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Civil Rights - The Status of Persons Infected with Asympotomatic HIV under the Americans with Disabilities Act of 1990 after Bragdon - Did the Supreme Court Miss an Opportunity to Protect Disabled Americans - Bragdon v. Abbott

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CIVIL RIGHTS—The Status of Persons Infected with Asymptomatic HIV Under the Americans with Disabilities Act of 1990 After *Bragdon*—Did the Supreme Court Miss an Opportunity to Protect Disabled Americans? *Bragdon v. Abbott*, 118 S. Ct. 1196 (1998).

INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA)[1] is a sweeping piece of legislation that seeks to eliminate discrimination against the millions of disabled Americans.[2] The ADA has protected disabled Americans from discrimination in both private and public contexts.[3] Despite the ADA's significance, the Supreme Court of the United States has only directly addressed or interpreted this historic statute on two occasions.[4]

On September 16, 1994, Sidney Abbott entered the office of Dr. Randon Bragdon for a routine dental appointment.[5] Abbott disclosed that she had been infected with the human immunodeficiency virus (HIV).[6] Although Abbott had been infected with HIV since 1986, at the time of her appointment she had not yet begun to show any outward signs of the infection.[7] Bragdon completed a dental examination, discovered a cavity, and informed Abbott of his policy against filling cavities of HIV infected patients in his office.[8] Bragdon said he was willing to fill the cavity in a hospital, at no added fee for his services, if Abbott was willing to pay for the additional cost of using the hospital's facilities.[9] Abbott declined this offer.[10]

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1. The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C. §§ 12101-12213 (1994)).
2. 42 U.S.C. § 12101(b)(1) (1994). The stated purpose of the ADA is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b) (1994).
3. *See infra* notes 38-43.
4. *See infra* note 124.
5. Bragdon v. Abbott, 118 S. Ct. 2196, 2201 (1998).
6. *Id.*
7. *Id.* at 2200-01.
8. *Id.*
9. *Id.*
10. *Id.* Bragdon "made no showing, however, that any area hospital had [the] safeguards [which he believed would reduce the risk of HIV transmission] or even that he had hospital privileges." *Id.* at 2211.

Instead, Abbott filed suit in the United States District Court for the District of Maine under the Maine Civil Rights Act[11] and section 302 of the federal Americans with Disabilities Act.[12] The federal statute prohibits discrimination in places of public accommodation such as a dentist's office.[13] Bragdon justified his decision by suggesting that if the procedure were performed in his office it would pose a "direct threat" to the health or safety of others, thus invoking a statutory defense under the ADA.[14]

After discovery, the parties filed cross motions for summary judgment.[15] The district court ruled in Abbott's favor, holding that her HIV infection satisfied the ADA's definition of disability.[16] The district court also held that Bragdon raised no genuine issue of material fact as to whether Abbott's HIV infection posed a direct threat to the health or safety of others.[17] The First Circuit Court of Appeals affirmed, holding that Abbott's asymptomatic HIV[18] was a disability under the ADA, and that Bragdon could not demonstrate that Abbott's HIV status posed a direct threat to the health or safety of others.[19] On November 26, 1997, the Supreme Court granted certiorari to decide whether asymptomatic HIV infection is a disability under the ADA and whether there was sufficient information to determine, as a matter of law, that Abbott's HIV infection posed no direct

11. The state law claims were not addressed by the U.S. Supreme Court. *See id.* at 2201.

12. 42 U.S.C. § 12182 (1994).

13. The ADA provides that: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (1994). The ADA defines the term public accommodation to include the "professional office of a health care provider." *See id.* § 12181(7)(F).

14. The ADA qualifies the mandate against discrimination by providers of public accommodation by providing:

> Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

See id. § 12182(b)(3).

15. *Bragdon*, 118 S. Ct. at 2201.

16. Abbott v. Bragdon, 912 F.Supp. 580, 585-87 (D. Me. 1995).

17. *Id.* at 591.

18. Asymptomatic is defined as the lack of any outward symptoms caused by the HIV infection. The HIV virus attacks the body's immune system by invading and destroying CD4+ cells. A person is regarded as having AIDS when their CD4+ cell count falls below 200 cells/mm^3 of blood. *Bragdon*, 118 S. Ct. at 2204.

19. Abbott v. Bragdon, 107 F.3d 934, 943-48 (1st Cir. 1997). The court of appeals held that Abbott was entitled to the protection of the ADA because her HIV infection met the Act's definition of a disability in that it was an impairment that substantially limited her major life activity of reproduction. The court of appeals based it decision regarding the threat Abbott's HIV infection posed to Dr. Bragdon by examining the Center for Disease Control's Recommended Infection Control Practices for Dentistry and the American Dental Association's policies regarding the treatment of HIV and AIDS infected patients. *Id.*

threat to the health or safety of others.[20] In a five to four decision[21] the Court affirmed the court of appeals' determination that asymptomatic HIV falls within the definition of disability under the ADA,[22] but vacated the summary judgment in favor of Abbott and remanded the direct threat issue to the First Circuit Court of Appeals for further proceedings consistent with the Court's opinion.[23]

This case note examines the *Bragdon* decision's impact upon those protected under the ADA. The note briefly discusses the history of the ADA and the federal Rehabilitation Act and the applicable case law under those statutes. The note then focuses on the majority and dissenting opinions in the case, and critiques their reasoning. The note concludes by examining the implications the Court's holding will have in future cases involving persons infected with HIV and other debilitating diseases, and offers an alternate method by which the Court could have decided the case.

BACKGROUND

The Rehabilitation Act of 1973

As the immediate predecessor to the ADA, the 1973 Rehabilitation Act serves as an important foundation to understanding the ADA. Congress first protected "handicapped"[24] persons by passing the Rehabilitation Act,[25] which prohibited discrimination against handicapped persons by any federal, or federally funded program or activity.[26] The Rehabilitation Act defined as handicapped any person who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[27] This definition was copied almost verbatim

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20. Bragdon v. Abbott, 118 S. Ct. 554 (1997) (order granting *certiorai*).

21. Justice Kennedy delivered the opinion of the Court. Bragdon v. Abbott, 118 S. Ct. 2196 (1998). Justice Kennedy's majority opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer. *Id.* Justice Stevens, joined by Justice Breyer, filed an opinion concurring in the decision. *Id.* at 2213. Justice Ginsburg also filed a concurring opinion. *Id.* at 2213. Chief Justice Rehnquist filed an opinion concurring in the judgment in part and dissenting in part. *Id.* at 2214. The Chief Justice's opinion was joined by in full by Justices Scalia and Thomas and by Justice O'Connor in Part II. *Id.* Justice O'Connor also filed an opinion concurring in the judgment in part and dissenting in part. *Id.* at 2217.

22. *Id.* at 2201-09.

23. *Id.* at 2213.

24. While the Rehabilitation Act used the term "handicapped," when drafting the ADA Congress chose to use the currently preferred term of "disabled." H.R. REP. NO. 101-485(II) at 50-51 (1990) *reprinted in* 1990 U.S.C.C.A.N. 332-333.

25. Pub. L. No. 93-112, 87 Stat. 357 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1994)).

26. Specifically the Rehabilitation Act prohibits discrimination in government employment practices, 29 U.S.C. § 791(a) (1994), in the awarding of federal contracts, 29 U.S.C. § 793(a) (1994), or by any program or activity receiving federal financial assistance, 29 U.S.C. § 794 (1994).

