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ENABLING WORK FOR PEOPLE WITH
DISABILITIES: A POST-INTEGRATIONIST
REVISION OF UNDERUTILIZED TAX
INCENTIVES

FRANCINE J. LIPMAN*

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[W]ork is a valued activity, both for individuals and society; and fulfills the need of an individual to be productive, promotes independence, enhances self-esteem, and allows for participation in the mainstream of life in America.

-Rehabilitation Act of 1973¹

INTRODUCTION

There are fifty-four million Americans with disabilities,² millions of whom long to work.³ Yet people with disabilities⁴ unfailingly have had

1. 29 U.S.C. § 720(a) (2000) (quoting Congress when it enacted the Rehabilitation Act in 1973 to include people with disabilities as productive members of society by prohibiting the federal government and entities that receive federal assistance from discriminating against people with disabilities in employment).

2. THE NAT'L ORG. ON DISABILITY, 2002 N.O.D. ANNUAL REPORT 3 (May 14, 2003), available at <http://www.nod.org/pdffiles/2002annrpt.pdf>. These fifty-four million citizens are “disadvantaged by high rates of unemployment, poverty, and a need for better civic services and access to them.” *Id.*

3. See THE NAT'L ORG. ON DISABILITY, ECONOMIC PARTICIPATION: FACTS & STATISTICS, EMPLOYMENT RATES OF PEOPLE WITH DISABILITIES (July 24, 2001) (comparing the percentage of unemployed people with disabilities that would prefer to be working (sixty-seven percent) to the percentage without disabilities (forty percent)), at <http://www.nod.org/content.cfm?id=134> (on file with the American University Law Review); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 898 [hereinafter Weber, *Law of Welfare*] (noting that “[a]lmost three-quarters of the people with disabilities who are not working want to work”); Am. Assoc. of People with Disabilities, *Information: Can I have some background on Americans with disabilities?*, at <http://www.aapddc.org/docs/info.html#background> (last visited Jan. 24, 2004) (on file with the American University Law Review) [hereinafter *Background*] (noting that over two-thirds of working-age people with disabilities want to work); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 128 n.20 (1998) [hereinafter Weber, *Employment Policy*] (referring to three surveys of working-age people with disabilities who were unemployed and reporting on the high percentage of responses that said they would

the highest rate of unemployment among all minority groups⁵ in America.⁶ For more than a decade, the unemployment rate for people with disabilities has been at staggering levels, ranging from sixty-six to seventy-five percent.⁷ Given this high rate of unemployment, it is not surprising that one-third of all people with

prefer to be working); see also U.S. GEN. ACCOUNTING OFFICE, BUSINESS TAX INCENTIVES: INCENTIVES TO EMPLOY WORKERS WITH DISABILITIES RECEIVE LIMITED USE AND HAVE AN UNCERTAIN IMPACT 1 (Dec. 12, 2002) [hereinafter GAO TAX STUDY] (reporting on the March 2001 U.S. Census data which states that seventeen million working-age people (ages sixteen through seventy-four) have a self-reported disability that limits their ability to work and results in an unemployment rate more than twice as high as their able-bodied equivalents), available at http://www.unclefed.com/GAOREports/d0339_sum.pdf; S. REP. NO. 101-116, at 9 (1989) (finding that "about 8.2 million people with disabilities want to work but cannot find a job").

4. "[M]ost members of the [disability rights] movement prefer 'people with disabilities' to the 'disabled,' because the former term emphasizes the person rather than the impairment." Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1413 (1999). "[S]cholars in the disability studies movement have noted that any classification of people into 'disabled' and 'non-disabled' categories must come from a prejudiced perspective because all human abilities can be placed on a continuum, thus making black-and-white categorization impossible." *Id.* at 1411. See also NANCY L. EIESLAND, *THE DISABLED GOD: TOWARD A LIBERATORY THEOLOGY OF DISABILITY* 27 (1994) (preferring the term "disability" over the term "handicap" because in professional parlance the former denotes an inability to perform a task, whereas the latter denotes the social disadvantages resulting from a disability). But see Leonard Kriegel, *Claiming the Self: The Cripple as American Male*, in *DISABLED PEOPLE AS SECOND-CLASS CITIZENS* 52 (Myron G. Eisenberg et al. eds., 1982) ("I am . . . an individual who has lived 35 out of his 46 years here on earth as a cripple, a word which I prefer to either handicapped or disabled, each of which seems to me a euphemism for the realities facing us.").

5. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(7) (2000) (describing people with disabilities as a "discrete and insular minority"); Eichhorn, *supra* note 4, at 1413-14 (noting that "disability activists have come to think of themselves as members of a [large] minority group").

6. Cf. THE NAT'L ORG. ON DISABILITY, EXECUTIVE SUMMARY: 2000 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES (July 10, 2002), at "Employment" [hereinafter 2000 N.O.D./HARRIS SURVEY] (stating that "employment is still the area with the widest gulf between all people with disabilities and the rest of the population"), at <http://www.nod.org/content.cfm?id=1076> (on file with the American University Law Review).

7. See Andrew I. Batavia, *Ideology and Independent Living: Will Conservatism Harm People with Disabilities?*, in *THE AMERICANS WITH DISABILITIES ACT: SOCIAL CONTRACT OR SPECIAL PRIVILEGE?*, 549 ANNALS AM. ACAD. OF POL. & SOC. SCI. 10, 12 (William J. Johnson ed., 1997) (citing a 1994 Harris Survey of Americans with Disabilities statistic indicating that people with disabilities have an unemployment rate of seventy-five percent); THE NAT'L ORG. ON DISABILITY, ECONOMIC PARTICIPATION: FACTS & STATISTICS, EMPLOYMENT RATES OF PEOPLE WITH DISABILITIES (July 24, 2001), at <http://www.nod.org/content.cfm?Id=134> (on file with the American University Law Review) (observing that when looking at all people with disabilities, the employment rate has remained consistent at twenty-nine to thirty-four percent). Additionally, among those with college degrees, fifty-five percent of people with disabilities are unemployed, compared to fourteen percent without disabilities. *Id.* The percentage of people with disabilities who self-report that they are completely unable to work has increased from twenty-nine percent to forty-three percent from 1986 to 2000. If they are excluded, the employment rate for people with disabilities appears to be much higher than fifty-six percent.

disabilities have annual household incomes of \$15,000 or less⁸ and are three times more likely to live in poverty than people without disabilities.⁹ As a result of pervasive poverty, discrimination,¹⁰ lack of access,¹¹ and abuse,¹² people with disabilities are less likely than their able-bodied counterparts to go to restaurants,¹³ supermarkets,

8. Weber, *Law of Welfare*, *supra* note 3, at 898-99.

9. See 2000 N.O.D./HARRIS SURVEY, *supra* note 6, at "Income" (finding that twenty-nine percent of people with disabilities versus ten percent of people without disabilities have household incomes of \$15,000 or less). The survey relied on the 1999 U.S. Census standard, which defined poverty as household income below \$17,000 for a family of four. *Id.* See also Robert Dole, *Are We Keeping America's Promises to People with Disabilities?*—Commentary on *Blanch*, 79 IOWA L. REV. 925, 928 (1994) (citing from a 1992 General Accounting Office study that "45% of families headed by a person with a disability, and 65% of single parents or single persons with a disability, live in poverty").

10. See THE NAT'L ORG. ON DISABILITY, ECONOMIC PARTICIPATION: FACTS & STATISTICS, EMPLOYMENT RATES OF PEOPLE WITH DISABILITIES (July 24, 2001), at <http://www.nod.org/content.cfm?i=134> (on file with the American University Law Review) (reporting that thirty-six percent of employed people with disabilities have experienced discrimination in the workplace including denial of a job (fifty-one percent); denial of a workplace accommodation (forty percent); less pay compared to similarly situated employees (thirty-two percent); refusal of a promotion (twenty-eight percent); and refusal of a job interview (twenty-two percent)); H.R. REP. NO. 101-485, pt. 2, at 30 (1989) (citing an example of a woman with arthritis who was excluded from a job teaching college because of her appearance; another example shows an individual who was fired from her job because her son had AIDS); 135 CONG. REC. S10708, S10720 (daily ed. Sept. 7, 1989) (remarks of Sen. Durenberger) (recounting the story of a woman with cerebral palsy who was denied a job because of potential co-workers' discomfort); Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 924 (describing "the refusal of a bank to allow a mentally retarded man to open a bank account because he did not fit the image the bank wanted to project").

