THE PARALYMPICS: YET ANOTHER MISSED OPPORTUNITY FOR SOCIAL INTEGRATION

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All endeavor calls for the ability to tramp the last mile, shape the last plan, endure the last hours toil. The fight to the finish spirit is the one . . . characteristic we must posses if we are to face the future as finishers.

—Henry David Thoreau

I. Introduction

All sports participants, disabled or otherwise, may experience the lofty vistas of victory or the humbling perils of defeat. Athletes with disabilities, whether on the local, national or international levels, are uniquely positioned to serve as valuable role models for social and civic integra-

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tion. Athletes with disabilities, however, have historically encountered and continue to encounter exclusion from sporting opportunities.[1]

In "Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities," scholars Michael Ashley Stein and Janet E. Lord posit that successful athletes with disabilities possess the ability, whether directly or indirectly, to eradicate negative attitudes and stereotypes.[2] Consequently, these athletes may promote greater equality through social, political, and economic inclusion. To further these purposes, Congress enacted civil rights legislation, such as the Rehabilitation Act of 1973 (Rehabilitation Act),[3] and the Americans with Disabilities Act of 1990 (ADA).[4] These acts foster a more equal and inclusive society by abolishing "the daily affront and humiliation involved in [access] denials"[5] to such public venues as sporting and recreational facilities.[6]

Unfortunately, the Colorado District Court and the Court of Appeals for the Tenth Circuit have engaged in disagreeable judicial inactivity. Their judicial decisions *Shepherd v. United States Olympic Committee*[7] and *Hollonbeck v. United States Olympic Committee*[8] have frustrated the purposes of the Rehabilitation Act and ADA. The analysis in *Shepherd* and *Hollonbeck* is flawed and disregards the intent of the aforementioned civil rights legislation.

II. The Olympics: Its History And Structure

According to legend, the well-known demigod Heracles founded the Olympics in honor of Zeus.[9] Written records date the first Olympic

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[1] *See, e.g.*, 42 U.S.C. § 12101(a)(2) (2000) ("[D]discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem . . . .") . Such discrimination exists in all facets of American life, including recreation.

[2] Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 Tex. J. C.L. & C.R. 167, 178, 183 (2008). This article provides an informative overview of the UN Convention. As the first of the blindness advocacy organizations to host such a symposium, the National Federation of the Blind is to be commended for advancing the discussion of disability law and policy in an academic direction; clearly, a well-deserved public relations success.

[3] Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (2000).

[4] Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1), (b)(1) (2000).

[5] Daniel v. Paul, 395 U.S. 298, 307-08 (1969).

[6] *See* 42 U.S.C. §§ 12101(a)(3)-(9) (2000); *Daniel*, 395 U.S. at 308; Consortium of Citizens with Disabilities, Chronology of the ADA Restoration Act (Sept. 2007), www.c-c-d.org/task_forces/rights/ada/Chron.pdf.

[7] Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072 (D. Colo. 2006).

[8] Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191 (10th Cir. 2008).

[9] International Olympic Committee, The Ancient Olympic Games, http://www.olympic.org/uk/games/ancient/index_uk.asp (last visited Apr. 4, 2009).

Games as early as 776 B.C.[10] In these games, participating Olympians received the sacred olive tree wreath if they won a particular competition.[11] However, in 393 A.D., the Christian Roman emperor, Theodosius I, abolished the Olympic Games because of their supposed ancient and pagan influences.[12] In 1896, 1,500 years later, the modern Olympics began in Athens, Greece.[13] Since the commencement of the modern Olympics, the games have undergone many changes.

The Paralympics are a recent innovation. Athletic competitions for war veterans with spinal cord injuries initiated the Paralympic movement. The games for these veterans first began in 1948 in Stoke Mandeville, a small village in England.[14] Four years later, when The Netherlands began participating in these athletic events, the national movement known as the Paralympics began.[15] Immediately after the 1960 Summer Olympic Games in Rome, Italy, the first formal Paralympic Games were hosted.[16] By 1988, a significant change in Olympic policy occurred. The Seoul Summer Olympic Games held both Olympic and Paralympic Games at the same venue, a practice that continues today.[17] In 2008, 4,200 athletes from 148 countries participated in the Beijing Paralympics.[18]

The International Olympic Committee, a non-profit organization, oversees the Olympic movement and supervises the Olympic Games.[19] The International Paralympic Committee, a member of the International Olympic Committee, governs the Paralympics.[20] A National Olympic Committee represents each nation that participates in the Olympic Games.[21] Within the United States, the U.S. Olympic Committee (USOC), an organization chartered by the acts of Congress, coordinates all U.S. Olympic-related activities.[22] In May 2001, the USOC created the

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[10] *Id*.

[11] International Olympic Committee, More on the History of the Games, http://www.olympic.org/uk/games/ancient/history_uk.asp (last visited Apr. 4, 2009).

[12] The Ancient Olympic Games *supra* note 9.

[13] International Olympic Committee, Athens 1896, http://www.olympic.org/uk/games/past/index_uk.asp?OLGT=1&OLGY=1896 (last visited Apr. 4, 2009).

[14] International Paralympic Committee, Paralympic Games, http://www.paralympic.org/release/Main_Sections_Menu/Paralympic_Games (last visited Apr. 4, 2009).

[15] *Id.*

[16] *Id*. During this landmark event, approximately 400 athletes with disabilities from twenty-three nations competed in eight different sports. *Id.*

[17] *Id*.

[18] More than 4,200 athletes to compete at Beijing Paralympics, http://news.xinhuanet.com/english/2008-08/24/content_9674902.htm.

[19] Jason Kroll, Note, *Second Class Athletes: The USOC's Treatment of Its Paralympians*, 23 CARDOZO ARTS & ENT. L.J. 307, 310-13 (2005).

[20] *Id*. at 311.

[21] *See generally id*.

[22] *Id*. at 310.

U.S. Paralympics Division to advance the involvement of athletes with disabilities in international sports.[23]

III. The Rehabilitation Act and the ADA

The Rehabilitation Act and the ADA mandate equal access and inclusion for athletes with disabilities.[24] The ADA is the extension of the Rehabilitation Act into non-federal public and private sectors.[25] As such, principles under both the Rehabilitation Act and the ADA are interchangeable. The ADA's and Rehabilitation Act's language may be cross-relied on in interpreting affirmative requirements of non-discrimination and reasonable accommodations.[26]

Title III lists twelve categories that fall under the ADA. Each category provides examples that qualify as "places of public accommodation."[27] According to the list, fitness, recreational, and sports facilities as well as athletic programming and services, fall within the definition of a place of "public accommodation."[28] The definition of "a place of public accommodation" should be interpreted liberally.[29] Additionally, the Rehabilitation Act, as well as Title II of the ADA, requires that programs and activities receiving federal financial assistance, or that are part of state or local government, must be administered "in the most integrated setting

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[23] *Id.* at 312.