27. *See* 29 U.S.C. § 706(8)(A) (1994).

into the ADA's definition of a disability.[28]

Prior to the enactment of the ADA, every applicable judicial decision found that asymptomatic HIV was a handicap covered by the Rehabilitation Act.[29] This case history is significant given the similarity between the Rehabilitation Act's definition of a "handicap" and the ADA's definition of a "disability."[30]

One of the most significant cases decided under the Rehabilitation Act was the Supreme Court's decision in *School Board of Nassau County, Florida v. Arline*.[31] In *Arline* a school teacher filed suit under the Rehabilitation Act after being fired because of her susceptibility to tuberculosis.[32] While the Supreme Court specifically declined to reach the question of whether a person with AIDS, HIV, or other contagious disease is per se disabled,[33] the Court announced that an employer can refuse to employ a person if doing so would prevent that person from being a direct threat to the health or safety of others.[34] The Court also adopted a standard by which the "threat" a person poses should be evaluated.[35] This decision became the foundation for the ADA's direct threat exception.[36]

The Americans with Disabilities Act.

The Americans with Disabilities Act of 1990 is perhaps the most significant piece of civil rights legislation enacted within the last twenty-five years.[37] The ADA seeks to eliminate discrimination against the forty-three million Americans who have one or more mental or physical disabilities.[38]

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28. *Bragdon*, 118 S. Ct. at 2202. For the ADA's definition of a handicap see 42 U.S.C. § 12102(2) (1994).

29. *Bragdon*, 118 S. Ct. at 2207 (citing numerous cases in which an HIV infection was found to be a disability under the Rehabilitation Act and Fair Housing Amendments Act definition of a disability).

30. *See id.* at 2202.

31. 480 U.S. 273 (1987).

32. *Id.* at 276.

33. *Id.* at 282, n.7.

34. *Id.* at 287-89.

35. *Id.* at 288. The Court adopted the following standard:

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

Id. (alteration in original) (quoting Brief for American Medical Association as Amicus Curiae at 19, School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (No. 85-1277)).

36. Bragdon v. Abbott, 118 S. Ct. 2196, 2210 (1998).

37. LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW § 1.05, 23 (2d. ed., West Group 1997). The Civil Rights Act of 1991, Pub. L. No. 102-166, is certainly an important piece of civil rights legislation, however given the ADA's breadth and scope it is arguably a more important piece of legislation.

38. 42 U.S.C. § 12101(a-b) (1994).

The ADA is divided into four subchapters addressing respectively: employment,[39] public entities and services,[40] providers of public accommodation and services,[41] and other miscellaneous matters.[42] The first subchapter is primarily enforced by the Equal Employment Opportunity Commission (EEOC) and private plaintiffs,[43] while the second and third subchapters are enforced by the Department of Justice, and as in this case, by third party plaintiffs.[44]

Because it would have been impractical for the Congress to list, or to have directed an administrative agency to list, all of the disabilities the ADA was designed to cover, Congress reused the Rehabilitation Act's definition of a handicap.[45] The definition used by the ADA defines disability with respect to the individual,[46] giving the courts the power to determine what constitutes a disability on a case by case basis. However, this lack of a clear definition has led to considerable litigation and many judicial decisions seeking to determine exactly which types of impairments are considered disabilities under the ADA. One of the most widely litigated subjects under the ADA is whether asymptomatic HIV is considered a disability.[47]

Prior to *Bragdon*, the federal courts of appeals were split on whether persons infected with HIV, who have not yet begun to show symptoms of the infection, are protected by the ADA. The First and Ninth Circuits held that asymptomatic HIV meets the definition of a disability as provided in the statute.[48] In fact, the First Circuit specifically held that asymptomatic HIV is a disability because it substantially interferes with the major life activity of reproduction.[49]

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39. *See id.* §§ 12111-12117.
40. *See id.* §§ 12131-12165.
41. *See id.* §§ 12181-12185.
42. *See id.* §§ 12201-12213.
43. *See id.* § 12117. The Department of Justice also has enforcement authority under this subchapter of the ADA. *See id.* § 12117.
44. *See id.* §§ 12133, 12188.
45. H.R. REP. NO. 101-485, at 50-54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 332-336.
46. A disability is defined by the ADA as: "with respect to an individual- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (1994). This definition was taken directly from the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(A) (1994).
47. Michael D. Carlis & Scott A. McCabe, *Are There No Per Se Disabilities Under The Americans With Disabilities Act? The Fate of Asymptomatic HIV Disease*, 57 MD. L. REV. 558, 580 (1998) (citing numerous cases in which federal courts have considered whether asymptomatic HIV is a disability [or handicap] under the Rehabilitation Act of 1973, or the ADA).
48. *See* Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir. 1997); *see also* Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994) (finding asymptomatic HIV infected persons disabled, under the Rehabilitation Act of 1973, because HIV is an infectious disease).
49. *Abbott*, 107 F.3d at 939-43.

This position was sharply disputed by the Fourth Circuit's holding that asymptomatic HIV is not *per se* a disability as defined by the ADA.[50] The Fourth Circuit later held that reproduction is not a major life activity under the ADA, and that even if it were, HIV does not interfere with reproduction or the activities associated with it.[51]

Considering a separate but related issue, the Eighth Circuit found that reproduction is not a major life activity under the ADA because reproduction is not consistent with the illustrative list of major life activities listed in the EEOC's regulations issued in accordance with Subchapter one of the ADA.[52] The Eighth Circuit held that it would be a "stretch of federal law" to include reproduction in the list of major life activities.[53] Similarly, the Fifth Circuit held that asymptomatic HIV does not interfere with the major life activity of reproduction and is therefore not covered under the ADA.[54]

The Department of Justice's regulations, promulgated pursuant to the ADA, [55] offer a position contrary to the Fourth Circuit by including HIV within the disabilities covered by the ADA.[56] While the original regulations did not specifically address asymptomatic HIV, the Department of Justice amended its definition of a mental or physical impairment to include both symptomatic and asymptomatic HIV following the above referenced decisions.[57]

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50. Ennis v. Nat'l. Assoc. of Bus. and Educ. Radio Inc., 53 F.3d 55, 60 (4th Cir. 1997). Employee charged that she was fired in violation of the ADA and claimed that her termination stemmed from her employer's fear that her son's HIV infection would increase the company's insurance premium. The Court held that since HIV was not a disability per se under the ADA, she failed to meet her prima facie case. *Id.* at 56-57, 60.

51. Runnebaum v. NationsBank of Maryland, N.A., 123 F.3d 156, 167-72 (4th Cir. 1997) (en banc). Employee filed suit claiming that he was terminated solely because he was infected with HIV. The Court found that asymptomatic HIV is not an impairment under the ADA because there are no diminishing effects upon the individual. *Id.* at 676-77.

52. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996) (citing 29 C.F.R. § 1630.2(i) (1996)). These activities include such things as, "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *See id.* In *Krauel*, the Court held that an employer's denial of insurance coverage for employee's fertility treatment did not violate the ADA because infertility was not an impairment that substantially affected one of her major life activities. *Id.* at 677.