11. See 2000 N.O.D./HARRIS SURVEY, *supra* note 6, at "Entertainment and Socializing" (noting the "significant gaps . . . between the two populations" in their access to entertainment and social activities, regardless of relative income, indicating that non-economic physical and social barriers are preventing people with disabilities from participating in these activities); Joseph P. Shapiro, *Liberation Day for the Disabled*, U.S. NEWS & WORLD REP., Sept. 18, 1989, at 20 (citing testimony that cab-drivers often refuse to provide transportation to individuals in wheelchairs).

12. See Shapiro, *supra* note 11, at 22 (describing an airline employee who "resented having to help a 66-year old double amputee board a plane [so] instead threw him on a baggage dolly"); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the H. Comm. on Educ. and Labor*, 100th Cong. 167 (1989) (statement of Cynthia L. Miller) (recounting the day when an "officer pointed his gun at my head, cocked it, and . . . pulled the trigger on an empty barrel because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight").

13. See 2000 N.O.D./HARRIS SURVEY, *supra* note 6, at "Entertainment and Socializing" (stating that people with disabilities are less likely (forty percent) than people without disabilities (fifty-nine percent) to go to restaurants at least once a week); *Americans with Disabilities Act of 1989: Hearings Before the Subcomm. on the Handicapped of the H. Comm. on Labor and Human Resources*, 101st Cong. 70 (1989) (testimony of Ronald L. Mace) (recounting that he and his wife were refused service at a restaurant because they could not sit on the stools for the oyster bar, and, after asking if other seating was available, they were told "to get out and don't ever come back"); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the H. Comm. on Educ. and Labor*, 100th Cong. 39

movies,¹⁴ malls, sporting events, attend religious services,¹⁵ socialize with friends, family, and neighbors,¹⁶ or engage in politics.¹⁷ Given this lack of participation in mainstream life, only one out of three people with disabilities, compared to two out of three of their "temporarily able-bodied"¹⁸ colleagues, say they are very satisfied with their quality of life.¹⁹

Work provides the opportunity to participate in, enhance and enjoy critical aspects and qualities of life.²⁰ In 1986, a groundbreaking Louis Harris *Survey of Disabled Americans* revealed that only thirty-three percent of disabled Americans worked and concluded that "[n]ot working is perhaps the truest definition of what it means to be disabled."²¹ Since 1986, Congress has passed numerous laws, including the landmark Americans with Disabilities Act (ADA),²² and

(1989) (statement of Linda Pelletier) (reporting that a Boston restaurant refused to serve alcohol to Ms. Pelletier and her friend who were in wheelchairs).

14. See *Americans with Disabilities Act of 1989: Hearings Before the Comm. on Labor and Human Res. and the Subcomm. on the Handicapped of the H. Comm. on Labor and Human Res.*, 101st Cong. 65 (1989) (statement of Vickie Franke) (reporting that in 1988, Ms. Franke's companion Lisa Carl, a person with cerebral palsy, was denied access to a movie theatre when the owner blurted "I basically don't have to let her in here, and I don't want her in here").

15. See 2000 N.O.D./HARRIS SURVEY, *supra* note 6, at "Entertainment and Socializing" (stating that people with disabilities are less likely (forty-seven percent) than people without disabilities (sixty-five percent) to attend religious services at least once a month).

16. See *id.* (stating that people with disabilities are less likely (seventy percent) than people without disabilities (eighty-five percent) to socialize with friends, family, and neighbors at least once per week).

17. See *id.* at "Political Participation/Voter Registration" (finding that only sixty-two percent of people with disabilities were registered to vote in the 1996 election, compared with seventy-eight percent of people without disabilities).

18. The term "temporarily able-bodied" is used by some disability activists to expose the fear of the non-disabled that they may not always have control over their bodies and may someday be disabled themselves. Eichhorn, *supra* note 4, at 1415. See also *The Ticket to Work and Self-Sufficiency Program*, 66 Fed. Reg. 67,370 (Dec. 28, 2001) (codified at 20 C.F.R. pt. 411) ("From calendar year 1986 to calendar year 1999, the number of individuals receiving disability benefits rose eighty percent, with about half receiving Social Security disability and half receiving Supplemental Security Income (SSI) benefits.").

19. 2000 N.O.D./HARRIS SURVEY, *supra* note 6, at "Life Satisfaction and Optimism for the Future" (finding that only thirty-three percent of people with disabilities, compared to sixty-seven percent of people without disabilities, say they are "very satisfied with their life").

20. See *id.* (noting that all ten of the quality of life indicators used to compile the N.O.D./HARRIS SURVEY are interconnected and that as one indicator improves or declines others will likely move in the same direction enhancing or inhibiting progress).

21. See Dole, *supra* note 9, at 928 (quoting Louis Harris and Associates, Inc., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream*, at 47 (Study No. 854009, 1986)).

22. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (2000)); see H.R. REP. NO. 101-485, pt. 2, at 34 (1990) (stating that the essential goal of the ADA is "to allow individuals with disabilities to be part of the economic

the federal government has spent billions of dollars to support the employment of people with disabilities²³ by funding vocational rehabilitation programs, national referral and recruitment services,²⁴ the Social Security and Veterans Administrations, affirmative action in federal hiring and contract preferences, and tax benefits.²⁵ Nevertheless, the most recent *Survey of Americans with Disabilities* reports that only thirty-two percent of Americans with disabilities were working in 2000.²⁶ As Senator Bob Dole observed, “[s]omething is clearly wrong.”²⁷

mainstream of our society” by removing barriers to employment). See generally Elizabeth Clark Morin, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U.L. REV. 189, 198-211 (1990) (reviewing Title I of the ADA, which concerns employment discrimination, and comparing it to similar legislation).

23. See Press Release, U.S. Dep’t of Health and Human Services, HHS to Award Individuals During Celebration of National Disability Employment Awareness Month (Oct. 30, 2003), at <http://www.hhs.gov/news/press/2003pres/20031030a.html> (on file with the American University Law Review) (setting forth President Bush’s proposed \$2.1 billion five year budget for the New Freedom Initiative devoted to supported employment programs); U.S. Dep’t of Health and Human Services, *HHS Programs Serve Americans with Disabilities* (revised May 9, 2002), at http://www.policyalmanac.org/social_welfare/archive/hhs_disability_programs.shtml (on file with the American University Law Review) (reporting Congress’s appropriation of \$400 million to implement the Ticket to Work and Work Incentives Improvement Act (TWWIA), which will give Americans with disabilities incentives and means to seek employment); White House, *New Freedom Initiative: A Progress Report* (revised May 9, 2002), at http://www.policyalmanac.org/social_welfare/archive/new_freedom_initiative_2.shtml (on file with the American University Law Review) (describing President Bush’s progress in breaking down barriers to employment for individuals with disabilities, including requesting an increase of \$165 million in funding and performance-based incentive grants for the Vocational Rehabilitation Program); Press release, Office of Disability Employment, U.S. Dep’t of Labor, Secretary of Labor Announces \$15.3 Million in Grants Supporting the Employment of People with Disabilities (Oct. 1, 2003), at <http://www.dol.gov/odep/media/press/employ.htm> (on file with the American University Law Review) (announcing additional grants for employment policy research and evaluation bringing the total commitment to \$61.5 million since 2001); see also Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1676 (2000) (finding that the government spends \$120 billion annually for people with disabilities); GAO TAX STUDY, *supra* note 3, at 33 (stating that there are over one hundred federal programs available to help people with disabilities obtain or retain employment, but few of these focus solely on employment issues of persons with disabilities).

24. See GAO TAX STUDY, *supra* note 3, at 7 (listing eight federal programs that target potential employers to hire, retain, and accommodate people with disabilities including Ticket to Hire, Project EMPLOY and the Job Accommodation Network).

25. See generally Dole, *supra* note 9, at 925-29 (reviewing the development of several federal laws and programs intended to “promote the dignity, independence and security” of people with disabilities in a variety of contexts, including employment).

26. 2000 N.O.D./HARRIS SURVEY, *supra* note 6, at “Employment.” See Stein, *supra* note 23, at 1677-78 (reporting that two comprehensive studies of post-ADA employment effects on workers with disabilities “concurred in finding a relative reduction in the employment rate of disabled workers concurrent with either a neutral or beneficial effect on wages”).

27. Dole, *supra* note 9, at 929 (concluding that current employment strategies do not appear to be effective and proceeding to answer the question of what is wrong

Federal employment initiatives for people with disabilities do not seem to be working.²⁸ Scholars argue that the ADA and similar legislation that exemplify the disability theory of "integrationism,"²⁹ with the goal of integrating people with disabilities into mainstream employment, cannot succeed.³⁰ Barriers to employment for people with disabilities cannot be eradicated simply by the modest integrationist approach of reasonable accommodation.³¹ A "post-

with America's strategy to employ the disabled); see also Batavia, *supra* note 6, at 13-14 ("Despite hundreds of billions of dollars spent on disability programs in the last century, people with disabilities continue to be among the most economically distressed members of our society.").