[24] Rehabilitation Act of 1973 § 504, 29 U.S.C. § 701(c)(3); ADA Amendment Act of 2008, Pub. L. No. 110-325, §§ 2(a)(1), (b)(1), 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

[25] Kroll, *supra* note 19, at 321; University of Illinois at Chicago's Office for Access and Equity, Disability Rights Legislation Overview, 1, http://www.uic.edu/depts/oae/Accessibility-checklist/Disability%20Rights%20Legislation%20Overview.pdf; *see* Deborah Leuchovius, ADA Q & A: The Rehabilitation Act and ADA Connection, http://www.pacer.org/parent/php/PHP-c51f.pdf. In addition, two critical developments, the ADA Amendments Act of 2008 and the international Convention on the Rights of Persons with Disabilities are relevant as they advance inclusion and integration on the disabled community's behalf. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); Convention of the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 46 I.L.M 333 [hereinafter Convention].

[26] *See, e.g.*, 29 U.S.C. § 794(g) (2000); Alexander v. Choate, 469 U.S. 287, 299-301 nn.19-20 (1985) (stating that the related terms "reasonable accommodation" and "reasonable modification" describe the same legal obligation).

[27] 42 U.S.C. § 12181(7)(A)-(L) (2000); *see also* PGA Tour, Inc. v. Martin, 532 U.S. 661, 676 & n.24 (2001) (citing 42 U.S.C. § 12181(7)(L) (2000)).

[28] 42 U.S.C. § 12181(7)(L) (2000).

[29] 42 U.S.C. § 2000a (2000); *see* Disability Rights Legislation Overview, *supra* note 25, at 4.

appropriate."[30] The purpose behind this so-called "integration mandate," is that a public entity or place of public accommodation may not deny a qualified person with a disability the opportunity to participate in programs or activities that are as equal to the able-bodied as possible, even if separate programs or activities would be, in the view of such public entity or place of public accommodation, best suited to the disabled. The integration mandate effectuates the purpose behind the principle of reasonable accommodations or modifications by ensuring that the disabled do not fall prey to separate but unequal treatment.[31]

The Rehabilitation Act and Titles II and III of the ADA incorporate mandates of social inclusion. These mandates require reasonable accommodations or modifications in policies, practices, or procedures.[32] Requiring these accommodations ensures that qualified individuals with disabilities can equally enjoy the benefits of or participate in the activities, goods, programs, or services of covered entities.[33]

As the Supreme Court noted in *PGA Tour, Inc. v. Martin*, accommodating individuals with disabilities requires that the requested accommodation or modification be reasonable, necessary, and justified, and should not cause a fundamental alteration to the program in question.[34] The question of what constitutes a reasonable accommodation or modification is fact-specific and is to be conducted on a case-by-case basis.[35]

Title II of the ADA prohibits a public entity from discriminating against a qualified individual based on a disability or the record of a disability in "services, programs, or activities."[36] Additionally, Title III provides a prohibition against discrimination by any individual who owns, operates, or leases a place of public accommodation, "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations."[37] A "qualified individual" with a disability is one who meets the essential eligibility criteria in order to benefit from goods, activities, programs, or services with or without reasonable accommodations or modifications to rules, policies or practices, the removal of barriers, or the provision of auxiliary aides and services.[38]

In addition, theories of liability under § 504 of the Rehabilitation Act and Titles II and III of the ADA include intentional or disparate discrimi-

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[30] 45 C.F.R. § 84.4(b)(2); 45 C.F.R. Pt. 84, App. A(a)(6); Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 591 (1999) (interpreting substantially similar provision in ADA Title II regulations).

[31] *Id.*

[32] *See, e.g.*, 29 U.S.C. § 794(a); 42 U.S.C. §§ 12132, 12182(a), (b)(2)(A)(ii) (2000).

[33] 42 U.S.C. §§ 12132, 12182(a), (b)(2)(A)(iii) (2000).

[34] PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 n.38 (2001).

[35] Lentini v. Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 844 (9th Cir. 2004).

[36] 42 U.S.C. § 12132.

[37] 42 U.S.C. § 12182(a), (b)(2)(A)(ii).

[38] 42 U.S.C. § 12131(2).

nation as well as the mere failure to accommodate.[39] Compensatory damages are available to plaintiffs seeking relief under the Rehabilitation Act and the ADA.[40] Punitive damages are not available.[41]

A plaintiff who institutes a civil action requesting some form of equitable relief or damages under § 504 of the Rehabilitation Act, or the ADA (Title II or III) must generally demonstrate that: 1) the Rehabilitation Act or the ADA (or both) applies to a particular entity, e.g., a public entity or place of public accommodation; 2) the plaintiff is disabled, and has been denied access or meaningful participation based on such disability; 3) the plaintiff is otherwise qualified for the program or service; 4) the defendant can engage in reasonable accommodations or modifications to ensure the inclusion of the plaintiff, but failed to do so, or provided accommodations in a way which afforded unequal participation to the plaintiff or utilized eligibility criteria that tended to screen out the plaintiff; and 5) with respect to the Rehabilitation Act only, the activity, program or service receives federal funding.[42]

But no rule is absolute. The defendant simply might not be considered a covered entity under the applicable statutory framework.[43] The defendant may not be able to otherwise provide such reasonable accommodations or modifications, for doing so would cause a fundamental alteration in the activity, good, program, or service the defendant provides.[44] As the Ninth Circuit pointed out in *Lentini v. California Center for the Arts,*

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[39] *See* Tennessee v. Lane, 541 U.S. 509, 531-32 (2004) (citing 42 U.S.C. § 12131(2) (2000)); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48 (2d Cir. 2002) (finding that plaintiffs who alleges violations of Title II "may proceed under any or all of three theories: disparate treatment, disparate impact, and failure to make reasonable accommodation"); Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840, 847 (7th Cir. 1999) (noting the existence of three "methods of proof" for claims under Title II). Discrimination can be proven "by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's rule disproportionally impacts disabled people." *Id.*

[40] *See* Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998); Jeremy H. *ex rel.* Hunter v. Mount Leb. Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996).

[41] Barnes v. Gorman, 536 U.S. 181, 189 (2002).

[42] *See* Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072, 1089-90 (D. Colo. 2006); Parr v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1086 (D. Haw. 2000); Schiavo *ex rel.* Schindler v. Schiavo, 358 F. Supp. 2d 1161, 1164 (M.D. Fla. 2005), *affirmed*, 403 F.3d 1289 (11th Cir. 2005) (discussing criteria 1 & 2); Tugg v. Towey, 864 F. Supp. 1201, 1205 (S.D. Fla. 1994).

[43] For instance, the ADA expressly exempts private clubs from coverage. 42 U.S.C. § 12187 (2000).

[44] Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997). Although this decision concerns reasonable accommodations for access of service animals, it still provides a helpful discussion of the definition of "fundamental alteration" and the resulting judicial inquiry.

Escondido,[45] the failure to provide reasonable accommodations or modifications, based on a fundamental alteration challenge, constitutes an affirmative defense.