53. *Id.*

54. Zatarain v. WDSU, 79 F.3d 1143 (5th Cir. 1996) *aff'g* memo 881 F.Supp. 240, 243 (E. D. La. 1995). Employee was fired because infertility treatments were interfering with her ability to perform her job responsibilities. She filed suit under the ADA but the Court held that reproduction is not a "major life activity" under the ADA. *Id.* at 241-44.

55. 42 U.S.C. § 12186(b) (1994).

56. 28 C.F.R. 36.104(1)(iii) (1997).

57. *Id.*

PRINCIPAL CASE

In *Bragdon,* the Supreme Court affirmed the First Circuit Court of Appeals' decision that Abbott's asymptomatic HIV infection constituted a disability under the ADA, but vacated the circuit court's judgment regarding the threat Abbott's HIV infection posed to Bragdon.[58] The Supreme Court remanded the case to the court of appeals for further proceedings consistent with its opinion to "determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk."[59] The majority opinion, written by Justice Kennedy, dealt with only two issues.[60] First, whether Abbott's HIV infection, while still in the outwardly asymptomatic stage, constituted a disability under the ADA, and second, whether the First Circuit cited sufficient information to conclude as a matter of law that Abbott's HIV infection did not pose a direct threat to the health and safety of others.[61]

HIV as a Disability.

The Court first examined whether Abbott's HIV infection met the requirements under the ADA's definition of a disability. A disability is defined by the ADA as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[62] The ADA requires the inquiry to be made on an individual basis examining closely the facts in each case.[63] The Court determined that asymptomatic HIV is an impairment under the ADA because of the way the HIV retrovirus attacks the body's immune system once it enters the body.[64] The Court held that "in light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease . . . [asymptomatic HIV] is an impairment from the moment of infection."[65]

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58. Bragdon v. Abbott, 118 S. Ct. 2196, 2212 (1998).

59. *Id.*

60. The Supreme Court actually granted certiorari on three issues: 1) Is reproduction a major life activity within the meaning of the ADA?, 2) Are asymptomatic persons infected with HIV disabled within the meaning of the ADA?, 3) Whether petitioner cited sufficient evidence to avoid summary judgment regarding the risk posed by performing a routine dental procedure on a person infected with HIV? *Id.* at 554. However, the Court only addressed the first two questions. *Id.* at 2200.

61. *Id.* at 2200.

62. 42 U.S.C. § 12102(2) (1994).

63. *See id.* The definition of a disability under the ADA begins with the phrase "with respect to an individual." *See id.*

64. *Bragdon,* 118 S. Ct. at 2200.

65. *Id.*

The Court next addressed whether reproduction constitutes a major life activity under the ADA. The Court noted the possibility that HIV infections could affect a wide variety of "major life activities," but since reproduction was the activity addressed by the court of appeals, the Court did not address other "major life activities" that might be substantially limited by the disease.[66] The Court "[had] little difficulty" determining that reproduction is a "major life activity."[67] The Court first examined the words of the statute itself: "The plain meaning of the word 'major' denotes comparative importance . . . [and] suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance."[68] The Court then found that "[r]eproduction falls well within the phrase 'major life activity.' Reproduction and the sexual dynamics surrounding it are central to the life process itself."[69] The Court denied Bragdon's claim that "major life activity" applies only to those activities which have "a public, economic, or daily character."[70] The ADA incorporated an illustrative list of major life activities originally issued by the EEOC under the Rehabilitation Act.[71] For this reason, the Court compared reproduction to the EEOC's illustrative list of major life activities.[72] This list includes activities such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working,"[73] The Court held that Bragdon's claim regarding the economic or public nature of major life activities was not consistent with the EEOC's illustrative list of major life activities and was therefore invalid.[74]

The Court then addressed the final element in the ADA's definition of disability: whether Abbott's impairment substantially limited a major life activity. The Court found that Abbott's HIV infection substantially limited her major life activity of reproduction in two separate ways.[75] The Court found that Abbott's major life activity of reproduction was limited because of the risk a woman infected with HIV poses to a man while trying to conceive a child via intercourse.[76] The Court also noted that there is roughly a twenty-five percent chance of transmitting the disease to a child during

66. *Id.* at 2205.
67. *Id.*
68. *Id.* (citing Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir. 1997)).
69. *See id.*
70. *Id.*
71. 42 U.S.C. § 12201(a) (1994).
72. *Bragdon*, 118 S. Ct. at 2205.
73. 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997).
74. *Bragdon*, 118 S. Ct. at 2205.
75. *Id.* at 2206.
76. *Id.* The Court cites numerous studies indicating that males have between a twenty and twenty-five percent chance of becoming infected with the disease when having unprotected intercourse with an infected woman. *Id.*

pregnancy.[77] This risk can be mitigated by use of an antiretroviral therapy to approximately an eight percent chance, but as a matter of law, the risk poses a substantial limitation on reproduction.[78] The Court concluded that "the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."[79]

The Court's holding is supported by the majority of administrative interpretations of "disability" from before and after the ADA was enacted.[80] The Court used as additional support the 1988 opinion issued by the Office of Legal Counsel of the Department of Justice (OLC).[81] The OLC's opinion concluded that both symptomatic and asymptomatic HIV infected persons met the requirements listed in the Rehabilitation Act's definition of handicap, because an HIV infection substantially limits the major life activity of reproduction.[82] The Court noted, as further support for this view, the fact that every applicable judicial decision under the Rehabilitation Act held that asymptomatic HIV satisfied the Rehabilitation Act's definition of a handicap.[83] When Congress copied the Rehabilitation Act's definition of handicap for the ADA's definition of disability, it was an indication that the ADA's "disability" should be seen as essentially the same as the Rehabilitation Act's "handicap."[84] Finally, the Court cited the regulations promulgated by the Department of Justice under Subchapter three of the ADA.[85] The Department of Justice's regulations are consistent with the Court's view and list both symptomatic and asymptomatic HIV infections as disabilities under the ADA.[86]

The Direct Threat Issue.

Bragdon, like any medical professional required to provide treatment under the ADA, could have legally refused to treat Abbott if her HIV infection posed a direct threat to the health or safety of others.[87] The ADA defines a direct threat as "a significant risk to the health or safety of others that

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 2207.
81. 12 Op. Off. Legal Counsel 264, Kimec Memo (Sept. 27, 1988).
82. *Bragdon*, 118 S. Ct. at 2207 (citing 12 Op. Off. Legal Counsel 264, 273 Kimec Memo (Sept. 27, 1988)).
83. *See id.* at 2208.
84. *Id.*
85. 42 U.S.C. §§ 12186(b), 12206(c), 12188(b).
86. 28 CFR § 36.104(1)(iii) (1997).
87. *Bragdon*, 118 S. Ct. at 2210 (citing 42 U.S.C. § 12182(b)(3) (1994)). This exception to the service requirement is available to any provider of public accommodation. 42 U.S.C. § 12182(b)(3) (1994).

cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."[88] The direct threat caveat is based upon the Supreme Court's decision in the 1988 *Arline* case.[89] The risk posed to others must be assessed from the standpoint of the person refusing the treatment or accommodation, and must be based upon reasonable medical evidence.[90]

The Court stated "[f]or the most part, the [First Circuit] Court of Appeals followed the proper standard in evaluating the Petitioner's [Bragdon's] position and conducted a thorough review of the evidence."[91] However, the Court questioned the court of appeals' reliance upon the Center for Disease Control Dentistry Guidelines and the 1991 American Dental Association Policy on HIV.[92] Since the court of appeals did not have briefs and arguments presented solely on whether Abbott's infection posed a direct threat to the health or safety of others during routine dental procedures, the Supreme Court found that the court of appeals did not have sufficient information upon which to base its ruling.[93] The Court vacated the judgment and remanded the case to the First Circuit Court of Appeals to "determine whether our analysis of some of the studies cited by the parties would change its conclusion that Petitioner [Bragdon] presented neither objective evidence nor a triable issue of fact on the question of risk."[94]

Concurring Opinions.

