs and Advocates*, 45 HARBINGER 8, 18 (2021) (describing how the consent decree required LSAC to implement "best practices" procedures as recommended by a panel of experts).

[464] U.S. DEP'T OF JUST., *supra* note 461.

[465] Statistics available to LSAC at the time it was creating the flagging policy would have shown that students who received accommodations tended to perform better on the

States Medical Licensing Exam had been determined not to violate federal law by the United States Court of Appeals for the Third Circuit.[466] Despite these reasons and existing caselaw, LSAC chose to pay $7.73 million and change its practices rather than continue litigation against the United States government.[467]

There are thus good reasons why a university's general counsel will support the disability office's decision to grant Marla her extra-time accommodation. If Marla's accommodation request is denied, the university could be sued by Marla and/or the DOJ; granting Marla's accommodation insulates the university from both suits.

The litigation risks from *granting* Marla's accommodation request are more diminished. First, there will no DOJ litigation in this scenario. This point is somewhat similar to the observation made above with regard to the inherent bias in most disability offices: An agency that is committed to protecting certain rights will usually only be concerned with underenforcement of those rights rather than overenforcement. The agency is concerned with policing the floor rather than the ceiling. Here again,

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LSAT than students that did not receive accommodations, and also that the scores of accommodated test-takers tended to "over-predict" future academic success. *See* J.J. Knauff, *Dissing Disabilities: A Student's Duty to Mitigate Maladies*, 2001 BYU EDUC. & L.J. 85, 103–04 (2001) (discussing these statistics). More recent studies have confirmed that this trend has continued. *See* Laura A. Lauth, Andrea Thornton Sweeney & Lynda M. Reese, *Accommodated Test Taker Trends and Performance for the June 2012 Through February 2017 LSAT Administrations (TR 17-03)*, https://www.lsac.org/data-research/research/accommodated-test-taker-trends-and-performance-june-2012-through-february [https://perma.cc/U7WF-D8B2] (revealing that accommodated LSAT takers scored higher than non-accommodated LSAT takers on eighteen of twenty LSAT tests administered between June of 2012 and February of 2017).

> That being the case, the testing entity could convincingly argue that accommodations 'fundamentally alter' the nature of the good or service being provided - a statistically valid predictor of future success in professional school - and therefore scores obtained under non-standard conditions could be flagged without constituting illegal discrimination under Title III.

Michael Edward Slipsky, *Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 81 N.C. L. REV. 811, 817–18 (2004).

[466] Doe v. Nat'l Bd. of Med. Exam'rs, 199 F.3d 146, 157 (3d Cir. 1999).

[467] U.S. DEP'T OF JUST., *supra* note 461.

then, the risks and motivations are asymmetrical for the university, with the decision to grant an accommodation being the easiest and less-risky path.

Tyler might be able to bring a private cause of action based on the notion that he is harmed by Marla's accommodation, but here the law is much less clear. Questions of standing and remedy would be major impediments to Tyler's suit. Even if the suit were allowed to go forward, it seems like the most probable remedy would simply be an injunction ordering the school to stop granting an extra-time accommodation. This is not the type of result that could get a university general counsel fired.

In any event, the odds of Tyler bringing suit are much less likely than the odds of Marla bringing suit. As discussed above, Tyler *is* harmed by Marla's accommodation, but his harm is much less than Marla's because the negative consequences of Marla's accommodation are dispersed amongst a larger crowd.

This does not mean that there will never be litigation challenging the decision to grant Marla's extra-time accommodation. As the drip of accommodations continues to grow into a deluge, eventually somebody (perhaps an affected group of students or a principled law professor or law school) will seek a modern judicial determination on the matter. I feel very strongly that this case will be decided in the way that the *Oser* litigation was resolved. Until then, however, university general counsels will continue to advise schools to grant Marla's accommodation request. This is the safe advice, even if it is inconsistent with the existing case law.