IV. The ADA Amendments Act of 2008

During the course of several years, various courts, including the U.S. Supreme Court, have judicially limited congressional intent to protect a broad swath of disabled individuals.[46] But pro-disability rights legislators, such as House Majority Leader Steny H. Hoyer (D-Md.), Congressman F. James Sensenbrenner, Jr. (R-Wisc.), and Senator Thomas Harkin (D-IA) have pursued legislation to correct the negative impact of court decisions on disability issues. A two-year effort by these and many other legislators, as well as the combined efforts of the disability advocacy community, finally resulted in the passage of the ADA Amendments Act of 2008 (Amendments Act).[47] President George W. Bush signed the Amendments Act into law on September 25, 2008. The Amendments Act has been in effect since January 1, 2009.

The Amendments Act ameliorates the harsh effects of federal and Supreme Court interpretations of the definition of disability under the original ADA.[48] The Amendments Act, which requires applicable federal agencies and departments to update their regulations to reflect the changes promulgated by its provisions, mandates several new requirements. First, from January 1, 2009 forward, the phrase "substantially limits" in the definition for disability, must be interpreted consistently with the findings and purposes of the ADA. The ADA emphasizes that the

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[45] Lentini v. Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 845 (9th Cir. 2004) (citing Colo. Cross Disability Coalition v. Hermanson Family Ltd., 264 F.3d 999, 1003 (10th Cir. 2003)).

[46] *See, e.g.*, Sutton v. U.S. Airlines, Inc., 527 U.S. 471, 489-91 (1999) (holding [erroneously in the view of the authors] that "mitigating measures" utilized by people with disabilities must be taken into account in determining and defining the existence of a disability).

[47] This legislation was initially titled the ADA Restoration Act of 2007. National Council on Independent Living, ADA Restoration Act, http://www.ncil.org/news/RestorationAct.html (last visited Mar. 5, 2009); Day in Washington, ADA Restoration Act to the ADA Amendment Act, http://dayinwashington.com/?p=141 (July 1, 2008); Dick Thornburgh, Counsel, Kirkpatrick & Lockhart Preston Gates Ellis LLP, Testimony Before the Senate Judiciary Committee (Nov. 15, 1997), http://www.c-c-d.org/task_forces/rights/ada/SenThornburgh.pdf; John D. Kemp, Attorney, Powers, Pyles, Sutter & Verville P.C., Testimony Before the U.S. Senate Health, Education, Labor & Pensions Comm. (Nov. 15, 2007), http://www.c-c-d.org/task_forces/rights/ada/SenKemp.pdf; *Cf.,* James Sherk & Andrew M. Grossman, ADA Restoration Act: Undermining the Employer-Employee Relationship (Jan. 28, 2008), http://www.heritage.org/research/legalissues/wm1785.cfm (last visited Apr. 2, 2009).

[48] ADA Amendments of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

disabled are an insular class, who because of historical exclusion from society, require heightened protections. Impairments that are episodic or in remission also are considered a disability if they would substantially limit a major life activity when active. Additionally, an impairment that "substantially limits" one particular major life activity need not limit other major life activities to be considered a disability.[49] Second, an extensive list of tasks that constitute major life activities include physical tasks such as walking, standing, and lifting; mental tasks such as learning, reading, and thinking; and even the operation of major bodily functions, such as immune system function, cell growth, and reproductive function.[50] Third, in explicit rejection of *Sutton v. U.S. Airlines*,[51] an individual does not have to establish that his impairment limits a major life activity to receive coverage under the regarded as facet of the ADA.[52] Fourth, protections afforded under the ADA are to be construed in favor of the broad coverage of individuals.[53]

V. An International Outlook

In March of 2007, the General Assembly of the United Nations established what is considered the first human rights treaty of the twenty-first century, the Convention on the Rights of Persons with Disabilities (Convention).[54] In April 2008, Ecuador galvanized this historic international instrument into effect by being the 20th state signatory to ratify the treaty.[55] As of September 2008, approximately 130 nations had signed the Convention and 37 countries had ratified it.[56]

The Convention is divided into several principles and articles.[57] Most notably, Article 30 addresses the participation of people with disabilities

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[49] § 4(a), 122 Stat. at 3556 (codified at 42 U.S.C. § 12102(4)(C)).

[50] § 4(a), 122 Stat. at 3555 (codified at 42 U.S.C. §§ 12102(2)(A)-(B)).

[51] The *Sutton* Court ruled that a "disability" exists only where impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if corrective measures were not taken. Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999).

[52] *Compare* § 2(b)(3), 122 Stat. at 3553, *and* § 4(a)(3)(A), 122 Stat. at 3555, *with Sutton*, 527 U.S. at 488, 493-94.

[53] ADA Amendments of 2008 §4(a), 122 Stat. 3553, 3555. (codified at 42 U.S.C. § 12102(4)(a)).

[54] Convention, *supra* note 25. This Convention is noteworthy because it builds upon the mandating principles and language of the Rehabilitation Act and the ADA, yet potentially possesses broader language than the aforementioned legislation.

[55] *See* United Nations Enable, Countries and Regional Integration Organizations, http://www.un.org/disabilities/countries.asp?navid=17&pid=166#E (last visited Mar. 30, 2009).

[56] *See id.*

[57] Convention, *supra* note 25. Subsections B through D of the Preamble indicate that a "disability" is an evolving concept that is part of human diversity and universality. *Id.* Additionally, the Convention proclaims that societal exclusion is

in cultural life as well as within sport, recreation, and leisure.[58] Article 30 comprises an important provision of the overall Convention as a vehicle for continuous social connectivity with and integration into civil society for disabled individuals.[59] Article 30 is similar to the Rehabilitation Act and the ADA in that its language imposes on the signatories affirmative obligations to provide reasonable accommodations or modifications.[60] It also requires that signatories ensure that people with disabilities are the recipients of equal programming and services by administrators, organizers, or providers of sporting and recreational activities, programs, or services, in the most integrated setting possible.[61]

VI. Shepherd v. United States Olympic Committee

In *Shepherd v. United States Olympic Committee*,[62] the District Court consolidated two cases involving Paralympic athletes[63] brought under Title III of the ADA and § 504 of the Rehabilitation Act.[64] The plaintiffs argued that the USOC violated the aforementioned statutes and discriminated against disabled athletes by (1) failing to provide USOC benefits to disabled athletes equal to that provided to non-disabled athletes, (2) limiting the funds available to the Paralympic program, and (3) denying equal representation to Paralympic athletes on Olympic advisory committees.

The Court began its decision by disputing the plaintiffs' allegations that the USOC's Olympic facilities and benefits should be generally available to disabled athletes. Plaintiffs claimed that the Olympic facilities oper-

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caused by the interrelationship of impairments of individuals, and discriminatory attitudes and stereotypes. *Id.*

[58] *Id.* at. 30.

[59] Previous international instruments, such as the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights, inadequately addressed sport and recreation. Stein & Lord, *supra* note 2, at 179.

[60] *Id*.

[61] Convention, *supra* note 25, at art. 30.