28. Batavia, *supra* note 6, at 13 (stating that "most disability programs in this country have had only modest success in achieving their goals; most have failed in assisting people with disabilities to achieve true independence through employment"); Dole, *supra* note 9, at 929 (describing the prevalent joblessness among people with disabilities and the need for a national strategy on employment); Stein, *supra* note 23, at 1687 (commenting that the "overall post-ADA employment rate for people with disabilities . . . paints a universally dismal picture," thus provoking the need for systemic research and further examination).

29. See Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 815 (1966) (terming the new paradigm for disability theory of equality for people with disabilities as "integrationism" and noting the shift from the old paradigm of "custodialism"—the duty by others to care for and protect people with disabilities); Weber, *Law of Welfare*, *supra* note 3, at 903 (noting that "[t]he ADA is a classic integrationist statute" creating legally enforceable rights against segregation and requiring employers to make "reasonable accommodations" for people with disabilities).

30. See Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, in *THE AMERICANS WITH DISABILITIES ACT: SOCIAL CONTRACT OR SPECIAL PRIVILEGE?*, 549 ANNALS AM. ACAD. OF POL. & SOC. SCI. 71, 80-81 (William J. Johnson ed., 1997) (stating that the ADA at best widens the scope of employer accommodations for people with disabilities who can work, and if society's goal is that people with disabilities should be able to work, then society should bear the cost of accommodation); Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 197-99 (1998) (finding that the ADA has not been as effective in increasing job opportunities for people with disabilities as first hoped, partly because "the duty to accommodate creates a powerful incentive for employers to discriminate rationally against persons with disabilities in order to avoid paying for accommodations"); Weber, *Law of Welfare*, *supra* note 3, at 889, 891 (reporting that "[t]he ADA has benefited only a narrow class of persons with disabilities—those who can successfully compete with others once their disabilities have been accommodated and for whom the needed accommodations do not cause the employer undue hardship"); see also Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1397 (1993) (opining that the ADA "falls short of the mark" and "compromises many of the rights it purports to furnish"); Stein, *supra* note 23, at 1672-73 (reporting that the few empirical studies conducted suggests that the disabled employment rate has declined since the ADA's passage despite evidence "that employers can accommodate disabled workers inexpensively, and perhaps enjoy economic benefits as a result").

31. See Weber, *Law of Welfare*, *supra* note 3, at 904-08 (describing how the limited integrationist features of the ADA stop short in aiding people with disabilities to gain employment).

integrationist" approach³² may be required to provide legitimate equal employment opportunities for people with disabilities.³³

Senator Bob Dole, a person with a disability and a disability rights advocate,³⁴ suggests that we must critically evaluate existing federal employment strategies for people with disabilities, keeping the programs that work and revising the programs that do not work.³⁵ Unfortunately, few studies of these federal employment strategies exist to make meaningful or conclusive evaluations.³⁶ However, in the Ticket to Work and Work Incentives Improvement Act of 1999³⁷ the United States Congress instructed the General Accounting Office (GAO) to "study and report on existing tax incentives to encourage

32. See *id.* at 915-19 (describing post-integrationist theory as moving beyond the "reasonable-accommodation paradigm" of integrationism to achieve legitimate equality through a significant redistribution of power and material resources in favor of persons with disabilities).

33. See *id.* at 889-94, 912-21 (stating that critics are questioning how to move people with disabilities beyond the plateau that has been reached and concluding that the integrationist theory's weaknesses and limits demand a new theory to continue efforts to secure equality for people with disabilities); Moss & Malin, *supra* note 30, at 236 (concluding that society must embrace a new anti-discrimination policy to deliver the ADA's promise of increased employment opportunities for people with disabilities).

34. See Dole, *supra* note 9, at 926 (quoting from his first speech in the United States Senate in 1969). Senator Dole demanded equality for Americans with disabilities by describing their unacceptable status:

As a minority, [people with disabilities have] . . . always known exclusion—maybe not exclusion from the front of the bus, but perhaps from even climbing aboard it; maybe not exclusion from pursuing advanced education, but perhaps from experiencing any formal education; maybe not exclusion from day-to-day life itself, but perhaps from an adequate opportunity to develop and contribute to his or her fullest capacity.

Id.

35. See *id.* at 929 (comparing the programs in force in 1994 to medicine that does not work, explaining that people with disabilities need new employment programs that succeed, just as people need new medicine when the medicine already available is not making them well).

36. *Id.* The unfavorable findings resulting from a 1993 General Accounting Office study on the nation's vocational rehabilitation program supplied the initial data concerning the value of the program to people with disabilities. *Id.* It found that only one-third of program graduates work regularly, often for low wages, and even then only one in twenty eligible individuals receive *any* services. *Id.*

37. Pub. L. No. 106-170, 113 Stat. 1860 (1999) (codified at 42 U.S.C. § 1320b-19 (2000)) (setting forth legislation enacted on December 17, 1999 intended to expand the options available for Social Security disability and Supplemental Security Income beneficiaries to access vocational rehabilitation services, employment services, and other support services for such beneficiaries to obtain, regain or maintain employment that reduces their dependency on cash benefits and removes existing work disincentives). The Ticket to Work and Work Incentives Improvement Act of 1999 provides individuals with disabilities expanded options for continuing health care coverage, employment preparation, vocational rehabilitation services and, placement services needed to obtain, regain, or maintain employment. *Id.* at Finding b.

businesses to employ and accommodate workers with disabilities.”³⁸ In December 2002, the GAO released the report on its study of these federal tax incentives.³⁹ This Article evaluates this federal employment strategy embodied in three distinct tax provisions⁴⁰ using post-integrationist theory.⁴¹

Part II presents the post-integrationist framework for the analysis. Part II begins with a brief description of the historical foundation of post-integrationism as a disability rights paradigm. The historical foundation includes descriptions of the contributing paradigms of custodialism and integrationism. Part II concludes with an outline of the overriding principles of post-integrationist theory. Part III begins with a description of the two tax provisions that provide incentives for employer accommodations for employees with disabilities. After the description of these tax provisions, the GAO report results are presented and used to analyze the efficacy of these tax incentives. Using post-integrationist principles, the accommodation tax provisions are evaluated and redesigned as one sweeping accommodation tax provision intended to motivate employers to hire and accommodate people with disabilities. The conclusion of Part III presents a proposed model statute of the revised tax provision providing funding for all ADA accommodations mandated for employees.

Part IV begins with a description of the work opportunity credit (WOC), a tax provision that is intended, among other goals, to provide incentives for hiring and retaining people with disabilities. Immediately after the description of the WOC, the GAO report of the WOC results are presented and used to examine the efficacy of this provision. Using post-integrationist principles, the WOC is evaluated and redesigned to better motivate employers to hire and retain people with disabilities. Part IV concludes with a description of the post-integration revision of the WOC. Part V begins with a description of the earned income tax credit (EITC), a tax credit that motivates low-income individuals to work. Using post-integrationist principles, the EITC is expanded to better address the severe work disincentives for people with disabilities. The expanded EITC should

38. See GAO TAX STUDY, *supra* note 3, at “Highlights” (citing Congress’s mandate in the Ticket to Work and Work Incentives Improvement Act of 1999).

39. *Id.*

40. The three tax provisions studied and reported on by the GAO include the work opportunity credit, I.R.C. § 51 (2003), the disabled access credit, I.R.C. § 44 (2003), and the barrier removal deduction, I.R.C. § 190 (2003).

41. See Weber, *Law of Welfare*, *supra* note 3, at 912-21 (providing a background on post-integrationist theory).

enable the revised accommodation and WOC tax provisions, which focus on tax incentives to motivate employers to hire and retain people with disabilities, with a tax incentive to motivate people with disabilities to work. Part VI presents and analyzes the societal costs versus the societal benefits of the three redesigned tax provisions. The Article finds that the immeasurable societal benefits of the three redesigned tax provisions should outweigh the considerable societal costs. Finally, the Article concludes with an appeal to Congress and the administration to keep America's promise of mainstream employment for people with disabilities and adopt these proposed tax amendments.