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Another aspect of the issue involves the public relations and marketing angle. This is an angle that is obviously important to university administrators. Given the industry custom and herding effect now in place, a school that goes against the grain would probably make headlines. This could conceivably affect the attractiveness of the school to students, particularly at the undergraduate level.

This concern is understandable. With regard to law schools, however, I believe that administrators have miscalculated the marketing angle. If a law school went against the grain and challenged the status quo regarding extra time on first-year exams, this would make the school potentially more attractive to the large number of students that do not receive accommodations. Simply put, Tyler might prefer to be at a school in which he will be measured against students that are under the same time

constraints as him.[468] Also, legal employers (including judges looking for judicial clerks) would value a school that measured students in the same way in which they will be measured on the job. A law school that was willing to buck the trend would realize these marketing benefits.

In short, I think administrators have miscalculated the marketing angle, particularly as it pertains to extra-time accommodations on law school exams. Schools are concerned with making Marla happy but do not seem to appreciate that this draws the ire of Tyler, Robert, and (perhaps) a silent majority. Nevertheless, this is a concern (misguided or not) that seems to be a contributing factor to the industry custom that has developed.

VII. CONCLUSION

This article—I hope—has accomplished two objectives.

First, it has demonstrated that federal law does not require an extra-time accommodation on the typical first-year, fact-pattern law school exams for those with ADHD. This accommodation constitutes a fundamental alteration. Time pressure is central to the objectives of this type of exam, and allowing some students to take the exam without similar time pressure can dramatically warp the integrity of the results. This undermines the utility of the exam grades.

Second, this article argues that this is a problem worth correcting. Granting extra time on a first-year law school exam is not a victimless event. In reality, there are several constituencies that are harmed when this accommodation is given.

The non-accommodated students who must compete with the accommodated students are, of course, harmed. This is the reality of forced-curve grades. What helps Marla hurts Tyler. The more accommodated students there are—and this is the undeniable trend—the more pronounced this effect becomes.

But there are also other, less-obvious victims of the current industry custom. When Marla boosts her GPA by having an extra-time accommodation, she becomes eligible for jobs that require certain capabilities and capacities. Thus, because of Marla's extra-time accommodation, Marla might land herself a job for which she is not well-suited. This is a miserable plight. Marla will have to struggle and fight,

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[468] *See* Amanda M. Foster, *Reasonable Accommodations on the Bar Exam: Leveling the Playing Field or Providing an Unfair Advantage?*, 48 VAL. U. L. REV. 661, 661 (2014) ("If you ask law students what they think about examination accommodations provided to students with disabilities, including learning disabilities, most students will tell you that it is unfair that some students get more time to take an examination.").

only to barely stay afloat. In some situations, this might not even be possible. When law schools treat Marla differently than the way that she will be treated in her employment (where lawyers with ADHD are not given a lighter workload than are other lawyers), they are essentially setting her up for failure. Marla is thus herself a victim of the school's over-accommodation.[469] Rather than dealing with Marla honestly about the profession in which she is entering, the school essentially kicks the can down the road. By the time Marla has figured out this unpleasant reality, the school has Marla's tuition dollars in hand; she is no longer the school's problem. Law schools fail Marla when they fail to treat her as she will be treated in her profession. Sometimes adults need to deliver tough news to young students, even if it is not the message that these students want to hear.

But there is also another victim of the industry custom that currently exists in law schools—the law schools themselves. As explained above, first-year law school exams serve an important sorting function that is part of the process by which students are placed in jobs that are best-suited to their capabilities. As the number of extra-time accommodations grows, the integrity of these first-year grades is undermined. Eventually, the grades might cease to accurately measure the attributes legal employers are seeking. When this happens, employers will look to other methods to ensure that their young employees have the capabilities and capacities necessary for the job. It is tough to predict what mechanisms might arise to fill this role, but the market is usually quite ingenious in fashioning solutions to problems. Law schools could, therefore, be essentially removed from this sorting that must occur. Law schools would go on, of course, because there is a need for students to learn the substantive rules of torts, contracts, etc. But law schools would be much less important if they performed only an educational function. The assessment function currently served by law schools is a huge part of the value added by these institutions. Law schools should be careful to protect the integrity of this function. It can be replaced. If that happens, law schools will never be the same.