[62] Shepherd v. U.S. Olympic Comm. 464 F. Supp. 2d 1072 (D. Colo. 2006).

[63] Mark Shepherd, a wheelchair basketball player, was a member of the United States Paralympic Wheelchair Basketball team in 1996. *Shepherd*, 464 F. Supp. 2d at 1072. Scott Hollonbeck, Jose Antonio Inguez and Jacob Walter Jung Ho Heilveil, were elite wheelchair racers, all of whom have competed in at least one Paralympic Games. Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191, 1194-95 (10th Cir. 2008).

[64] *Hollonbeck*, 513 F.3d at 1194-95 (combining Hollonbeck v. U.S. Olympic Comm., No. 07-1053 and Shepherd v. U.S. Olympic Comm., No. 07-1056). Additional common-law claims were brought by Plaintiff Shepherd and Plaintiff Vie Sports, a sports marketing company formed by Plaintiff Hollonbeck. These claims—breach of contract and promissory estoppel claims against the USOC—were separated by the Court from the consolidated ADA claims supra. *Shepherd*, 464 F. Supp. 2d at 1076 n.1.

ated by the USOC constituted "places of public accommodation,"[65] and that the programming benefits offered by the USOC constituted "goods, services, facilities, privileges, advantages, or accommodations"[66] under Title III of the ADA. The plaintiffs further contended that the USOC discriminated against them by denying them, on the basis of their disabilities, the "full and equal enjoyment" of these same USOC benefits.[67] Therefore, the plaintiffs urged the adoption of an "equitable" or "proportionate" remedial standard similar to that contained within Title IX.[68] The Court, however, disagreed, finding that "graft[ing] a remedial scheme promulgated under a statute banning sex discrimination onto statutes prohibiting disability discrimination, and then infus[ing] both into the statute establishing [the USOC] simply falls outside the scope of federal judicial authority."[69]

The Court centered its jurisdictional analysis on whether the term "public accommodation"[70] was a proper "fit" for governance of USOC benefits. According to the Court, the ADA applied only to "places of public accommodation," so the ADA's requirement of "full and equal enjoyment" did not apply to USOC benefits. In sum, the Court determined that it lacked jurisdiction over the USOC, as the USOC training facilities were not available to the public.[71] Additionally, the Court noted that the discrimination the plaintiffs alleged did not constitute per se dis-

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[65] *Shepherd,* 464 F. Supp. 2d at 1081. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(a) (2000).

[66] *Shepherd,* 464 F. Supp. 2d at 1081.

[67] *Id.*

[68] Title IX "prohibits sex discrimination in 'any education program or activity receiving federal financial assistance.'" Grove City Coll. v. Bell, 465 U.S. 555, 557-58 (1984) (citing Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681(a)). Section 902 of Title IX requires that these recipients of federal funds adhere to the prohibition, otherwise termination of assistance or "any other means authorized by law" is permitted. *Id.*

[69] *Shepherd,* 464 F. Supp. 2d at 1082. The Court also found that "absent an extension of existing law by Congress or a relevant regulatory agency, neither the wrong of which Plaintiffs complain nor the relief they seek "fit" within the rubric of the ADA or Rehabilitation Act." *Id.* at 1086. The Court noted its desire that the legislative branch amend the ASA to favor a remedial standard akin to Title IX. *Id.* at 1086 n.13.

[70] As defined in the ADA.

[71] *Shepherd,* 464 F. Supp. 2d at 1083. The Court distinguished between the instant case and *PGA Tour, Inc. v. Martin*. *Id.* (citing PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001)). *Martin* required golf courses that held themselves out as available to the general public could not discriminate against disabled participants, since the USOC training facilities were not available to the general public. *Id.* Rather, USOC

parate treatment.[72] The Court concluded that the plaintiffs were misplaced in their attempts to utilize "courts and federal antidiscrimination law to remedy inequities . . . which exist solely as a reflection of political will (or lack thereof) within the USOC and/or the legislative and executive branches of government directing its charter."[73]

Although the Court ultimately struck down the plaintiff's ADA claims, it continued with an analysis of the Defendants' claims.[74] Plaintiffs first contended that USOC programming was not offered to Paralympic athletes.[75] Plaintiffs alleged that as a result, they were forced to incur significant personal expenses which consequently "diminishe[d] their ability to train and their opportunity to compete on behalf of the United States as a Paralympian."[76] Plaintiffs further argued that their allegations arose under the ADA and the Rehabilitation Act, rather than under the ASA.[77] This distinction would require the USOC to amend their "corporate mandate" in a manner that accommodated plaintiffs and entitled them to the "full and equal enjoyment" of USOC benefits.[78] Defendants challenged plaintiffs' assertions, claiming that the decision to allocate

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facilities were only available to those selected to the Olympic, Pan-American, or Paralympic teams. *Id.*

[72] The Plaintiffs sought to remedy the "lack of parity" between Paralympic and Olympic programming. *Id.*

[73] *Id.* The Court decried "a culture that relegates Paralympians to second class status in the quantity and quality of benefits and support they receive from the USOC," but ultimately noted that "the inequities and injustices Plaintiffs describe are ultimately for the legislative or executive, and not judicial, branches of government to acknowledge and rectify." *Id.* at 1086.

[74] The Court took these actions "for purposes of appeal and in order fully to develop the record." *Id.* Clearly, the Court has recognized that its decision would be unpopular with disability advocates and was certain to be appealed.

[75] *Id.* Plaintiffs alleged that Paralympics were routinely denied benefits which are afforded to Olympic athletes. For example, the financial award Olympians received for winning gold, silver, and bronze medals are 10-times greater than the financial awards Paralympians receive for winning the same medals. *Id.* at 1081 n.7, 1086. Olympic athletes had first priority in using USOC training facilities while Paralympic athletes were given lowest priority. *Id.* Various Olympic grants, such as Basic and Tuition Assistance Grants, as well as Elite Athlete Health Insurance were only offered to Olympic athletes. *Id.* Paralympians were not permitted to march in the Olympic opening ceremonies. *Id.* They were not provided with uniforms whereas Olympians were. *Id.* Finally, Paralympians had to pay significant training expenses out of pocket. According to the Plaintiffs, all of these denied benefits collectively impaired the plaintiffs' abilities to train for Paralympic competitions. *Id.*

[76] *Id.* at 1087.

[77] *Id.*

[78] Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(a) (2000).