Through supported mainstream employment, people with disabilities will participate more actively in critical aspects of life and begin to enjoy legitimate equality.⁴² Work provides the opportunity for self-sufficiency through wages, a productive role in society, enhanced self-esteem and self-worth, order, sources of friendship, and social support.⁴³ The day-to-day involvement of people with disabilities in the workplace and in life will break down societal stereotypes, ignorance, fear, and prejudices.⁴⁴ Society benefits from

42. See Weber, *Employment Policy*, *supra* note 3, at 129 (citing a 1994 study of the costs and benefits of supported employment for persons with severe physical and multiple disabilities and arguing that even when the additional costs of supporting a person with a disability are deducted from his or her paycheck, employment in the general workplace yields greater monetary benefits than employment in sheltered workshops).

43. See THE NAT'L ORG. ON DISABILITY, ECONOMIC PARTICIPATION: FACTS & STATISTICS, WHAT IS THE EMPLOYMENT GAP? (May 15, 2002), at <http://www.nod.org/content.cfm?id=968> (on file with the American University Law Review) (commenting that work impacts home ownership, transportation, access to health care, ability to socialize, pursuit of advanced education, and community participation); see also Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behaviour and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 400 (1997) (describing how individuals with disabilities enjoying integrated and positive employment outcomes report greater life satisfaction and increased self-esteem).

44. "Research shows that employers who have no employees with disabilities have more negative attitudes towards workers with disabilities than those who have moderate or large numbers." Weber, *Employment Policy*, *supra* note 3, at 133 (citing Sharon E. Walters & Clara Mae Baker, *Title I of the Americans with Disabilities Act: Employer and Recruiter Attitudes Toward Individuals with Disabilities*, 20 J. REHABILITATION ADMIN. 15, 20 (1996)). A lack of regular contact with people who are different fosters stereotypes and prejudices. See *id.* at 133 (noting that disability discrimination is often "the result of unconscious attitudes or unexamined stereotypes"). When people with differences carry out common tasks and recognize their mutual responsibilities, "they enact the narratives of their common humanity and their common citizenship." Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 122 (1990). Participation in public life and access to society affirms for people with disabilities that they are full members of society and deserve equal rights. See Drimmer, *supra* note 30, at 1410 (concluding that to end systematic, stigmatizing subordination of people with

an expanded and more diverse workforce, consumer base, electorate, tax base, congregations, and neighborhoods.⁴⁵ "From a diversity of culture and experience comes national strength, tolerance, and understanding."⁴⁶ Moreover, society would save billions or even trillions of dollars in cash benefits from self-supporting employment of people with disabilities.⁴⁷ Most significantly, enabling work affirms the common humanity, citizenship, and equality of people with disabilities.⁴⁸

I. POST-INTEGRATIONIST THEORY: A FRAMEWORK FOR DISABILITY POLICY ANALYSIS

This Article proposes to enable work for people with disabilities by the redesign of three underutilized tax provisions. The analysis for the redesign will apply the principles of post-integrationist theory.⁴⁹

disabilities, laws must be enacted to ensure uncompromised and full participation in all aspects of society).

45. See, e.g., THE NAT'L ORG. ON DISABILITY, ECONOMIC PARTICIPATION: FACTS & STATISTICS, WHAT IS THE EMPLOYMENT GAP? (May 15, 2002), at <http://www.nod.org/content.cfm?id=968> (on file with the American University Law Review) (asserting that when more people with disabilities work, there are more consumers putting money back into the economy). The benefits are not merely economic. See Drimmer, *supra* note 30, at 1409 ("From a diversity of culture and experience comes national strength, tolerance, and understanding."); Weber, *Employment Policy*, *supra* note 3, at 130 (explaining how integration fosters truth and demonstrates "that persons with disabilities are not threatening, helpless, or evil"). "Being exposed to the reality that persons with disabilities are in the world and part of it should, over time, bring changes in the way others view reality." *Id.* at 172.

46. Drimmer, *supra* note 30, at 1409.

47. "If just one-half of one percent of the current Social Security disability and SSI beneficiaries were to cease receiving benefits as a result of engaging in self-supporting employment, savings in cash benefits would total \$3.5 billion over the work-life of these individuals." The Ticket to Work and Self-Sufficiency Program, 20 C.F.R. § 411 (2001). See also Morin, *supra* note 22, at 212 (noting that if individuals receiving disability become self-sufficient, the government could reduce the billions of dollars spent annually on persons with disabilities); Stein, *supra* note 23, at 1674-77 (setting forth results of surveys finding that every dollar spent on accommodations saved \$50 on average in net benefits and, although more than one half of accommodations cost less than \$500, two-thirds of such accommodations enjoyed net benefits greater than \$5,000 and demonstrating that employers can realize economic benefits in recruitment, training, and replacement expenses by reducing costly job turnover); Weber, *Employment Policy*, *supra* note 3, at 130 (noting that maintaining thirty-five year olds currently on Supplemental Security Income or Social Security Disability Insurance and medical and other benefits for the rest of their lives costs over one trillion dollars).

48. See Drimmer, *supra* note 30, at 1410 (commenting that people with disabilities deserve equal rights); see also Michael B. Laudor, *Disability and Community: Modes of Exclusion, Norms of Inclusion, and the Americans with Disabilities Act of 1990*, 43 SYRACUSE L. REV. 929, 929 (1992) (examining the complex relationships "between the disabled and the able" and finding that we are all interdependent).

49. See Mary Kate Kearney, *The ADA, Respiratory Disabilities and Smoking: Can Smokers at Burger King Really Have it Their Way?*, 50 SYRACUSE L. REV. 1, 58-61 (2000) (identifying Mark Weber's label of "post-integrationists" and describing the post-

Post-integrationist theory has evolved from the limits of integrationism, which were born from the limits of custodialism.⁵⁰ To better comprehend post-integrationist theory, its historical roots of custodialism and integrationism must be explored.

A. Custodialism

Custodialism dates back to the Middle Ages⁵¹ and continued through at least the 1970s⁵² when people with disabilities were separated into institutions and kept out of public sight and mind.⁵³ Our legal system mandated separation to protect members of society from the discomfort of having to deal with the existence of “cripples” or look at their “deformed” and “unsightly” appearances.⁵⁴ Even animals had to be protected from the disturbing sight of “cripples”; as recounted in the ADA’s legislative history, a private New Jersey zoo excluded Down’s syndrome children because their abnormal appearances would have upset the wild animals.⁵⁵ Even more unspeakable, society attempted to protect itself from deformities by compelling the sterilization of “feeble-minded” women⁵⁶ or denying

integrationist vision).

50. See Weber, *Law of Welfare*, *supra* note 3, at 899-921 (describing the evolution of disability policy from custodialism to integrationism to post-integrationism).

51. In Middle Ages, people with disabilities were imprisoned, institutionalized, isolated from community life or driven from the cities. See Drimmer, *supra* note 30, at 1359-60 (noting that the English Public Poor Relief provisions enacted in 1536 deemed pauperism a legal crime enforced by punishment, incarceration, and disenfranchisement).

52. See Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1695-96 (noting that aspects of a “new paradigm,” focused on eliminating barriers rather than on fixing individuals, were included in legislation enacted in 1973 and 1975, and lawmakers and society continued to define and accept this paradigm through 1990 when the ADA was enacted); tenBroek & Matson, *supra* note 29, at 814-16 (describing the civil rights movement emerging in 1966 among people with disabilities, which they labeled “integrationism”).

53. See Weber, *Law of Welfare*, *supra* note 3, at 899-900 (noting that under custodialism, people with disabilities who ventured out encountered a public that often assessed them based upon their perceived disabilities rather than as equals).

54. See *id.* at 900 (reporting a Chicago ordinance in effect until 1973, which prohibited public exposure of those “deformed” or “unsightly” in public). There are other cases in which people with cerebral palsy or arthritis have been denied jobs because of the possibility of “discomfort that would be caused to co-workers or customers by looking at them.” *Id.* at 901. In 1985, a trial judge in a mass tort litigation birth defect case excluded all plaintiffs with visible deformities from the courtroom because he believed their appearances would improperly influence the jury. See *In re Bendectin Litig.*, 857 F.2d 290, 297 (6th Cir. 1988) (describing the exclusion which led to a partial reversal of the trial court decision).