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[469] *See* Suzanne E. Rowe, *Reasonable Accommodations for Unreasonable Requests: The Americans with Disabilities Act in Legal Writing Course*, J. LEGAL WRIT. INST. 3, 3–4 (2006) ("If pressed too far, the Americans with Disabilities Act could harm a key population it was intended to serve—law students with learning disabilities . . . . [T]hey may graduate without developing essential skills in legal analysis, organization, writing, research, oral communication, and citation, and will be, as a result, unable to practice law successfully.").

Appendix A
Question 1 (55 Minutes/27.5 Points)
(Torts I Fall 2021)

Larry, Curly, and Moe are cousins who live in Hickory, Indiana. Larry is 22 years old and of below-average intelligence; he works as a janitor at Hickory High School. Curly is 16 years old and a junior at Hickory High School. Moe is 13 years old and in 8th grade.

One Friday evening the three cousins decided to attend a Hickory High School basketball game. During the second quarter, the three decided to go hang out in the parking lot. While there, Larry and Moe smoked cigarettes while Curly swigged whisky. After 30 minutes, Curly was intoxicated.

The conversation eventually turned to whether the boys could push over a podium that was in the parking lot (which was packed with cars). The podium was 15 feet high and was used by the marching band director when the band practiced in the parking lot.

The boys decided to give it a try. All three boys pushed as hard as they could, and the podium toppled over, landing on a Chevy Tahoe and crashing through the front windshield. The boys ran off as fast as they could.

Wilbur Flatch was taking a smoke break from the basketball game when he heard the crash. When Flatch looked over through the darkness of the parking lot, he thought he saw somebody in the front seat of the Tahoe. As it turns out, the Tahoe belonged to the school nurse, and it was not a living person in the front seat of the Tahoe, but rather a CPR dummy that the nurse had used for CPR training that day.

Believing that there was somebody in the front seat of the Tahoe that needed help, Flatch took off running in the dark towards the Tahoe. Unfortunately, Flatch did not see a cable that was about two feet off the ground (and which surrounded the parking lot); Flatch tripped over the cable and broke his shoulder in the fall.

Flatch has sued each of Larry, Curly, and Moe for Negligence in Indiana state court. Discovery in the case has revealed the following information:

1. Flatch's shoulder was broken because Flatch's bones were weak due to a lifetime of drinking.
2. The force needed to topple over the podium was 100 Newtons.

3. The force supplied by Larry was 110 Newtons.
4. The force supplied by Curly was between 50 and 60 Newtons.
5. The force supplied by Moe was between 40 and 50 Newtons.

Using the material we have covered in class this quarter, discuss the breach, cause-in-fact, and proximate cause/duty elements in Flatch's lawsuits against Larry, Curly, and Moe.

Question 1 (35 Minutes/17.5 Points)
(Property I Summer 2013)

J.R. Ewing has filed a quiet title action involving Southfork, an improved tract of ranch land in Texas just north of Dallas. Named in the lawsuit is Clifford Barnes. Both parties claim true ownership of Southfork.

The following facts involving this dispute are undisputed:

In 1970, Clifford Barnes purchased a deed from Digger Barnes that described Southfork. Because of a surveying mistake, however, Clifford believed that the land he had purchased was actually directly south of Southfork, a tract of land called Southtine. Clifford went into immediate possession of Southtine in 1970 and has been in possession up until the time of this dispute.

In 2001, Jock Ewing purchased a deed from Digger Barnes that described Northfork. Northfork is an unimproved tract of land useful for cattle ranching. Because of the same surveying mistake, however, Jock believed that the land he was purchasing was Southfork, which was improved with an impressive mansion. Jock immediately went into possession of Southfork.