USOC benefits rested solely within the USOC's "exclusive jurisdiction."[79]

The Court agreed that the various benefits denied to the plaintiffs could potentially have fallen within the "exclusive jurisdiction"[80] of the USOC,[81] under the holding of *Lee v. United States Taekwondo Union*.[82] In *Lee,* the District Court of Hawaii ruled that the plaintiffs' civil rights claims, brought independent of the ASA, were not preempted. As the *Lee* court expressed, to are invoked, they are not by other statutory schemes, such as, the ASA[83] The *Lee* Court also held that, "to the extent Plaintiff was seeking [resolution of his] . . . state tort and contract claims . . . such claims were preempted."[84]

In other words, the Court held that the ASA did not bow to federal laws "that provide private rights of action to ensure freedom from discrimination."[85] In the instant case, according to the *Hollonbeck* Court, where the remedy sought by the plaintiffs fell under the USOC's exclusive jurisdiction, then the ASA preempted the plaintiffs' claims. The Court found, however, that it could not preclude the plaintiffs' ADA claims, as they called for a remedy to "disability-based discrimination."[86]

The Court proceeded with an analysis of the plaintiffs' merits under the ADA and Rehabilitation Act. To state a cause of action under these laws, the plaintiffs had to demonstrate that:

> (1) they were disabled; (2) Defendants operated places of public accommodation; (3) Plaintiffs qualified for participation in the USOC program or for USOC benefits; and (4) the USOC discriminated against Plaintiffs by denying them the opportunity to participate in the program, by providing them a participation opportunity unequal to that afforded non-disabled individuals, and/or by using

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[79] *Shepherd*, 464 F. Supp. 2d at 1087. The defendants proffered several cases to show that no private cause of action could arise under the ASA. The plaintiffs did not deny defendants' cause of action allegation. *Id.*

[80] Ted Stevens Olympic and Amateur Sports Act of 1978, 36 U.S.C. § 220503(3) (2000).

[81] The Court recognized that this was a gray area – "an exceedingly close call" that could have gone either way. *Shepherd*, 464 F. Supp. 2d at 1088.

[82] *Id.* (citing Lee v. U.S. Taekwondo Union, 331 F. Supp. 2d 1252 (D. Haw. 2004)).

[83] *Shepherd*, 464 F. Supp. 2d at 1088 (citing Lee v. U.S. Taekwondo Union, 331 F. Supp. 2d 1252, 1260-61 (D. Haw. 2004)).

[84] *Id.* (citing Lee v. U.S. Taekwondo Union, 331 F. Supp. 2d 1252, 1257 (D. Haw. 2004)).

[85] *Id.* (quoting Lee v. U.S. Taekwondo Union, 331 F. Supp. 2d 1252, 1260 (D. Haw. 2004)).

[86] *Id.* Plaintiffs sought the – not necessary equal – provision of benefits and incentives which would afford Paralympians the "full and equal enjoyment" of USOC benefits. *Id.* at 1089.

> eligibility criteria for program benefits that screened out or tended to screen out the disabled from fully enjoying the program.[87]

The Court determined that to successfully bring a cause of action under Title III of the ADA, the plaintiffs had to demonstrate that they were both disabled and "otherwise qualified" to receive USOC benefits.[88] According to the Court, if the USOC aimed its Olympic program solely at "qualified members" of the general public, then likewise, to be considered for equal benefits under the ADA, disabled individuals had to demonstrate that they were "otherwise qualified" for USOC benefits.[89]

The plaintiffs also argued that the USOC was charged with the allocation of programming and benefits in a *non-discriminatory* manner.[90] According to the Court, however, the plaintiffs wrongly cited cases which involved the elimination of programs or facilities for the disabled, which turned on *access* to the disabled, rather than the *quality* of access.[91]

Finally, the Court struck down plaintiffs' argument that "no valid basis other than invidious discrimination justifies the 'eligibility criteria' of being an Olympian to receive Olympic benefits."[92] The plaintiffs argued that the USOC mandate of "training and obtaining the best athletes"[93] should apply equally to all programs under the USOC's auspices. Therefore, plaintiffs argued it was unnecessary as well as discriminatory for the USOC to limit its facilities, benefits, and programming to Olympic athletes.[94] The Court reasoned that as plaintiffs received access to USOC programming through the Paralympics, any right to "nondiscriminatory provision of Olympic benefits stops."[95] In other words, the USOC merely had to provide a disability program (in the form of the

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[87] *Id.* at 1090.

[88] *Id.*

[89] *Id.* at 1091. The Court noted that "[a] plaintiff is 'otherwise qualified' under the Rehab[ilitation] Act if he is able to meet all of a program's requirements in spite of his disability." *Id.* (quoting Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979)). Moreover, according to the Court, "Plaintiffs must show that with or without reasonable modification to USOC rules, policies, or practices, they meet the essential eligibility requirements for Olympic benefits." *Id.*

[90] *Id.* (emphasis added).

[91] *Id.* at 1092 n.18. According to the Court, the plaintiffs cited *Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach,* 846 F. Supp. 986 (S.D. Fla. 1994), and *Rodde v. Bonta,* 357 F.3d 988 (9th Cir. 2004), in their briefs. *Id.* In *Dreher Park,* the elimination of the program was found to be discriminatory as it created unequal access for the disabled. *Dreher Park*, 846 F. Supp. at 991-92. In *Rodde,* shutting down a disability-friendly facility meant that the remaining facilities were insufficient for the needs of the disabled. *Rodde*, 357 F. 3d at 998.

[92] Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072, 1093 (D. Colo. 2006).

[93] *Id.* at 1094.

[94] *Id*.

[95] *Id.* at 1095.

Paralympics) to halt any further inquiry into the "full and equal enjoyment" of USOC benefits for the disabled.

The Court concluded with a final nail in the coffin: plaintiffs must seek to enforce their "equitable allocation of benefits"[96] compromise through the legislative or executive branch, rather than the judicial branch.[97]

VII. Hollonbeck v. United States Olympic Committee

In *Hollonbeck v. United States Olympic Committee*,[98] the Paralympic athletes[99] in *Shepherd*[100] appealed several issues to the Court of Appeals for the Tenth Circuit, including *inter alia* the District Court's grant of a motion to dismiss in favor of the United States Olympic Committee ("USOC") on a claim brought under § 504 of the Rehabilitation Act.[101]

In their brief, appellants argued four claims: "(1) the relevant universe for analysis should be all amateur athletes over which the USOC has responsibility; (2) they are 'otherwise qualified' for the Athlete Support Programs; (3) The USOC's policy discriminated against them; and, (4) The USOC's policy effectively screened out amateur athletes with disabilities."[102] Appellees countered that the Olympics were a separate program from the Paralympics. Therefore, Appellees argued that the USOC's "treatment of participants in the two programs should not be compared . . . to determine whether disabled athletes were denied [USOC benefits] in violation of § 504 [of the Rehabilitation Act]."[103] The Court of Appeals affirmed the decision of the District Court, finding in favor of the USOC.

Appellants first argued that the ASA's definition of "amateur athlete"[104] extended to Paralympic athletes.[105] Appellants also argued that

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[96] *Id.*

[97] *Id.*

[98] Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191 (10th Cir. 2008).

[99] Mark Shepherd, a wheelchair basketball player, was a member of the United States Paralympic Wheelchair Basketball team in 1996. *Shepherd*, 464 F. Supp. 2d at 1075. Scott Hollonbeck, Jose Antonio Inguez and Jacob Walter Jung Ho Heilveil, were elite wheelchair racers, all of whom have competed in at least one Paralympic Games. *Hollonbeck*, 513 F.3d at 1193.