55. See Weber, *Law of Welfare*, *supra* note 3, at 901.

56. See *Buck v. Bell*, 274 U.S. 200, 205-07 (1927) (declaring that “three generations of imbeciles are enough” and allowing involuntary sterilization of female imbeciles); *Ruby v. Massey*, 452 F. Supp. 361 (D. Conn. 1978) (upholding parents’ right to have their mentally and physically disabled daughters sterilized); see also

life-saving medical treatment for infants with disabilities.⁵⁷ Children with disabilities that did survive were excluded routinely from adequate or any education.⁵⁸ Not until 1975 did Congress require states to provide free, public education for all school-aged children with disabilities.⁵⁹

Institutional and attitudinal barriers that segregated, isolated, and excluded people with disabilities caused loneliness, despair, pernicious unemployment, and poverty.⁶⁰ In response to this extreme repression and surrounded by an infectious civil rights movement, activists groups demanded greater participation in society for people with disabilities.⁶¹ Between the 1970s and 1990, legislators and their constituents began to respond to demands for basic civil rights for people with disabilities.⁶² A new paradigm, termed "integrationism," emerged pledging to include and accommodate people with disabilities in society's mainstream.⁶³

Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 145-49 (1993) (recounting more recent practices of sterilization of women with mental disabilities); Laudor, *supra* note 48, at 934-36 (discussing the "visceral outrage," cruelty, and complicated issues of family, society, and individual interests that sterilization of people with disabilities evokes).

57. Weber, *Law of Welfare*, *supra* note 3, at 900; *see also* Drimmer, *supra* note 30, at 1359 (noting that throughout much of Western history, "imperfect" children and adults were abandoned or killed).

58. *See* Weber, *Law of Welfare*, *supra* note 3, at 900-01 (noting that when Congress passed legislation in 1975 prohibiting disability-based discrimination in public education, 1.75 million children with disabilities were denied an education); *see also* Drimmer, *supra* note 30, at 1360 (stating that through the 1970s, a great majority of children with disabilities did not receive any education).

59. *See* Education for All Handicapped Children Act of 1975 (current version at 20 U.S.C. §§ 1400-1487 (2000)).

60. *See* Dole, *supra* note 9, at 926-27 (reviewing the history of the disability rights movement through his speeches and federal legislation); Silverstein, *supra* note 52, at 1695 (describing institutional and attitudinal barriers in the "old paradigm" of custodialism).

61. *See* Drimmer, *supra* note 30, at 1375-77 (noting that activist groups engaging in demonstrations and civil disobedience changed predominant views of disabilities and advanced the belief that people with disabilities deserve civil rights).

62. *See* Dole, *supra* note 9, at 925-27 (describing the transition to the new disability movement); Silverstein, *supra* note 52, at 1695 (commenting that the "new paradigm" was emerging through legislation and societal behavior); Weber, *Law of Welfare*, *supra* note 3, at 899-901 (describing the transition from custodialism to integrationism). For an excellent discussion of federal legislation impacting the lives of people with disabilities during this time, *see* Drimmer, *supra* note 30, at 1379-96.

63. *See* tenBroek & Matson, *supra* note 29, at 814-16 (discussing the belief that people with disabilities have the potential to fully participate in the social and economic life of the community). Professor tenBroek was a pioneering activist for disability rights and was visually impaired himself.

B. Integrationism

Integrationism theorists believe that neither societal attitudes nor environmental attributes should be allowed to impose limits on people with disabilities beyond those imposed by their physical and mental impairments.⁶⁴ For example, a person who is blind should not have to suffer any limits beyond the physical limitations of her loss of sight.⁶⁵ Societal attitudes based on “myths, stereotypes, aversive responses, and outright prejudices”⁶⁶ cause segregation, isolation of, and discrimination against people with disabilities.⁶⁷ Environmental factors create restrictions exacerbating actual impairments and preclude people with disabilities from participating in mainstream society.⁶⁸ Mark C. Weber, a disability rights legal scholar, observed that “integrationist scholars hoped that once basic adaptations had been made, society would not be required to afford fundamentally different treatment to individuals with disabilities.”⁶⁹

A “classic integrationist statute,”⁷⁰ the ADA, was signed into law by President George Bush on July 26, 1990, a day termed “Liberation

64. See *id.* at 814 (stating that in reality, psychological and socio-economic handicaps outweigh the physical handicaps suffered by people with disabilities); see also Janet Radcliffe Richards, *Genes and the Just Society: How Not to End Disability*, 39 SAN DIEGO L. REV. 693, 697-98, 706-13 (2002) (describing disability as a social construction).

65. See tenBroek & Matson, *supra* note 29, at 814 (stating that disability and its limits should be isomorphic; for example, blindness should impose no limits other than the visual and physical limits resulting from the inability to see); see also Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245, 267-69 (1994) (illustrating attitudinal barriers by describing the discriminatory reactions, including the New York Times' editorial comment that the nomination “pushes the outer boundaries of what the judicial system can accommodate,” to President George Bush's 1992 nomination of Richard C. Casey, a blind former federal prosecutor, to a judgeship on the United States District Court for the Southern District of New York).

66. tenBroek & Matson, *supra* note 29, at 814.

67. See Blanck & Marti, *supra* note 43, at 349-74 (discussing discrimination resulting from society's attitudes and behaviors toward people with disabilities); Weber, *Employment Policy*, *supra* note 3, at 131-35 (discussing the history of employment discrimination against people with disabilities).

68. See tenBroek & Matson, *supra* note 29, at 814-16 (describing disabled people throughout history as being mistrusted, misunderstood, mistreated, and impoverished); 2000 N.O.D./HARRIS SURVEY, *supra* note 6, at Entertainment and Socializing (noting that significant environmental barriers restrict work, entertainment, and social activities for people with disabilities).

69. Weber, *Law of Welfare*, *supra* note 3, at 904.

70. *Id.* at 903. See John J. Sarno, *The Americans with Disabilities Act: Federal Mandate to Create an Integrated Society*, 17 SETON HALL LEGIS. J. 401, 401-02 (1993) (analyzing the impact of the ADA on the private sector and discussing the constitutional and legislative framework attempting to fully integrate people with disabilities). The ADA includes the following policy statement articulating America's goals regarding people with disabilities: “the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . .” *The Americans With*

Day for the Disabled.”⁷¹ The ADA outlaws the segregation of people with disabilities⁷² and mandates that private and public providers of services, facilities, and employment reasonably accommodate people with disabilities.⁷³ Before 3000 disability rights advocates on the south lawn of the White House, President Bush promised that with the ADA “every man, woman and child with a disability can pass through once-closed doors into a bright new era of equality, independence and freedom.”⁷⁴ The chief sponsor of the ADA, Senator Tom Harkin (D. Iowa), proclaimed the new legislation as the “20th century Emancipation Proclamation for all persons with disabilities.”⁷⁵ Even the most enthusiastic ADA commentators, however, recognized that many people with disabilities would continue to be left out of the workforce and, as a result, out of the mainstream of economic life in America.⁷⁶

More than a decade after the ADA’s enactment, people with disabilities continue to be victims of invidious discrimination⁷⁷ and

Disabilities Act of 1990 § 2(a), 42 U.S.C. § 12101(a) (2000).

71. Stephen Chapman, *Waving a Magic Wand at the Needs of the Handicapped*, CHI. TRIB., Sept. 24, 1989, § 4 (Perspective), at 3 (dubbing the projected enactment of the ADA “Liberation Day for the disabled” prior to its enactment).

72. Title I of the ADA prohibits private employers from segregating people with disabilities into separate work areas, lines of advancement, or particular facilities. 42 U.S.C. § 12112(b)(1) (2000). See also 42 U.S.C. § 12112(a) (2000) (providing that private employers shall not discriminate against a qualified individual with a disability in regard to job application procedures, hiring, or compensation). Titles II and III prohibit segregatory discrimination against people with disabilities in public settings and public services, including public transportation. See 42 U.S.C. § 12182(a), (b)(iii), (iv) (2000) (mandating that no person with a disability shall be discriminated against in the full and equal enjoyment of any public accommodation).

73. See 42 U.S.C. §§ 12112(b)(5)(A) (2000) (regarding employment accommodations), 12182(b)(2)(A)(iv) (requiring public facilities to remove access barriers to stores and offices and requiring adapted telecommunication services and public transportation). Moreover, all new construction and alterations must meet accessibility standards. See 42 U.S.C. § 12183 (2000) (establishing the law regarding public accommodations and commercial facilities); 28 C.F.R. § 35.151 (2003) (requiring accessibility of state and local government facilities to people with disabilities).

74. Arlene Mayerson & Matthew Diller, *The Supreme Court’s Nearsighted View of the ADA*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 124 (Leslie Pickering Francis & Anita Silvers eds., 2000); see also JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 140 (1993) (quoting President George Bush’s proclamation: “[l]et the shameful walls of exclusion finally come tumbling down”).

75. 136 CONG. REC. 17,369 (daily ed. July 13, 1990) (statement of Sen. Harkin).

76. See Weber, *Employment Policy*, *supra* note 3, at 126 (citing a number of commentators who note the significant physical and behavioral barriers to full employment which will continue due to compliance failures).