Jock possessed Southfork until 2008. At that time, Jock sold a deed to J.R. Ewing. The deed from Jock to J.R. used the exact same language that was used in the deed Jock received from Digger Barnes. Like Jock before him, J.R. believed that he was getting a valid deed to Southfork, even though the deed actually described Northfork.

Starting in 2008, J.R. used the mansion on Southfork as a summer residence. The mansion on Southfork sat empty during the remainder of the year except for an occasional party that J.R. would host. J.R., like Jock before him, did not use the remainder of Southfork (apart from the mansion) for anything else. There are no other properties in the area with improvements similar to the mansion on Southfork; most of the land in the area is used for cattle ranching.

In 2010, Clifford Barnes sent a letter to J.R. explaining that Clifford was the true owner of Southfork and that J.R. should evacuate immediately. J.R. responded in 2010 by filing the present suit, claiming ownership of Southfork under adverse possession. Clifford immediately responded to J.R.'s suit by filing a counter claim to eject J.R. from Southfork.

Discuss this suit. You can assume that Texas Civil Practice & Remedies Code §16.025, setting a five-year statute of limitations in some instances, is not applicable.

Question 4 (35 Minutes/17.5 Points)
(Torts II, Winter 2019)

David was driving his farm truck on a remote county road in New Hampshire when the top of his truck clipped a large tree limb that had grown over the road. The limb got caught in the top of the truck and was pulled from the tree, landing on the road. David stopped his truck to inspect it for damages and noticed that the tree limb was blocking the road. David inspected the limb and realized that it was much too heavy to move himself. As such, David began walking back to his truck and started to dial 911 so as to inform the police that there was an obstruction on the road. At that exact moment, however, Professor Ryan called David with a trade offer for their ultra-competitive fantasy football league. David got consumed in negotiating this trade offer, forgot about calling 911, and drove away from the scene.

About 3 hours later, Paula was driving her truck on the same road and came upon the scene. Paula saw the tree limb obstruction and slammed on her brakes. Her truck slightly hit the downed tree limb, causing a minor dent in the bumper of Paula's truck. The real problem for Paula, however, was that the tree limb precluded her from continuing on the road. Paula backtracked about 45 miles so as to take another route to her destination, but her trip was delayed by about two hours.

As it turns out, Paula was on her way to deliver an important shipment of widgets to Bates. When the shipment arrived late, Bates became irate. As a result of this incident, Bates refuses to do any further business with Paula.

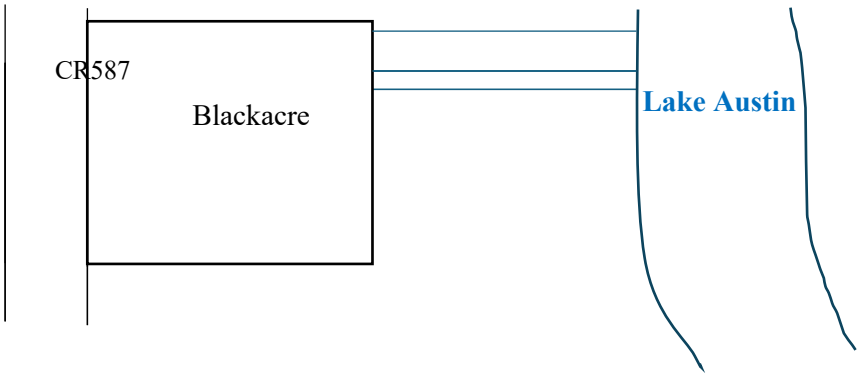
Paula learned that David was the one involved in knocking down the tree limb, and she has brought a Negligence suit against him. Paula alleges that David breached when he failed to call 911 to inform authorities regarding the limb obstruction. In the suit, Paula seeks recovery for her dented bumper ($200) and also for her lost profits in losing the Bates account ($10,000).

David has sought to have the complaint dismissed on "no duty" grounds.