Two short concurring opinions were filed in this case. The first, written by Justice Stevens, and joined by Justice Breyer, demonstrated the difficulty the Court had in creating a majority opinion in this case. Justice Stevens' concurrence stated that he believed summary judgment was properly granted on the issue of risk and would have preferred to affirm the court of appeals' decision outright, but he joined Justice Kennedy's opinion in order to create a majority.[95]

Justice Ginsburg filed a concurring opinion praising the Court's decision to remand the case to the First Circuit.[96] Justice Ginsburg recommended "erring on the side of caution" to ensure "a fully informed determination

88. *See* 42 U.S.C. § 12182(b)(3).
89. *See supra* note 31 and accompanying text.
90. *Bragdon*, 118 S. Ct. at 2210 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987); 28 C.F.R. § 36.208(c) (1997)).
91. *See id.*
92. *Id.* at 2211.
93. *Id.*
94. *Id.*
95. *Id.* at 2213 (Stevens, J., concurring).
96. *Id.* at 2213 (Ginsburg, J., concurring).

whether Abbott's disease posed 'a significant risk to the health and safety' of [Bragdon] that [could not] be eliminated by a modification of policies, practices, or procedures."[97] Justice Ginsberg also indicated that she believed asymptomatic HIV is a disability under the ADA when a person is "perceived" as being disabled.[98] This statement could be seen as an invitation for plaintiffs to demonstrate that asymptomatic HIV also meets the "regarded as disabled" prong of the ADA's definition of a disability.

The Opinions Concurring in the Judgment in Part and Dissenting in Part.

Chief Justice Rehnquist filed an opinion concurring in the judgment in part and dissenting in part.[99] The Chief Justice concurred with the Court's holding that the case should be remanded to the First Circuit to determine whether Abbott's condition posed a direct threat to the health or safety of others, but disagreed with the Court's conclusion that asymptomatic HIV constitutes a disability under the ADA.[100] Chief Justice Rehnquist's opinion was joined in full by Justices Scalia and Thomas.[101] Justice O'Connor joined the Chief Justice's opinion regarding the "direct threat" provision, but wrote separately to discuss her reasons for concluding that asymptomatic HIV is not a disability under the ADA.[102]

In order to reach his conclusion that asymptomatic HIV does not fall within the ADA's definition of disability, the Chief Justice analyzed the ADA's definition and focused on the importance of an individual inquiry in this case because the matter was dismissed on summary judgment by the district court.[103] Chief Justice Rehnquist first suggested that Abbott must demonstrate that her asymptomatic HIV infection meets all three parts of the ADA's definition of disability.[104] In other words, Abbott would have had to demonstrate that her HIV infection substantially limited *her* major life activity of reproduction. Bragdon did not dispute that HIV was an impairment under the ADA, and for this reason the Chief Justice moved on to the second requirement.[105] Because the record contained no evidence that Abbott wanted to reproduce before becoming infected with HIV,[106] the Chief Justice stated that it could not accurately be said that her major life activity of re-

97. *Id.* at 2214 (citing 42 U.S.C. § 12182(b)(3) (1994)) (Ginsburg, J., concurring).
98. *See id.* (citing 42 U.S.C. § 12102(2)(C) (1994)) (Ginsburg, J., concurring).
99. *Id.* at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
100. *Id.* at 2214-17 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
101. *Id.* at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
102. *Id.* at 2217-18 (O'Connor, J., concurring in the judgment in part and dissenting in part).
103. *Id.* at 2214-16 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
104. *Id. See supra* note 46 and accompanying text.
105. *Bragdon*, 118 S. Ct. at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
106. *See id.* at 2214-15 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

production had been substantially limited in any way.[107] The Chief Justice claimed that because Abbott failed to demonstrate that her major life activity had been limited in this regard, the Court should not have decided that asymptomatic HIV constitutes a disability, in this case, under the ADA.[108]

After making this direct attack on Abbott's case, the Chief Justice criticized the Court's holding in a more general manner. The Chief Justice suggested that the Court was "simply wrong in concluding as a general matter that reproduction is a 'major life activity.'"[109] The Chief Justice argued that reproduction is not a "major life activity" in the same sense as those activities contained in the guidelines under the Rehabilitation Act, and incorporated by reference into the ADA.[110] The dissent also claimed that the Court incorrectly relied upon Webster's first definition of "major," stressing relative importance, and should have focused instead on the second definition stressing "quantity, number, or extent."[111] The Chief Justice acknowledged that "reproductive decisions are important in a person's life," but he denied that they are "major life activities."[112]

The dissent then proposed that asymptomatic HIV does not substantially limit Abbott's major life activity of reproduction.[113] The record indicated that "those [infected with HIV] are still entirely able to engage in sexual intercourse, give birth to a child if they become pregnant, and perform the manual tasks necessary to rear a child to maturity."[114] The Chief Justice suggested that reproduction is still a matter of choice despite the limitations that HIV infection imposes.[115] The Chief Justice concluded this section of his opinion stating that the "Respondent's [Abbott's] argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects."[116]

In the second part of his opinion the Chief Justice addressed the direct threat issue.[117] The Chief Justice agreed with the way the Court defined and

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107. *Id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
108. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
109. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
110. *Id.* The regulations issued by the EEOC under the Rehabilitation act were incorporated into the ADA at 42 U.S.C. § 12201(a). *See supra* note 68 and accompanying text.
111. *Bragdon*, 118 S. Ct at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
112. *See id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1994)).
113. *See id.* at 2215-16 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
114. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing Brief for the Petitioner at 53-54, Abbot v. Bragdon, 118 S. Ct. 2196 (No. 97-156) (1998.)).
115. *See id.* at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
116. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
117. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

addressed the direct threat issue, but questioned why the Court gave the scientific opinion of a public health official more credence than other scientific opinions.[118] The Chief Justice suggested that each opinion should be evaluated on its own merits and the Court should not merely "defer to the reasonable medical judgments of public health officials."[119] With these principles in mind the Chief Justice suggested that Bragdon presented more than enough information to avoid summary judgment on the direct threat question.[120]

Justice O'Connor filed a short opinion concurring in the judgment in part and dissenting in part.[121] In her opinion she criticized the Court's ruling that Abbott's HIV status substantially limited one or more of her major life activities.[122] Justice O'Connor stated that "the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons."[123]

ANALYSIS

Bragdon was the Court's first major decision under the Americans with Disabilities Act.[124] It was also the first time the Supreme Court directly addressed HIV and AIDS since the AIDS epidemic began nearly 18 years ago.[125] In *Bragdon*, the Court was primarily concerned with the interpretation of the ADA rather than its constitutionality.[126] For these reasons, *inter alia*, a clear understanding of the *Bragdon* decision will be important for a comprehensive understanding of the ADA.