77. See *id.* at 131-35, 144 (describing the long, virulent, and widespread legacy of discrimination that dissuades people with disabilities from entering the workforce).

suffer persistent unemployment and poverty.⁷⁸ The ADA and its underlying foundation, integrationism, have fallen far short of moving people with disabilities to the mainstream.⁷⁹ Critics suggest that the ADA is too modest and that a paradigm more aggressive than integrationism is needed to advance people with disabilities to the next level.⁸⁰ The ADA provides minimal requirements for access that do not impose "undue hardship," or "fundamentally alter" an environment,⁸¹ but rather are "readily achievable," and simply shift "some costs of disability to employers (in the form of reasonable accommodations), merchants (in the form of readily achievable removal of barriers for shopkeepers), and government itself (in the form of program accessibility)."⁸² People with disabilities continue to bear the bulk of the costs of their actual, societal, and environmentally imposed disabilities.⁸³

Scholars contend that the ADA's antidiscrimination measures alone cannot narrow the gap in accessibility between those who are disabled and those who are not.⁸⁴ The ADA only benefits persons with disabilities whose attributes are already superior to other job

78. See *supra* note 9; see also Stein, *supra* note 23, at 1677-81 (reporting that two comprehensive studies of post-ADA employment effects on workers with disabilities found an increase in unemployment rates for people with disabilities); Weber, *Law of Welfare*, *supra* note 3, at 898-99 (describing pervasive and persistent unemployment and poverty for people with disabilities).

79. In fact, one scholar argues that people with disabilities using the ADA to assert their rights may be forced "to adopt the very stereotypes Congress sought to eradicate in passing the laws." Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 250. Rovner explains that proof of the elements of a discrimination claim force a plaintiff to prove that she is "disabled" and a "victim." *Id.* at 252, 255-60. Rovner recounted unsuccessful litigation against American Airlines for civil rights violations stemming from a mobility-impaired woman who was forced to drag herself on and off two separate flights without assistance. Prior to the flights, the woman had gone to great lengths to confirm the availability of adequate assistance. Rovner wonders whether allowing a jury to see such a plaintiff as a strong person rather than as a victim is a mistake in the litigation context. *Id.* at 255-60.

80. See, e.g., Weber, *Law of Welfare*, *supra* note 3, at 904-08 (setting forth the limits of integrationism and its "classic" statute, the ADA); see also Drimmer, *supra* note 30, at 1397 (offering that the ADA falls short of its mark to elevate people with disabilities into equality with all other persons); Moss & Malin, *supra* note 30, at 199-215 (analyzing the limitations of the ADA and proposing an alternative solution); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 337-40 (2001) (finding inherent flaws in the civil rights paradigm underlying the ADA); Bonnie B. Tucker, *Preface to Sara D. Watson et al., Discrimination on the Basis of Disability: The Need for a Third Wave Movement*, 3 CORNELL J.L. & PUB. POL'Y 253, 253 (Bonnie P. Tucker ed., 1994) (recognizing that the complexity of disability cannot be addressed simply by integrationism).

81. Weber, *Law of Welfare*, *supra* note 3, at 904 (quoting 42 U.S.C. § 12182(b)(2)(A) (2000)).

82. *Id.* at 907.

83. *Id.* at 907-08.

84. *Id.* at 908.

candidates (after considering any required reasonable accommodation).⁸⁵ However, candidates with disabilities have faced long-term invidious barriers to education and job training and, therefore, have neither the resources nor the opportunities to achieve superiority.⁸⁶ If people with disabilities are to realize the promise of emancipation, society must move beyond the limits of integrationism and implement more aggressive measures that redistribute power and material resources in their favor. The disability theory that has been proposed to accomplish this goal is "post-integrationism."⁸⁷

C. *Post-Integrationism*

Post-integrationism evolves from the critical limits of integrationism.⁸⁸ Integrationism embodied in anti-discrimination legislation and reasonable accommodation has not resulted in equality for people with disabilities.⁸⁹ Post-integrationism proposes more aggressive measures to fulfill the promises of the ADA based on the following principles.

1. "Strategic Essentialism":⁹⁰ *Specialized treatment for people with disabilities to confer equal benefit, social choices, and power for all persons*

Like many oppressed minorities, people with disabilities should encourage each other to reaffirm, celebrate, and explore their unique identity and culture.⁹¹ People with disabilities must affirm their equal citizenship and demand equal rights, not because the

85. Weber, *Employment Policy*, *supra* note 3, at 137.

86. *See id.* at 138-42 (noting the limitations on education and rehabilitation services for people with disabilities).

87. *See Weber, Law of Welfare*, *supra* note 3, at 912-21 (describing the transition from integrationism to post-integrationism).

88. *See id.* at 912 (noting that "[p]ost-integrationist ideas are still in the process of creation").

89. *See generally* 2000 N.O.D./HARRIS SURVEY, *supra* note 6 (noting that despite significant gains over the past decade, people with disabilities lag far behind those without disabilities in ten specific quality of life measurements, including employment, income, and education).

90. *See Weber, Law of Welfare*, *supra* note 3, at 914 (defining the term "strategic essentialism" as the need to identify people with disabilities as different from the mainstream and to respond to the differences). Like the women's equality movement, people with disabilities have had to contend with norms created without them and which have the effect of excluding them. *Id.* at 919-21.

91. *See Drimmer, supra* note 30, at 1407-08 n.289 (suggesting that disabled citizens celebrate their own unique culture by adopting slogans similar in spirit to "Black is Beautiful" or "Black By Popular Demand," both used by the African American civil rights movement); *see also Weber, Law of Welfare, supra* note 3, at 919-21 (comparing the development of the women's equality movement ideology to disability equality ideology, particularly regarding how far to stress similarities and differences).

disabled deserve pity, and not because they have sufficiently blended into mainstream society in order to achieve some level of success, but because the American ideal of equality demands such treatment.⁹²

People with disabilities must openly affirm their unique identity as different from the mainstream to facilitate them in organizing politically and demanding specialized treatment based upon this difference.⁹³ The ADA's treatment of disability as a private matter that confidentiality provisions protect is inconsistent with post-integrationism principles.⁹⁴

Due to the uniqueness of people with disabilities, specialized treatment beyond simple integration and reasonable accommodation is necessary to equalize the rights and well-being of those with and without disabilities.⁹⁵ People with disabilities deserve equal benefits, not merely access.⁹⁶ Under integrationism, people with disabilities must adapt to the "normal," non-disabled world with only reasonable accommodations.⁹⁷ This approach has not resulted in increased mainstream employment for people with disabilities.⁹⁸ Specialized treatment is necessary to provide people with disabilities as a group sufficient power to end their disadvantaged status.⁹⁹ Under post-integrationism, society would respond to the needs of people with disabilities and redefine the norm to adapt it to each unique and

92. See Drimmer, *supra* note 30, at 1407 (detailing a gradual approach to full societal inclusion for people with disabilities).

93. See Weber, *Law of Welfare*, *supra* note 3, at 913-14 (describing "strategic essentialism"); see also Drimmer, *supra* note 30, at 1407 (concluding that people with disabilities must "come out of the closet").

94. See Weber, *Law of Welfare*, *supra* note 3, at 913-14 (asserting that public identification of people with disabilities may be necessary for a unified development of political power).

95. *Id.* at 913; see Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 554 (2001) (concluding that narrow interpretations of formal equality perpetuate discrimination of people with disabilities "by refusing to recognize that the 'same' treatment can itself be discriminatory").

96. See Kearney, *supra* note 49, at 60-61 (noting that the right to equal benefits places a burden on businesses to change their services beyond reasonable accommodation to allow a person with a disability to enjoy the benefits of the business).

97. See *id.* at 58-60 (describing the post-integrationist principle that society should adjust to the needs of people with disabilities; the current expectation that people with disabilities should adjust to the "normal," non-disabled world).

98. See Stein, *supra* note 23, at 1677-80 (describing the results of two employment and wage studies that indicate, among other findings, that unemployment of men with disabilities (ages eighteen to sixty-four) increased by an average of 7.2% relative to non-disabled men, and that hours worked per week declined ten to fifteen percent across the male and female twenty-one to thirty-nine year old age group).