Discuss whether this suit should be dismissed on "no duty" grounds.

This case will be governed by New Hampshire law (which we have not studied). To the extent that your analysis depends on specific attributes of New Hampshire law, be sure to indicate this in your answer.

Question 1 (70 Minutes/35 Points)
(Property II Spring 2016)



In 1993, Willie Nelson owned Blackacre and Grayacre (depicted above), which are located on the outskirts of Austin, Texas. Blackacre abuts County Road 587, which is a narrow, winding dirt road filled with potholes and susceptible to flooding. Grayacre abuts Lake Austin, but it does not touch a public road. Nelson lived in a house on Blackacre. Nelson frequently used Lake Austin, which he would reach from his house by use of a paved road along the northern portion of Grayacre. Nelson had a fleet of boats and other water vehicles docked on a marina just off of Grayacre.

In 1994, Nelson sold Grayacre to Matthew McConaughey by a special warranty deed; the deed did not mention the roadway over Grayacre. Nevertheless, Nelson continued to use the road for access to and from Lake Austin.

The first time McConaughey saw Nelson using the road, he approached Nelson and asked: "Are you on the road again, Willie?"

Nelson responded: "It'd be cooler if you gave me permission to use it."

McConaughey replied: "Alright, alright, alright. But why don't you let me boogie across Blackacre so that I have access to CR587?"

Nelson responded: "Sure."

After this 1994 conversation, Nelson continued to make frequent use of the road across Grayacre. McConaughey would also cross Blackacre to

get *to* Grayacre *from* CR587, and vice versa. However, because there was no house on Grayacre (McConaughey would occasionally camp on Grayacre and play the bongo drums around a campfire), and because McConaughey usually reached Grayacre via Lake Austin, McConaughey's use of Blackacre was infrequent.

In 2005, Nelson sold Blackacre to Michael Dell. The deed mentioned nothing about use of the road on Grayacre, but Nelson orally told Dell that use of the road was "no problem." After purchasing Blackacre, Dell tore down Nelson's old house and began construction of a compound. He did not use the road on Grayacre during construction.

In 2007, McConaughey sold Grayacre to Sandra Bullock by a quitclaim deed. The deed contained the following language: "Grayacre to Bullock, subject to a roadway easement in favor of Blackacre."

In 2008, Bullock sold Grayacre to Jesse James by a general warranty deed. The deed made no mention of an easement burdening Grayacre.

In 2009, Dell finally completed work on his compound and moved in. Dell then commenced use of the roadway on Grayacre. Unlike Nelson previously, Dell would often pull his boats from the water and use the road on Grayacre to haul them to and from Blackacre. James made no objection, as he never went to Grayacre and was unaware of Dell's use of the road.

In 2016, James sold Grayacre to Jordan Spieth by a quitclaim deed; the deed made no mention of an easement burdening Grayacre. When Spieth first visited the property (well after purchasing it), he was dismayed to see Dell hauling large yachts across Grayacre. Spieth hired contractors to place heavy chains and other obstacles across the road so as to prevent Dell's continued use.

Dell has brought suit against Spieth, seeking an injunction requiring Spieth to remove the obstacles preventing Dell's use of the Grayacre roadway. Spieth denies Dell's legal right to the continued use of the roadway.

Spieth has brought in James, Bullock, and Nelson to the litigation. If Spieth loses his legal dispute with Dell, Spieth believes that he is entitled to compensation from either James, Bullock, or Nelson for the market value of the easement burdening Grayacre. Spieth's claim against James is based on the purchase agreement between the two, in which no mention is

made of any servitude burdening Grayacre. Spieth's claims against Bullock and Nelson are based on the deeds Bullock and Nelson delivered.

Discuss this litigation. For purposes of this question, you can assume that Texas law is unclear as to whether it follows the holdings in *Willard v. First Church of Christ, Scientist*. Additionally, you should assume that Texas has a ten-year statute of limitations for suit on a deed covenant.