[100] *Shepherd*, 464 F. Supp. 2d at 1072.

[101] *Hollonbeck*, 513 F.3d at 1193.

[102] *Id.* at 1194.

[103] Appellant's Consolidated Opening Brief at 3, Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191 (10th Cir. May 2, 2007) (No. 07-1053 & No. 07-1056), 2007 WL 1707146.

[104] Defined as "an athlete who meets the eligibility standards established by the national governing body or paralympic sports organization for the sport in which the athlete competes." Ted Stevens Olympic & Amateur Sports Act, 36 U.S.C. § 220501(b)(1) (2000).

[105] *Hollonbeck,* 513 F.3d at 1194. Initially, the 1982 version of the ASA directed the USOC "to encourage and provide assistance to amateur athletic programs and

the definition of "program or activity" under § 504 of the Rehabilitation Act was akin to Title IX,[106] which prohibited discrimination by recipients of federal funding, and required an institutional analysis of discrimination. Appellants sought an identical comparison of the USOC's treatment of amateur athletes competing in the Olympic, Pan-American and Paralympic Games, rather than a sole analysis of the USOC's treatment of disabled athletes in the Paralympic Games.[107]

The Court of Appeals, however, demurred, holding that the ASA did not contain any regulations regarding the USOC's day-to-day activities, other than a vaguely worded legislative requirement for the USOC to obtain "the most competent amateur representation possible in each event of the Olympic Games, the Paralympic Games, and the Pan-American Games."[108]

Appellants' second claim was predicated on their first: namely, that through an institutional analysis, they were "otherwise qualified"[109] for the USOC's Athlete Support Programs because they were considered to

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competition for handicapped individuals, including where feasible, the expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals." 36 U.S.C. § 220503(13). At that time, the ASA made no mention of the Paralympic movement or Paralympic Games. However, in 1998, the ASA was amended to expand the USOC's responsibilities to the Paralympic Games. 36 U.S.C. §§ 220501-220529.

[106] Education Amendments of 1972, 20 U.S.C. § 1681 (2000) (Title IX). According to Appellants' Brief, Title IX contains an identical definition of "program or activity" as provided in § 504. Appellant's Consolidated Opening Brief, *supra* note 103, at 15. *Compare* 20 U.S.C. § 1687 *with* 29 U.S.C. § 794(b).

[107] Appellant's Consolidated Opening Brief, *supra* note 103, at 15.

[108] 36 U.S.C. § 220503(4). The Court further distinguished Appellants' Title IX claims on the puerile notion that while separation based on gender would sometimes trigger institution-wide analysis, utilizing the same regulatory framework would not support Appellants' Title IX claims. *Hollonbeck,* 513 F.3d at 1197.

[109] Section 504 of the Rehabilitation Act requires that: "No *otherwise qualified* individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (2006) (emphasis added). Furthermore, for the Appellants to demonstrate a prima facie case under § 504, they must show proof that "(1) plaintiff is handicapped under the Act; (2) he is 'otherwise qualified' to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminates against plaintiff." *Hollonbeck,* 513 F.3d at 1194 (citing Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir. 1999)). Establishment of "otherwise qualified" standard requires that the Appellant demonstrate that he "meet[s] all of a program's requirements in spite of his [disability]." *Id.* at 1196 (quoting Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979) (internal quotations removed). Absent this showing, courts may require "reasonable accommodations" that do not fundamentally alter the program. *Id.* (citing Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 288 n.17 (1987)).

be "amateur athletes" under the ASA.[110] In addition, the appellants argued "[t]here is no evidence that the eligibility requirement of being an Olympic or Pan-American athlete is essential to the Athlete Support Programs."[111] Permitting Paralympic athletes to participate in Athlete Support Programs did not constitute a fundamental alteration or modification of USOC programming.[112] Simply put, "[b]eing an amateur athlete—as defined by statute—is an essential eligibility requirement . . . being an Olympic athlete is not."[113]

As such, appellants argued that the USOC should not be permitted to exclude Paralympic athletes from USOC benefits.[114] Permitting Paralympic athletes to participate in USOC benefits would actually serve to further the USOC's program as a whole.[115] The Court rejected this argument, finding that appellants could not "compel discretionary acts of administrators absent discrimination."[116]

Appellants also argued that the USOC's policy of excluding Paralympic athletes from USOC benefits was facially discriminatory and discrimination by proxy.[117] The provision of Olympic athletes or Pan-American athletes with USOC benefits unequal to those afforded Paralympic athletes constituted *intentional* disability discrimination, a violation of § 504 of the Rehabilitation Act.[118] Further, appellants argued that while the USOC's discrimination was aimed at Paralympic athletes rather than against disabled athletes *per se*, Paralympic athletes still served as a "proxy" for the protected class of disabled athletes.[119]

The Court disagreed with appellants' contention of intentional discrimination, given that the USOC's policy limited benefits to those athletes solely eligible to compete in Olympic or Pan American Games, rather than the Paralympic Games.[120] According to the Court, the USOC policy "clearly [did] not contain an explicit requirement of not being disabled."[121] The Court also held that, as the aforementioned USOC requirement was specifically not "directed at an effect or manifestation of a handicap"[122] (although it limited eligibility to Olympic and Pan Ameri-

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[110] *Hollonbeck,* 513 F.3d at 1196.

[111] Appellant's Consolidated Opening Brief, *supra* note 103, at 16.

[112] *Id.* at 34.

[113] *Id.*

[114] *Hollonbeck,* 513 F.3d at 1196.

[115] *Id.*

[116] *See id.*

[117] *Id.*

[118] Appellant's Consolidated Opening Brief, *supra* note 103, at 38.

[119] *Id.* at 39.

[120] *Hollonbeck,* 513 F.3d at 1196.

[121] This otherwise discriminatory USOC "policy" is clearly ripe for legislative amendment, a fact that the Court noted in its conclusion. *See id.* at 1197.

[122] *Id.* at 1196-97 (quoting McWright v. Alexander, 982 F.2d 222, 228 (7th Cir.1992)) (internal quotations removed).

can athletes), the USOC policy did not discriminate against Paralympic athletes on the basis of their disability.[123] In sum, the Court found that the USOC's classification was facially neutral and not proxy discrimination.[124]

Finally, appellants argued that the USOC's policy created a disparate impact as it established "criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability" in violation of § 504.[125] Such "neutral" USOC requirements[126] effectively excluded all Paralympic athletes, since their chances of receiving said benefits were "close to zero."[127] Therefore, the USOC's criterion for receiving Olympic benefits was tantamount to disparate impact discrimination.[128]

The Court held that a finding of disparate impact was insufficient to establish a prima facie case under § 504 of the Rehabilitation Act.[129] The Court also determined that further analysis would be necessary to assess whether the Paralympic athletes were otherwise qualified for USOC benefits, and whether reasonable accommodations would not fundamentally alter the nature of the USOC program.[130] A change to the eligibility requirements would indeed fundamentally alter the nature of the USOC program, since according to the Court the USOC policy was "facially neutral" and not "directed at an effect or manifestation of a handicap."[131]

The Court concluded that it simply could not "modify the Rehabilitation Act to reach a result in [appellants'] favor absent statutory or regulatory authority . . . [rather, the appellants] should seek a remedy with the legislative or executive branches, not the courts."[132]

VIII. Our View

The *Shepherd* and *Hollonbeck* courts appear to agree with Justice Scalia's dissent in *PGA Tour, Inc. v. Martin* that the *Martin* majority interpreted the ADA's provisions with "a benevolent compassion that the

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[123] *Id.* at 1197. The flawed logical reasoning utilized here—the exclusion of a particularly disparate group of individuals through the discrete selection and inclusion of all other groups—is the basis for the conclusions generated by this article.