99. See Weber, *Law of Welfare*, *supra* note 3, at 919 (describing an "antisubordination" approach to equality calling for not "reasonable accommodation" but "whatever treatment is necessary for people with disabilities . . . to obtain sufficient power" to rise from their subordinate status).

essential person.¹⁰⁰ As a result, a person with a disability would not bear the burden of adapting to an existing non-disabled norm, but would define an individualized, unique norm.¹⁰¹ The world would be reshaped to ensure that within this norm, a person with a disability would enjoy equal benefits rather than merely an equal opportunity to access the non-disabled norm.¹⁰² This approach focuses on the specialized treatment that each person requires to receive equal benefits rather than adapting all people to a pre-conceived norm for equal opportunity.¹⁰³ Post-integrationists do recognize, however, that specialized treatment for people with disabilities comes at a significant cost.¹⁰⁴

2. *Costs of disability should be borne by society*

If society is dedicated to the emancipation of people with disabilities, post-integrationists argue that the financial costs must be shifted from people with disabilities to society as a whole.¹⁰⁵ Society has exacerbated the cost of disabilities by creating inaccessible communities and fostering intolerance and discrimination; now, society must pay the full price of undoing its damage. To achieve legitimate, equal opportunity for people with disabilities, society “must eliminate the cost-based incentives to discriminate by funding

100. See Kearney, *supra* note 49, at 58-61 (noting that rather than forcing people with disabilities to integrate (albeit with reasonable accommodations) into the existing non-disabled world, post-integrationists believe the non-disabled world should adapt to the norm defined by each person with a disability); Weber, *Law of Welfare*, *supra* note 3, at 914 (describing various components of post-integrationism, including identification of one's essential self as unique, not mainstream, and demanding a response based on the difference).

101. See Kearney, *supra* note 49, at 59-60 (commenting that people with disabilities should not have to suffer the burden of adapting to a non-disabled norm, but should define their own unique norm).

102. See *id.* at 60 (commenting that equality of benefits “places a burden on businesses to make whatever changes are necessary regardless of cost or effect on the provision of services” to adapt to the unique norm of each person with a disability).

103. See Weber, *Law of Welfare*, *supra* note 3, at 915-16 (describing Harlan Hahn's equality theory of equal benefit versus equal opportunity); see also Kearney, *supra* note 49, at 59-60 (examining an alternative relationship between society and people with disabilities and redefining equality as equal benefits rather than equal opportunities).

104. See, e.g., Moss & Malin, *supra* note 30, at 231-32 (discussing the reasonable cost of a full-funding program for ADA accommodations).

105. See Drimmer, *supra* note 30, at 1410 (stating that “society as a whole has acted to exclude people with disabilities through inaccessible communities and intolerant culture”); Kearney, *supra* note 49, at 59-60; see also David G. Duff, *Disability and the Income Tax*, 45 MCGILL L.J. 797, 808 (2000) (quoting the Standing Committee on Human Rights and the Status of Disabled Persons' assertion that “[d]isability involves costs—to government and society as a whole, but most importantly, to disabled persons themselves” (emphasis added)).

reasonable accommodations fully.”¹⁰⁶ In addition to the altruistic desire to provide equal rights for citizens, public funding for these costs provides social insurance for anyone who, at any moment, could become disabled.¹⁰⁷

3. *Move from autonomy and legally enforceable rights between opposing groups to interdependence and balancing relationships among all people*

Full funding for accommodations and other special treatment for people with disabilities would reduce lawsuits that poison relationships and present other serious deficiencies for enforcing anti-discrimination laws.¹⁰⁸ Integrationism promotes individual enforcement of civil rights, which may not be asserted “because of ignorance, irrational fear, or well-founded reluctance to disrupt existing relationships with those who have power over them.”¹⁰⁹ Achieving equality is not simply litigating discrimination claims or promoting integration. It requires “identifying the relationships that affect the well-being of persons with disabilities, examining the justice of the relationships, and modifying them to increase social choices and balance power among the persons involved.”¹¹⁰ Post-integrationists emphasize balancing relationships among all people rather than focusing on the competing rights of people with disabilities and people without disabilities.¹¹¹

I will use the foregoing three post-integrationist principles to analyze and redesign the subject tax provisions. Congress enacted the first two tax provisions presented to motivate employers to hire and retain employees with disabilities by providing tax incentives that reimburse employers for certain costs of accommodations.¹¹²

106. Moss & Malin, *supra* note 30, at 221-26.

107. See *id.* at 224-25 (noting the self-interested aspects of public funding for eliminating barriers to people with disabilities—as insurance for the “temporarily able-bodied”).

108. See *id.* at 235-36 (suggesting that a new anti-discrimination policy based on expenditures to eliminate incentives to discriminate rather than on lawsuits may be an appropriate change for people with disabilities and other oppressed minorities).

109. Weber, *Law of Welfare*, *supra* note 3, at 906; see Kearney, *supra* note 49, at 60 (discussing the social relationship model of equality that values interdependence over autonomy).

110. See Weber, *Law of Welfare*, *supra* note 3, at 918 (citing sources that urge people with disabilities to struggle for power, not integration); see Kearney, *supra* note 49, at 61 (applying the post-integrationist social relationship model to smoking bans in businesses and determining that the primary consideration would be the perspective of the person with the disability).

111. See Kearney, *supra* note 49, at 60-61 (setting forth Martha Minow’s “social relations” approach to equality); see also Weber, *Law of Welfare*, *supra* note 3, at 919-21 (incorporating feminists’ thoughts of equality theory from Professor Martha Minow and Professor Ruth Colker to develop equality theories for people with disabilities).

112. See GAO TAX STUDY, *supra* note 3, at 1-2 (describing the purpose of the

II. TAX INCENTIVES DESIGNED TO MOTIVATE EMPLOYERS TO ACCOMMODATE EMPLOYEES WITH DISABILITIES: THE BARRIER REMOVAL DEDUCTION AND THE DISABLED ACCESS CREDIT

A. Barrier Removal Deduction

Congress enacted the barrier removal deduction¹¹³ in 1976 “to encourage the more rapid modification of business facilities and vehicles to overcome widespread barriers that hampered the involvement of people with disabilities and the elderly in economic, social and cultural activities.”¹¹⁴ This tax provision allows taxpayers to immediately expense and deduct rather than capitalize and depreciate,¹¹⁵ over an extended time period,¹¹⁶ qualified architectural and transportation barrier removal expenses.¹¹⁷ For purposes of this tax provision, the Internal Revenue Code of 1986 (the “Code”), as amended, defines architectural and transportation barrier removal expenses as expenditures “for the purpose of making any facility or public transportation vehicle owned or leased by the taxpayer for use in connection with his trade or business more accessible to, and usable by, handicapped¹¹⁸ and elderly individuals.”¹¹⁹ “Qualified” architectural and transportation barrier removal expenses must meet standards promulgated by the Secretary and the Architectural and Transportation Barriers Compliance Board as described in Treasury Regulations.¹²⁰ The Treasury Regulations describe in great technical detail twenty-one facility and public transportation conformity requirements.¹²¹ Expenses incurred to remove a barrier so that

disabled access credit and the barrier removal deduction as encouraging the hiring and retention of people with disabilities by offsetting the expenses incurred to remove barriers preventing accessibility).

113. I.R.C. § 190 (2003).

114. GAO TAX STUDY, *supra* note 3, at 7.

115. See I.R.C. §§ 167(a), 168(a) (2003) (describing the general rules for depreciation deductions).

116. The applicable recovery period for capital improvements to nonresidential real property is thirty-nine years. See *id.* § 168(c).

117. *Id.* § 190(a)(1).

118. For purposes of this tax provision, “handicapped” is defined as follows:

The term ‘handicapped individual’ means any individual who has a physical or mental disability (including, but not limited to, blindness or deafness) which for such individual constitutes or results in a functional limitation to employment, or who has any physical or mental impairment (including, but not limited to, a sight or hearing impairment) which substantially limits one or more major life activities of such individual.

Id. § 190(b)(1), (3).

119. See Treas. Reg. § 1.190-2(a)(4) (2002) (defining an “elderly individual” as a person who is sixty-five years old or above).

120. I.R.C. § 190(b)(2) (2003).

121. Treas. Reg. § 1.190-2(b)(2)-(22) (1979) (including conformity requirements

facilities or public transportation conform to one or more of the enumerated requirements are qualified architectural and transportation barrier removal expenses.¹²² Any expenses incurred “in connection with the construction or comprehensive renovation of a facility or public transportation vehicle or the normal replacement of depreciable property” are not allowed as qualifying expenses.¹²³

When the barrier removal deduction was enacted in 1976, it was limited to \$25,000 of qualified expenditures per tax year.¹²⁴ For tax years beginning after December 31, 1983, the barrier removal deduction limit was increased to \$35,000 per tax year.¹²⁵ Any qualifying expenditures in excess of the deduction limit must be capitalized and depreciated over the applicable recovery period.¹²⁶ On November 5, 1990, three months after Congress enacted the ADA, Congress reduced the maximum amount of the barrier removal deduction to \$15,000 and enacted the disabled access credit.¹²⁷

B. Disabled Access Credit

The disabled access credit provides qualifying small businesses with an election¹²⁸ to receive a fifty percent tax credit for “eligible access expenditures.”¹²⁹ A tax credit is a dollar for dollar reduction of a

for grading, walks, parking lots, ramps, entrances, doors and doorways, stairs, floors, toilet rooms, water fountains, public telephones, elevators, controls, identification, warning signals, hazards, international accessibility symbol, additional standards for rail facilities, standards for buses, rapid and light rail vehicles, and other barrier removals).