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118. *Id.* at 2217 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
119. *Id.* (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 n.18 (1987)).
120. *See id.* at 2217 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
121. *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).
122. *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).
123. *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).
124. Joan Biskupic & Amy Goldstein, *Disability Law Covers HIV, Justices Rule, 5-4 Decision Protects Those Not Having AIDS*, THE WASHINGTON POST, June 26, 1998, at A1. On June 15, 1998, ten days before *Bragdon* was decided, the Supreme Court held that Subchapter II of the ADA, the public entity section, applies to state prisons. Pennsylvania Dept. of Corrections v. Yeskey, 118 S. Ct. 1952, 1954-55 (1998). While the Supreme Court first addressed the ADA in *Yeskey*, the *Bragdon* decision is arguably more important. The Court's decision in *Yeskey* clarified the extent to which the ADA applies to public entities, but does not have the breadth or significance of the Court's decision in *Bragdon*.
125. Biskupic & Goldstein, *supra* note 124 at A1. The Supreme Court has rarely addressed cases in which HIV or AIDS is an issue. In all of the following cases HIV or AIDS was mentioned but not the primary focus of the case: Washington v. Glucksberg, 521 U.S. 702 (1997); Farmer v. Brennan, 511 U.S. 825, (1994); American Red Cross v. S.G., 505 U.S. 247 (1992); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989); School Bd. of Nassau County v. Arline 480 U.S. 273 (1987).
126. The constitutional challenges to the ADA at the district court level, Abbott v. Bragdon, 912 F.Supp. 580, 592-96 (D. Me. 1995), were not considered by the Supreme Court. Further, when determining if reproduction is a major life activity under the ADA the Court did not mention or discuss the "right of procreation" developed under the Fourteenth Amendment in cases such as Roe v. Wade, 410 U.S. 113, 152-56 (1972).

The *Bragdon* decision will play a crucial role in the history of the ADA for at least two important reasons. First, *Bragdon* resolved the conflict among the circuits regarding the status of persons with asymptomatic HIV. Second, *Bragdon* will play an important role in the history of the ADA because the decision has further defined and clarified the types of disabilities that are to be protected. However, given the importance of the ADA and the role it plays in protecting "disabled" persons from discrimination, it is possible the Court's decision in *Bragdon* has not done as much as it could have to clarify the ADA's definition of disability. It is unfortunate that the Court missed an opportunity to announce a more tenable interpretation of the ADA.

The Americans with Disabilities Act should be applied so that persons infected with HIV, whether they are symptomatic or asymptomatic, are protected by the ADA. HIV infection is a debilitating disease that affects every facet of the lives of those who become infected. As many as one million Americans may be infected with the HIV virus,[127] demonstrating the need for a tenable rule of law on this issue. It is clear from the legislative history that Congress intended for persons infected with HIV, whether symptomatic or asymptomatic, to be covered under the ADA.[128]

The Court's Analysis of the ADA's Definition of a Disability.

Congress failed to list, or direct an administrative agency to list, all the disabilities protected by the ADA, nor did Congress choose to define carefully each word in the ADA's definition of "disability."[129] This has forced courts to determine which conditions are protected under the ADA on a case by case basis. Congress very clearly intended ADA protection to extend to those who are in a risk category for discrimination due to some impairment such as blindness, deafness, or paraplegia.[130] In this regard, the ADA has been very successful in protecting the forty-three million Americans that the ADA covered before *Bragdon*.[131] However, the vague wording of the ADA

127. Petition for Writ of Certiorari at 11, Abbot v. Bragdon, 107 F.3d 934 (1st Cir. 1996)(No. 976-156).

128. H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; S. REP. NO. 101-116, at 22 (1990). This conclusion is supported by remarks made by members of Congress during debates regarding the ADA. 136 Cong. Rec. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); 136 Cong. Rec. H4626 (daily ed. July 12, 1990) (statement of Rep. Waxman); 136 Cong. Rec. 11,453 (daily ed. May 22, 1990) (statement of Rep. McDermont); 135 Cong. Rec. 19,867 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

129. Like the Rehabilitation Act of 1973, rather than listing all of the disabilities that are protected under the ADA, the ADA defines a disability. *See supra* note 46. Further, the regulations issued under the ADA by the DOJ define a disability in the same way, but provide an illustrative list of impairments which meet the ADA's definition. 28 C.F.R. § 36.104 (1997).

130. 42 U.S.C. § 12101(b) (1994); *see also* 28 C.F.R. § 36.104(1) (1997).

131. 42 U.S.C. § 12101(a)(1) (1994).

has forced the courts to further define the term "disability" in order to determine which "impaired" persons are covered by the ADA.

1. Reliance upon the Rehabilitation Act of 1973.

The Court recognized Congress's clear intent that the Rehabilitation Act should frame any discussion of the ADA.[132] This recognition was based on the language of the statute stating that nothing in the ADA should diminish the protections created by the Rehabilitation Act.[133] In addition, Congress's intent is illustrated by the incorporation of the Rehabilitation Act's definition of "handicap" for the ADA's definition of "disability."[134] For these reasons, the Court recognized the importance of the Rehabilitation Act's case law in determining which impaired individuals the ADA protects from discrimination.[135] This precedent was significant because every case brought before the enactment of the ADA found that asymptomatic HIV met the statutory definition of "handicap."[136] The dissent's refusal to acknowledge the significance of this precedent is disturbing because it ignores Congress's command to consider Rehabilitation Act case law when interpreting the ADA.

2. The Court's Decision and its Difficulties.

The ADA's definition of a disability, taken almost verbatim from the Rehabilitation Act,[137] has three distinct prongs. An individual is considered disabled under the ADA if: (1) they have an actual impairment which substantially limits a major life activity, (2) they have a record of such impairment or (3) they are regarded as having such an impairment.[138] The majority of courts have attempted, as did the Supreme Court in this case, to force asymptomatic HIV infection into the first prong of the ADA's definition.[139]

Dr. Bragdon conceded that HIV is an impairment under the ADA, and the dissent did not address the issue,[140] so the Court's holding that HIV was

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132. Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998).

133. The ADA provides: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title " 42 U.S.C. § 12201(a) (1994).

134. *See supra* note 46.

135. *Bragdon*, 118 S. Ct. at 2208.

136. *Id.*

137. *See supra* note 46.

138. *Bragdon*, 118 S. Ct. at 2201 (citing 42 U.S.C. § 12102(2) (1994)).

139. Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 20-26 (1997).

140. *Bragdon*, 118 S. Ct. at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The Chief Justice did not address whether HIV is an impairment since the petitioner did not dispute that asymptomatic HIV is an impairment under the ADA. *Id.*

an impairment probably had two related purposes. First, the Court was responding to the Fourth Circuit's holding that asymptomatic HIV is not an impairment under the ADA,[141] and second, the Court was attempting to clarify that in order to meet the statutory definition, impairments only have to be present, not necessarily outwardly detectable.[142]

a. Difficulties With The Court's Interpretation.