[124] *Id.*

[125] Appellant's Consolidated Opening Brief, *supra* note 103, at 46-47 (quoting 28 C.F.R. § 41.51(b)(3)(i) (2005)) (internal quotations removed).

[126] In other words, the requirement of being an Olympic or Pan American athlete in order to receive USOC benefits.

[127] Appellant's Consolidated Opening Brief, *supra* note 103, at 47.

[128] *Id.*

[129] *Hollonbeck*, 513 F.3d at 1197.

[130] *See id.*

[131] *Id.* at 196-97 (quoting McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992) (internal quotations removed)).

[132] *See id.* at 1197-98.

law does not place [within the] power [of the Supreme Court] to impose."[133] The rulings in the instant cases evidence the court's effort to evade instituting any judicial requirement that the USOC adhere to its civil rights obligations under the Rehabilitation Act and the ADA.[134]

Congress intended to eradicate the historical segregation of a class of citizens, thus assuring a more just and equal republic.[135] As such, to enable the USOC to enjoy a free pass in furnishing reasonable accommodations or modifications to Paralympiads who were "otherwise qualified" individuals that met essential eligibility criteria for the Paralympics, is a disheartening shortcoming of a Judiciary entrusted with the weighty task of safeguarding justice.

In *Hollonbeck,* the court issued an opinion that failed to realize the remedial purpose of the ADA. The court also declined to interpret the organization liberally as a "place of public accommodation" and impose the obligations in the Rehabilitation Act and the ADA once Paralympic athletes were qualified to utilize its facilities, services, or programs.[136] To narrowly define coverage for a "place of public accommodation" such as the USOC, allows the USOC to shirk its legal obligations. At a minimum, the Court should have explored the reasonability or even the necessity of the provision of reasonable accommodations or modifications by the USOC to the Paralympic athletes.

The Rehabilitation Act and the ADA are *in pari materia.* The principles and framework from both may be mutually relied upon when evalu-

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[133] PGA Tour, Inc. v. Martin, 532 U.S. 661, 691 (2001) (Scalia J., dissenting); Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072, 1082 (D. Colo. 2006); *Hollonbeck,* 513 F.3d at 1197.

[134] The court stated that, "[w]e sympathize with Plaintiffs' efforts to obtain benefits similar to those received by their Olympic counterparts. However, we cannot modify the Rehabilitation Act to reach a result in their favor absent statutory or regulatory authority to import, wholesale, Title IX regulations and precedent into § 504. Plaintiffs should seek a remedy with the legislative or executive branches, not the courts." *Hollonbeck,* 513 F.3d at 1197-98 (internal citations omitted).

[135] *See, e.g., Martin*, 532 U.S. 661, 690-91. The court stated:

> But surely, in a case of this kind, Congress intended that an entity . . . not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a . . . rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.

Id.; Career Concepts, History and Overview of the Americans with Disabilities Act, http://www.careerconcepts.biz/history_of_the_ADA.pdf; Thomas N. Stewart, III, The Purpose of the Americans with Disabilities Act, http://www.disabilityaccesslaw.com/ada_purpose.html (last visited Apr. 2, 2009).

[136] *See* Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191 (10th Cir. 2008) (failing to speak to the proper interpretation of "place of public accommodation" as it applied to this case).

ating the USOC's civil rights obligations toward Paralympic athletes.[137] The Rehabilitation Act's and ADA's numerous requirements—to which the USOC must comply – prohibit invidious discrimination, and require the provision of reasonable accommodations, modifications, or both.[138]

To demonstrate a prima facie case of disability discrimination, the plaintiff must show:

> (1) that the plaintiff has a disability; (2) that the plaintiff is otherwise qualified to participate in the program; (3) that in the circumstance of the USOC, where an organization can be interpreted as a federally chartered public entity, the program receives federal money; and (4) that the program discriminated against the plaintiff.[139]

Presuming that the appellants were "otherwise qualified" and that the USOC received federal funding, the dissent appropriately states that, "this case can and should be resolved by simple application of the *plain language of the statute*, and this court should reverse the judgment of the district court."[140] The Rehabilitation Act and the ADA therefore instruct, as the dissent in *Hollonbeck* correctly reasons, that the USOC has an affirmative obligation to not only refrain from intentional discrimination, but also to abstain from establishing eligibility criteria, programming, or services that screen-out Paralympiads on a disparate basis from similarly situated able-bodied athletes.[141]

Moreover, the majority in *Hollonbeck* indicates "the relevant universe for analysis under § 504 is the individual programs under the USOC's umbrella."[142] However, as discrimination often occurs as a result of "benign neglect," the failure of a covered entity to provide reasonable accommodations or modifications can constitute unreasonable and discriminatory action.[143]

As the USOC is charged with responsibility for the U.S. Paralympics Division, it would be difficult for it to argue that its management and staff are not "on notice" that certain affirmative obligations under the Reha-

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[137] Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1260-61 n.2 (D.C. Cir. 2008) (citing Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999); *see* Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 905, 908 (6th Cir. 2004); Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840, 845 n.6 (7th Cir. 1999)).

[138] *See* 29 U.S.C. § 794(a) (2006); 42 U.S.C. §§ 12132, 12182 (2000).

[139] *Hollonbeck,* 513 F.3d at 1198 (Holloway, J. dissenting) (citations omittied).

[140] *Id*. (emphasis added).

[141] *Id*. at 1199 & n.3 (citing Alexander v. Choate, 469 U.S. 287, 295-97 & n.17 (1985)).

[142] *Id*. at 1196.