The Court's analysis of a disability under the ADA is problematic for several reasons. The Court concluded that because of the relative importance of reproduction, it qualifies as a "major life activity" under the ADA.[143] The Court reached this conclusion by examining the plain meaning of the term "major."[144] By relying upon Webster's Collegiate Dictionary's first definition of "major," the Court decided that "major" refers to a qualitative evaluation of the activity and held "the plain meaning of the word 'major' indicates comparative importance."[145] However, the Court provided no reason for selecting the qualitative rather than quantitative use of the word "major." The Court simply states that this test should be applied.

The Court then asserted that reproduction, like the activities listed in the EEOC guidelines, is of great qualitative importance in a person's life.[146] This list includes such activities as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[147] Reproduction does not seem to fit well with the list of illustrative major life activities issued by the EEOC. All of these activities are certainly qualitatively important, but they are nothing like reproduction. Decisions to reproduce are usually conscious lifestyle choices based on many factors and considerations including age, health, economics, and religious beliefs. This is in sharp contrast to the EEOC's representative list of major life activities, which are not lifestyle choices, but are conditions necessary to live and function normally within society on a daily basis. The inability to hear, work, or learn cannot and should not be compared to the ability to reproduce. Further, the use of the qualitative standard in conjunction with

141. The Fourth Circuit held that asymptomatic HIV is not an impairment under the ADA because the definition of an impairment requires the individual to be lessened and, "without [outwardly visible] symptoms, there are no diminishing effects on the individual." Runnebaum v. NationsBank of Md., 123 F.3d 156, 168 (4th Cir. 1997) (en banc).

142. *Bragdon*, 118 S. Ct. at 2202. The Court discusses the Department of Health, Education and Welfare's regulations interpreting the Rehabilitation Act, C.F.R. § 84.3(j)(2)(I), which do not require the impairment to be outwardly detectable. *Bragdon*, 118 S. Ct. at 2202.

143. *Bragdon*, 118 S. Ct. at 2205.

144. *Id.*

145. *Id.* (citing Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir. 1997).

146. *See id.*

147. Issued under the Rehabilitation Act at 45 C.F.R. § 84.3(j)(2)(ii) (1997), incorporated into the ADA at 42 U.S.C. § 12201(a) (1994).

the Court's disregard for the illustrative list of major life activities can be seen as an invitation by the Court for future litigation regarding the status of other qualitatively important activities such as marriage, occupation, and choosing where to live.[148]

People with outwardly detectable disabilities like those listed in the EEOC's guidelines are often subject to discrimination because they are set aside from the rest of society.[149] To say that persons who are unable to reproduce are treated similarly is a tenuous argument. After all, the decision to reproduce is primarily a private matter, unknown to members of the general public. This privacy makes discrimination solely on the grounds of reproductive ability unlikely.

The dissent by Chief Justice Rehnquist suggests that the Court's qualitative approach is not sufficient and instead suggests that a quantitative approach be used to evaluate major life activities.[150] Like the majority, the Chief Justice offers no support for his position other than the quantitative definition of "major." The dissent's approach seems far too narrow when compared to the illustrative list of major life activities in the EEOC's guidelines. Activities such as seeing, breathing, and working have both quantitative and qualitative importance. To rely solely on the quantitative importance of an activity seems insufficient for determining whether that activity is a "major life activity" under the ADA.

Neither the Court's nor the dissent's approach to determining what types of activities can be classified as major life activities under the ADA appears to be adequate. In order to most accurately determine what activities should and should not be termed "major life activities" under the ADA's definition of disability, both the quantitative and qualitative approaches should be used. By doing so, courts would be able to draw from the strengths and advantages of both the qualitative and quantitative approaches to determine which "major life activities" should be included within the ADA's definition of a disability.

b. Potential Future Difficulties.

Under the Court's ruling, the protection of the ADA has perhaps been unnecessarily extended to persons who, unlike Abbott, are not in need of the statute's protection. The Court's interpretation of a disability may allow

148. *Bragdon*, 118 S. Ct. at 2215.

149. 42 U.S.C. § 12101(a) (1994). It was to prevent this type of discrimination that Congress enacted the ADA. *Id.* at § 12101(b).

150. *Bragdon*, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

men who are sterile, impotent, extremely obese to the point that reproduction is physically impossible, or otherwise unable to reproduce, to fall within the protection of the ADA. The same may be true of women who are infertile, or otherwise unable to reproduce. Such individuals might meet the Court's interpretation of the ADA's definition of a disability in that they have an impairment which substantially limits their major life activity of reproduction, despite the fact that they are otherwise able to function normally in society in every other way. This may create significant negative results, including more litigation by private plaintiffs and an increased workload for the courts, the EEOC, and the DOJ.[151]

The Court's decision may make it possible for persons with certain genetic predispositions towards diseases to seek protection under the ADA.[152] In the very near future employers and insurance companies may use genetic screening to identify those individuals who could be genetically predisposed to certain diseases.[153] The high cost associated with many genetically related diseases may force employers and insurance companies to deny employment or insurance coverage to persons with genetic predispositions to certain diseases.[154] This event might cause the courts to view genetic dispositions as "impairments" under the ADA. Just as the Court held that HIV is a disability because of the limitations it places on reproduction, courts could now begin to consider genetic diseases as disabilities in much the same manner.

In addition, with its decision in *Bragdon*, the Court may have actually created inconsistencies in the ADA's protection of asymptomatic HIV-infected individuals. The holding that asymptomatic HIV-infected persons are disabled because of limitations on their ability to reproduce could be construed to protect only those asymptomatic HIV infected persons who are otherwise reproductively capable. Those asymptomatic HIV infected persons with other limitations on their major life activity of reproduction (infertility, sterility etc.) may not be covered by the ADA protections. For example, a woman with HIV who was infertile may not be considered disabled because the HIV infection would not actually limit her ability to reproduce. Similarly, asymptomatic HIV infected children who have not yet reached puberty might not be protected by the ADA because they would not

151. Assuming that these federal agencies respond to, and investigate, this type of an alleged violation of the ADA.

152. The view that Huntington's Disease should be considered a genetic disability was recently advocated by one commentator. *See* Brian R. Ginn, Note, *Genetic Discrimination: Huntington's Disease and the Americans With Disabilities Act*, 97 COLUM. L. REV. 1406 (1998).

153. The ADA allows for a medical test of a potential employee after a conditional offer of employment has been given. 42 U.S.C. § 12112 (1994).

154. Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1, 10 (1994).

yet be capable of reproduction. These types of distinctions are inconsistent with Congress's clear intent that all persons infected with HIV be protected under the ADA.[155]

Because the ADA requires the disability to be "with respect to an individual,"[156] some courts may be unwilling to extend the protection of the ADA to asymptomatic HIV-infected homosexuals because they may be unable to demonstrate that their decision not to reproduce has been affected in any way by their HIV status.[157] While decisions regarding reproduction are in no way limited to heterosexuals, it may be more difficult for homosexuals to demonstrate their intentions to reproduce. In trying to limit discrimination, the Court may have actually created another method of discrimination.

The exceptions discussed above are inconsistent with the ADA itself and civil rights legislation as a whole. Clearly, Congress intended to include all HIV-infected individuals within the statute's reach,[158] yet because of the Court's application of the actual disability prong, large classes of HIV infected individuals could remain unprotected by the ADA. The difficulties with the Court's interpretation of the ADA's definition of disability would, of course, be limited by the fact that persons with the above limitations could attempt to demonstrate that they are covered by the ADA for reasons other than their inability to reproduce. These examples are included because they demonstrate the potential inconsistencies that could result from the Court's decision.

The Direct Threat Issue

Despite the protection the ADA provides for individuals meeting the ADA's definition of disability, Dr. Bragdon could have refused to treat Abbott if he could have demonstrated that her infectious condition "posed a direct threat to the health or safety of others."[159] It is possible the direct threat provision could be used, as it may have been used in this case, to discriminate against certain individuals because of prejudices associated with

155. *See supra* note 128 and accompanying text.

156. 42 U.S.C. § 12102(2) (1994).

157. The ADA clearly states that the protections of the ADA are not to be extended solely on the basis of homosexuality or bisexuality. 42 U.S.C. § 12211(a) (1994).

158. *See supra* note 128.

159. 42 U.S.C. § 12182(b)(3) (1994). The ADA defines a "direct threat" to be a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." *Id.* This provision stems from the Supreme Court's recognition in *School Bd. Of Naussau County v. Arline*, 480 U.S. 273, 287 (1987), of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks, resulting, for instance, from a contagious disease. Bragdon v. Abbott, 118 S. Ct. 2196, 2210 (1998).

their conditions. The fact that Dr. Bragdon claimed to be willing to treat Abbott in a hospital, but lacked hospital privileges at any local hospital, could be seen as an example of this type of discrimination.

The Court remanded the determination of whether the dental procedure constituted a direct threat to Dr. Bragdon. The majority concluded that the medical opinions of public health officials should be given their due deference.[160] Chief Justice Rehnquist criticized this position and stated, "I am aware of no provision of law or judicial practice that would require or permit courts to give some scientific views more credence than others simply because they have been endorsed by a politically appointed public health authority."[161]

While any evidence of actual biases of the source should be taken into consideration when determining the scientific merit of the evidence, all scientific opinions should be evaluated on the basis of their scientific merit and application of the facts to the case, regardless of their source.[162] There is no reason that the views of public health officials should be treated as more or less impartial and scientifically correct than the views and scientific opinions of private entities simply because they have been developed and/or endorsed by persons on the public payroll. Courts should evaluate evidence presented based on the validity of the evidence alone.

Impacts of the Court's Decision.

The first and most likely impact of the Court's decision will be an increase in litigation regarding what types of impairments meet the ADA's definition of disability.[163] By adopting the qualitative test to determine which activities are "major life activities" under the ADA, the Court has opened up the possibility for more litigation regarding other qualitatively important life activities such as "who to marry, where to live, and how to earn one's living."[164] Surely many plaintiff's attorneys will cite *Bragdon* as support for the inclusion of diseases and conditions that had not previously been thought to be covered by the ADA.[165]

Approximately thirty-seven percent of all reported HIV discrimination

160. *Bragdon*, 188 S. Ct. at 2211. Justice Kennedy stated:that "[t]he views of public health authorities . . . are of special weight and authority." *Id.*

161. *Id.* at 2217 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

162. However, the source of the evidence should be considered in those cases where a clear bias can be demonstrated or accurately assumed.

163. Eric D. Randall, *HIV Infection Covered by ADA*, 1998 No. 7 ADAUP 25, 1 (1998).

164. *Bragdon*, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

165. Jonathan R. Mook, *Ruling that HIV is a Disability Could Open Pandora's Box of ADA Claims*, 6 No. 4 EMPLOYMENT L. STRATEGIST 1 (August, 1998).

complaints occur in the workplace.[166] Given the pervasive nature of reported HIV discrimination in the workplace, the *Bragdon* decision will have a significant impact upon private employers. The *Bragdon* decision will affect the implementation of private employers' practices and policies concerning employment and insurance. The *Bragdon* decision has made it more difficult for employers to determine who is covered by the ADA by requiring them to recognize conditions that are not outwardly detectable. "[T]he Supreme Court's expansive view of the ADA's definition of 'disability' in Bragdon may be seen as opening the proverbial Pandora's Box of claimed ADA disabilities and as making it much more difficult for employers to determine who is and who is not covered by the statutory protections."[167]

The Court's ruling in *Bragdon* has created a potential conflict between an employer's right to know whether an employee is covered by the ADA, and the employee's legitimate right to privacy. Because the employer could be held liable for violations of the ADA, it would seem the employer has the right to know which members of his workforce are under the protection of the ADA. This right is in direct conflict with the employee's legitimate right to privacy concerning his or her own medical history.[168] The employee's right to privacy is especially crucial regarding his or her HIV status, given the societal stigmas associated with HIV infections.[169] These stigmas include fears of infection,[170] homosexuality, and intravenous drug use.[171] Since the employee must disclose his disability in order to be afforded the protections of the ADA,[172] asymptomatic HIV infected persons face the difficult choice of either disclosing their HIV status, and facing the stigmas discussed above, or not having the protection of the ADA.

Further, until the direct threat issue is addressed by the First Circuit, employers, as well as public entities and providers of public accommodations, will be at a disadvantage when trying to develop standards by which to evaluate whether an individual poses a direct threat to the health or safety of others. "[N]otwithstanding an employer's good-faith belief that a disabled employee would pose a direct threat, the employer may be second-guessed by a court based on information or evidence that an employer did not even have."[173]

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166. ROBERT L. BURGDORF JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 443 (1995).
167. *Id.*
168. KURT H. DECKER, EMPLOYEE PRIVACY FORMS AND PROCEDURES § 5.50, at 259 (1988).
169. *Id.* at 260.
170. BURGDORF, *supra* note 166, at 443.
171. DECKER, *supra* note 168, at 260.
172. JAMES G. FRIERSON, EMPLOYER'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 47-48 (1992).
173. Mook, *supra* note 165, at 1.

Finally, as a result of *Bragdon* the insurance costs of employers could be increased. Because the Court included "[r]eproduction and the sexual dynamics surrounding it" in the category of "major life activities,"[174] employers may be forced to include infertility and sterility treatments in their health insurance plans. This argument is supported by the fact that the Court's decision calls into question the Fifth Circuit's holding that infertility treatments are not protected under the ADA because reproduction is not a "major life activity."[175] It seems logical to conclude that employers could now be responsible for providing infertility and sterility treatments in their health insurance plans. This argument gains additional support from the First Circuit's holding that financial limitations on insurance benefits paid by an employer-administered health care plan to disabled persons on account of their disability constitutes a violation of Title I of the ADA.[176] In all probability, the Court's holding will be quite problematic for private employers who provide their own insurance.

A Missed Opportunity.

The *Bragdon* decision provided some important new protections for persons infected with asymptomatic HIV, but it is possible the Court has created as many difficulties as it has solved. Given the potential unnecessary costs and detrimental inconsistencies under *Bragdon*, the Supreme Court should have protected all persons infected with asymptomatic HIV under the "regarded as disabled" prong of the ADA.[177] This would have allowed the Court to protect those people with asymptomatic HIV based on the way they are treated by others, rather than trying to place asymptomatic HIV infected persons under the protection of the ADA by using the "actually disabled" prong[178] of the ADA's definition of a disability.[179]

The Majority did not address why the Court chose to ignore the "regarded as" prong of the ADA's definition of disability. In his dissent, Chief

174. Bragdon v. Abbott, 118 S. Ct. 2196, 2205 (1998).

175. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 675, 677 (8th Cir. 1996); *see also* note 36.