[143] *See, e.g.,* Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1260 (D.C. Cir. 2008) (citing Alexander v. Choate, 469 U.S. 287, 295 (1985)); s*ee also* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412-13 (1979)).

bilitation Act and the ADA apply.[144] The Court's failure to recognize that public entities are tasked with ensuring meaningful access to people with disabilities, including the full spectrum of activities, benefits, programs, or services, enjoyed by other similarly situated individuals should not and cannot be permitted to stand.[145] *A fortiori*, it is exactly this kind of "benign neglect," or outright discriminatory treatment, in which the USOC engages when it unilaterally decides what benefits to furnish to athletes with disabilities. The appellants did not even request activities, benefits, programs, or services that were "substantively different," or that were "disability-tailored"; rather, they merely requested access to USOC benefits, to which they are entitled as top-level performing athletes for the USOC.[146]

With the decision in *Hollonbeck,* the majority permitted the USOC to abstain from complying with its legislative obligation of ensuring meaningful access to its activities, benefits, programs, or services. But, as the ancient Chinese proverb instructs, a journey of a thousand miles begins with one small step. As an organization publicly chartered by Congress and entrusted with the task of ensuring, fortifying, and promoting the viability and quality of all organizations under its auspices, it is critical that the USOC take the first small step by engaging in its federally mandated task to serve as an inclusive role model for people with disabilities in the United States.[147]

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[144] *See, e.g.,* Robertson v. Las Animas County Sheriff's Dep't, 500 F.3d 1185, 1196-98 (10th Cir. 2007) ("When the plaintiff has alerted the public entity to his need for accommodation (or *where the need for accommodation is obvious,* or required by statute or regulation), the public entity is on notice that an accommodation is required . . . ." (quoting Duvall v. County of Kitsap*,* 260 F.3d 1124, 1139 (9th Cir. 2001))).

[145] *See id.* at 1195 (citing Chaffin v. Kan. State Fair Bd.*,* 348 F.3d 850, 857 (10th Cir. 2003); Randolph v. Rodgers*,* 170 F.3d 850, 858 (8th Cir. 1999)).

[146] *See, e.g.,* Am. Council of Blind v. Paulson, 525 F.3d 1256, 1268 (D.C. Cir. 2008) (citing Alexander v. Choate, 469 U.S. 287, 303 (1985) (requiring the Treasury Department to modify paper currency to help visually impaired distinguish between bill is reasonable); Modderno v. King*,* 82 F.3d 1059, 1062 (D.C. Cir. 1996*)* (holding the ADA does not require modification of a policy to give the same benefits to the mentally ill as the physically ill.); Doe v. Mut. of Omaha Ins. Co.*,* 179 F.3d 557, 560-61 (7th Cir. 1999) (denying to require an insurance company to modify its policy to accommodate patients with aids, a disabling condition.); Rodriguez v. City of New York, 197 F.3d 611, 619 (2d Cir. 1999) (holding that the failure to modify Medicaid policy to provide safety monitoring does not violate the ADA or Rehabilitation Act); Jones v. City of Monroe, 341 F.3d 474 (6th Cir. 2003) (denying an injunction requesting that the court order Monroe to modify its parking program)).

[147] *See generally* Lara Krigel Pabst, *Embodying the Olympic Spirit: Why Paralympic Athletes Should Be Entitled to Proportionate Benefits Under the Americans with Disabilities Act*, 76 U. MO. KAN. CITY L. REV. 751, 758-59 (2008) (providing an informative discussion and overview of the structure of the USOC, as well as a cogent argument as to why either under the ADA or by way of new

IX. Conclusion

The important question here becomes, "who is at fault?" On one hand, is the USOC to blame for failing to provide the Paralympic athletes with the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations . . . ."[148] that they deserve? Some, including the *Hollonbeck* and *Shepherd* courts, argue that the USOC functionally established the Paralympic program, thus satisfying their burden under the ADA. But this de minimis standard is the equivalent of purchasing a car, but lacking the keys to drive. While the Paralympic athletes are certainly capable of success in Paralympic events, they are relegated to second-class status by the USOC's denial of the same benefits it provides to Olympic athletes.[149]

On the other hand, Congress must be at fault for promulgating vague legislation[150] that created nothing but unneeded headaches for everyone involved.[151] As Professor Conrad aptly noted, "the fault is not as much in the architects, engineers . . . as in the government's methods of promulgating a regulation."[152] Congress's well intended purpose in amending the ASA was "to encourage and provide assistance to amateur athletic programs and competition for handicapped individuals, including where feasible, the expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals."[153] However, in the case at bar, Congress has failed in its self-mandated charge to enable the Paralympic athletes to truly succeed in competition.

Since the Supreme Court has denied certiorari on *Hollonbeck*, there is no sense in crying over spilt milk. Despite the *Hollonbeck* Court's judicial inactivism, it got one thing right; "[The remedy lies] with the legislative or executive branches, not the courts."[154] At this point, the judicial process—at least in the Court of Appeals for the 10th Circuit—closed the door on Paralympic athletes. But all is not for naught.

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legislative enactment, the USOC should have an affirmative obligation to accommodate people with disabilities); *see* H.R. Rep. No. 95-1627, at 8-9 (1978)).

148 42 U.S.C. §§ 12182(a), (b)(2)(A)(ii) (2000).

149 *See generally* Kroll, *supra* note 19, at 310-13.

150 The ASA is a prime example.

151 Mark A. Conrad, *Wheeling Through Rough Terrain – The Legal Roadblocks of Disabled Access in Sports Arenas*, 8 Marq. Sports L.J. 263, 286 (1998) (noting that the failure of the DOJ to "convincingly define its regulations because of its failure to institute formal notice and comment standards" required a higher court to resolve the confusion).

152 *Id.*

153 36 U.S.C. § 220503(3)(A) (2000).

154 Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191, 1197-98 (D. Colo. 2008).

Congress has historically shown a penchant for reversing unpleasant judicial decisions.[155] Further amendment of the ASA by Congress would narrow the USOC's coverage under the Rehabilitation Act and the ADA, by extending the definition of a "place of public accommodation" to include the USOC. This would certainly provide one expedient vehicle towards resolving the issues *Shepherd* and *Hollonbeck* raised. Another avenue to address the opportunity the courts woefully missed in the instant decisions is by remedial legislation and by accompanying implementation through the rulemaking and enforcement processes of the government. To advance the cause of social integration, such remedial legislation and enforcement actions would require the USOC, and all similarly situated visible sporting or recreational institutions, to provide at least "equitable" or "proportionate" benefits to the Paralympic athletes, would not "fundamentally alter" the nature of the USOC or its accomplices, the Olympics and the Pan-American games.

The District Court and the Court of Appeals for the Tenth Circuit woefully failed to utilize the proverbial power of the pen to ensure progress towards a more inclusive society. Certainly, the appellants should have been safeguarded by the courts or through affirmative civil rights legislation. These protections should have been as clear as the rippling waters of the Great Lakes. One can only hope that, as the *Shepherd* and *Hollonbeck* courts failed to safeguard the rights of athletes with disabilities, Congress will proactively engage in legislative activism, such as the ratification of the Convention on the Rights of Persons with Disabilities.

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[155] The Eleventh Amendment overturned *Chisholm v. Georgia*, 2 U.S. 419 (1793). The Fourteenth Amendment overturned *Scott v. Sandford*, 60 U.S. 393 (1856). The Sixteenth Amendment overturned *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *opinion vacated on reargument*, 158 U.S. 601 (1895). The Nineteenth Amendment overturned *Minor v. Happersett*, 88 U.S. 162 (1874). The Twenty-Sixth Amendment overturned *Oregon v. Mitchell*, 400 U.S. 112 (1970).