176. Carparts Distrib. Ctr., Inc. v. Automotive Wholesalers' Ass'n. of New England, Inc., 37 F.3d 12 (1st Cir. 1994). The court of appeals held that a lifetime limit of $25,000 for benefits paid for AIDS related illnesses, as compared to the $1,000,000 limit for other illnesses, was a violation of Title I of the ADA. *Id.* at 20.

177. 42 U.S.C. § 12102(2)(C) (1994). Under this approach a person must demonstrate that they were regarded as having an impairment which substantially limited one of their major life activities. *See id.* § 12102(2).

178. *See id.* § 12102(2)(A).

179. This argument was mentioned by Justice Ginsburg in her concurrence, *Bragdon v. Abbott*, 118 S. Ct. 2196, 2213-14 (1998) (Ginsburg, J., concurring), and was argued in the alternative to the "actual disability" argument by Abbott. Brief for the Respondent Sidney Abbott at 37-41, Abbot v. Bragdon, 118 S. Ct. 2196 (No. 97-156) (1998). This position, and many of the arguments discussed below were recently advocated by Elizabeth C. Chambers, Note and Comment, *Asymptomatic HIV as a Disability Under the Americans With Disabilities Act*, 73 WASH. L. REV. 403 (1998).

Justice Rehnquist stated that the Court chose not to examine the "regarded as" approach because it had not been raised at the district court level, and the circuit court chose not to address the issue.[180] The Court could have examined such an approach, however, because it had been brought up in Abbot's brief to the Supreme Court.[181] Unfortunately, that Court chose not to address this question, which would have led to a far more tenable standard of evaluating how asymptomatic HIV infected persons are protected under the ADA. Essentially, courts could look at HIV infections in one of two ways under the "regarded as" prong of the ADA.[182]

First, the Court could have protected all persons infected with HIV by stating that all persons with HIV are regarded as being disabled because of the way persons infected with the disease are treated by the public. Society's fear and general discomfort with the disease often manifests itself by treating those infected with the disease as second-class citizens. The facts in *Bragdon* itself seem to support this notion. While this approach would successfully protect persons like Abbott, and would be consistent with Congress's desire to protect all HIV-infected persons,[183] it is problematic for several reasons. First, this broad approach is probably inconsistent with the statute's mandate that the determination of a disability must be made "with respect to an individual."[184] The plain language of the statute requires that the issue of disability must be decided on an individual rather than class-wide basis.[185] Therefore, any form of a blanket protection is inconsistent with the statute's clear direction. Second, as previously discussed, any form of broad protection may unnecessarily extend the ADA into areas where it is not needed. While Congress intended to protect those infected with HIV, Congress did not wish to extend the protection of the ADA to those who experience no discrimination. Certainly, if not all HIV-infected persons are being discriminated against there is no reason to unnecessarily extend the ADA to reach those persons.

The Court should have held that the "regarded as" prong of the definition be applied to HIV-infected persons on a case-by-case basis. The courts would then apply the ADA in only those cases where a person is discriminated against by an employer, a provider of public accommodation, or by a public entity as a result of his or her condition. An HIV infected person would not be disabled because of his or her impairment, but because of the

180. *Bragdon*, 118 S. Ct. 1196, 2214 n.1 (1998) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
181. *See supra* note 179.
182. *Bragdon*, 118 S. Ct. at 2213-14 (Ginsburg, J., concurring).
183. *See supra* note 125.
184. 42 U.S.C. § 12102(2) (1994).
185. *Id.*

way they were treated and "perceived" or "regarded by" employers, providers of public accommodation, or by public entities as a result of their impairment. By protecting HIV-infected persons under the "regarded as" prong, the Court could have extended the protection of the ADA to all situations where evidence of discrimination against those persons with HIV could be demonstrated. In cases where an individual accuses an employer, public official, or provider of public accommodations of discriminating against a person based on his or her HIV infection, the court could simply look at the facts in the case and determine if discrimination had, in fact, occurred. The ADA's protections would be extended to all HIV-infected persons who are disabled or regarded as disabled but only invoked when actual discrimination is demonstrated. This approach seems to be more consistent with Congress's intent that all HIV-infected persons should be included within the ADA's protection. While Congress intended for HIV-infected persons to be protected by the "actual disability" prong of the ADA,[186] the inconsistencies created by classifying reproduction as a "major life activity" will lead to the exclusion of some HIV infected persons. This seems to create a tension between Congress's intent and the results of the Court's decision. By following Congress's intent to protect HIV individuals under the "actual disability" prong, the Court cannot meet Congress's intent to protect all HIV infected persons.

The use of the "regarded as" prong is also supported by the EEOC's regulations under the ADA. The regulations already state that a person qualifies under the "regarded as" prong of the disability definition if they are discharged from a job in response to a rumor that they are HIV-positive.[187] The regulations also support the idea that the "regarded as" prong applies when other people misperceive an impairment as a disability. As an example, consider the case of a potential employee with a severe cosmetic disfigurement.[188] While the disfigurement may not actually affect a person's ability to work, the way they are perceived by others may prove to be a disability.[189]

Finally, the Supreme Court's reasoning in *Arline* supports the view that HIV-infected individuals should be protected under the "regarded as" prong of the definition of a disability. In *Arline* the Court held that although an impairment itself may not substantially limit a major life activity, other persons' negative and discriminatory reactions to that impairment may raise the impairment to the level of a disability.[190] "The Court recognized that by in-

186. *See supra* note 128 and accompanying text.
187. 29 C.F.R. § 1630.2(1)(2) (1997).
188. *Id.*
189. *Id.*
190. School Bd. of Nassau County v. Arline, 480 U.S. 273, 283 (1987).

cluding the 'regarded as' prong in the disability definition, Congress intended to fight the effects of erroneous but nevertheless prevalent perceptions about disabled persons who may not actually be incapacitated."[191] Given the Supreme Court's interpretations of the definition of "disability" used in the ADA, it appears that the Court could have used the "regarded as" prong as a far more effective way of protecting persons infected with HIV. The Court could have avoided the difficulties and inconsistencies it appears to create by stretching the actual disability prong of the ADA and forcing HIV infections within it.

CONCLUSION

In *Bragdon*, the Court illustrated the importance of the ADA in preventing discrimination against disabled persons. The Supreme Court has taken an important step in demonstrating that prejudice and fear should no longer control the manner in which persons who are infected with asymptomatic HIV are treated. While the Court has probably invited future litigation by expanding the class of disabled persons, the Court fulfilled the clear intent of Congress to protect persons infected with HIV from discrimination. The Court could have decided the case upon a different and perhaps more tenable ground if the Court had used the "regarded as," rather than the "actually disabled" prong of the ADA's definition of disability. This would have simultaneously avoided the confusion about who, among the class of HIV-infected individuals, are protected, and would not have extended ADA protections to those with reproductive difficulties unrelated to HIV.

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191. Chambers, *supra* note 179, at 428 (citing *Arline*, 480 U.S. at 279).