122. *Id.* § 1.190-2(b)(1) (defining generally the term “qualified architectural and transportation barrier removal expenses”).

123. *Id.*

124. For tax years beginning before December 31, 1983, the deduction limit was \$25,000. I.R.C. § 190(c) (2003) (citing Pub. L. No. 94-455, § 2122(a), 90 Stat. 1914-1915 (1976) (amended 1984)).

125. *See id.* (citing Pub. L. No. 98-369, § 1062(b), 98 Stat. 1047 (1984) (amended 1990)) (setting forth the deduction limit of \$35,000 applying to tax years beginning after December 31, 1983 and before November 5, 1990).

126. *See id.* §§ 167, 168, 263 (2003) (discussing and defining capitalization, depreciation, and accelerated cost recovery).

127. *See* Pub. L. No. 101-508, § 11611(a), (c), 104 Stat. 1388-501 - 1388-503 (codified in 26 U.S.C. §§ 44, 190(c) (2000)).

128. *See* I.R.C. § 44(b)(2) (2003) (providing that the credit only applies if the taxpayer so elects). This irrevocable election must be made by claiming the deduction as a separate line item identified on the taxpayer’s timely filed (including extensions) tax return. Treas. Reg. § 1.190-3(a)-(b) (1979) (setting forth the manner of making this irrevocable election). If a qualifying taxpayer makes this election, the taxpayer may not receive any other tax benefit with respect to her access expenditures either as a deduction, an additional credit, or an increase in the adjusted basis of the property. I.R.C. § 44(d)(7) (2003).

129. *See* I.R.C. § 44(a) (2003) (setting forth that up to \$10,000 of access expenditures after an initial expenditure of \$250 qualify for a fifty percent tax credit).

taxpayer's tax liability.¹³⁰ Accordingly, a tax credit generally provides a greater economic benefit than a tax deduction.¹³¹ The disabled access credit is one of numerous tax credits comprising the general business credit.¹³² The general business credit is a nonrefundable tax credit that offsets a taxpayer's regular income tax liability after certain adjustments to, but not below, zero.¹³³ Any general business credit in excess of a taxpayer's adjusted current regular income tax liability can be carried back one year and carried forward twenty years to offset any adjusted regular income tax liability for such year.¹³⁴ Therefore, if a taxpayer does not have any current regular tax liability, she may benefit from her disabled access credit (as included in her general business credit) through a tax credit carry-back to a past tax year or a carry-forward to future tax years.

The disabled access credit is limited to \$5,000 or fifty percent of up to \$10,000 of eligible access expenditures in excess of the first \$250 of expenses per tax year.¹³⁵ Eligible access expenditures include "amounts paid or incurred by an eligible small business for the purpose of enabling such eligible small business to comply with applicable requirements under the ADA (as in effect on the date of the enactment of this section)."¹³⁶ The Code further defines "eligible access expenditures" to include reasonable amounts¹³⁷ incurred to (1) provide qualified interpreters, readers, or other effective methods of communicating with visually or hearing impaired individuals; (2) to acquire or modify equipment, devices, materials or services for

130. See James Edward Maule et al., *Tax Credits: Concepts and Calculation*, Tax Mgmt. (BNA) No. 506-2d, at A-7 (Oct. 21, 2002) (describing the dollar for dollar benefit of a tax credit).

131. A \$5,000 tax credit provides a \$5,000 reduction in tax liability; in comparison, a \$5,000 tax deduction or gross income exclusion provides a reduction in tax liability equal to the taxpayer's marginal tax rate (e.g., thirty-five percent) multiplied by the amount of the deduction or excluded income (e.g., up to \$10,000 of expenses x thirty-five percent = up to \$3,500). See *id.* (contrasting the benefits of a tax deduction or income exclusion with a tax credit).

132. I.R.C. §§ 38(b)(7), 44(a) (2003).

133. *Id.* § 38(c) (setting forth the limitations of the amount of the general business credit); see Maule et al., *supra* note 130, at A-196 (noting that the general business credit may not be offset against the alternative minimum tax).

134. I.R.C. § 39(a) (2003) (describing one year carry-back and twenty year carry-forward of unused credits).

135. *Id.* § 44(a). In the case of a partnership or an S corporation, the limit on the amount of the credit applies on the entity level (that is, the partnership or the S corporation) and on the entity owner level (that is, partners or shareholders). *Id.* § 44(d)(3). Moreover, in the case of controlled groups of corporations, the limit applies to the group, treating the group as one person. *Id.* § 44(d)(2).

136. *Id.* § 44(c)(1).

137. *Id.* § 44(c)(3) (noting that to qualify for the credit amounts incurred they must be *reasonable* and necessary).

individuals with disabilities;¹³⁸ or (3) remove “architectural, communication, physical, or transportation barriers which prevent a business from being accessible to, or usable by, individuals with disabilities.”¹³⁹ In addition, and consistent with the barrier removal deduction, qualifying expenditures must not be in connection with new construction¹⁴⁰ and must meet standards agreed to by the Architectural and Transportation Barriers Compliance Board as set forth in the Treasury Regulations.¹⁴¹

Notably, only qualified small businesses are eligible for the credit.¹⁴² The Code provides that qualified small businesses are defined as businesses with gross receipts¹⁴³ of \$1,000,000 or less for the preceding tax year, or businesses employing thirty or fewer full-time employees¹⁴⁴ during the preceding tax year.¹⁴⁵

C. GAO Report on the Accommodation Tax Provisions

The GAO studied the barrier removal deduction and the disabled access credit between October 2001 and September 2002 using, among other information, the latest year data available from the Internal Revenue Service’s (IRS) Statistics of Income (SOI) programs.¹⁴⁶ While the IRS’ database provides specific usage information on the disabled access credit, it does not have detailed usage information on the barrier removal deduction.¹⁴⁷ The GAO’s analysis, issued in December 2002,¹⁴⁸ reports the following conclusions regarding these accommodation tax provisions.

138. Disability has the same meaning as defined in the ADA (as in effect on November 5, 1990). *Id.* § 44(d)(1).

139. *Id.* § 44(c)(2).

140. *Id.* § 44(c)(4) (qualifying expenses must not have been “paid or incurred in connection with any facility first placed in service after” November 5, 1990).

141. *Id.* § 44(c)(5).

142. *Id.* § 44(a)-(b).

143. *Id.* § 44(b), (d)(5) (defining gross receipts to exclude any returns and allowances made during the tax year).

144. *Id.* § 44(b) (providing that full-time employees are employees who are employed “at least [thirty] hours per week for [twenty] or more calendar weeks in the taxable year”).

145. *Id.*

146. GAO TAX STUDY, *supra* note 3, at 3 & app. I (describing research approach in accordance with generally accepted government auditing standards and using 1999 SOI data, legislative histories, other relevant studies, and numerous and varied interviews).

147. *See id.* at 3, 10, 14 (commenting that because the barrier removal deduction is grouped with other deductions, each tax return would have to be individually examined to determine the extent of the usage of the barrier removal deduction).

148. *Id.* at 1.

1. *Taxpayer use of the disabled access credit*

In 1999, an irrelevantly tiny percentage of taxpayers, one out of every 686 corporations and one out of every 1,570 individuals with a business affiliation, reported the disabled access credit on their tax returns.¹⁴⁹ The GAO estimates that 21,086 taxpayers reported approximately \$59.4 million in 1999 disabled access credits.¹⁵⁰ More specifically, the GAO estimates that 18,662 individuals with a business affiliation claimed \$51.4 million of credits and 2,424 corporations claimed \$8 million resulting in an average credit claimed of approximately \$2,818 per claiming taxpayer.¹⁵¹ The disabled access credit is available for business accommodations for employees and clients with disabilities, and both the IRS' database and the GAO's estimates include both dollar amounts.¹⁵² As a result, even the small percentages of usage reported (.15% for corporations and .06% for individuals with a business affiliation) overstate the percentage of businesses actually making accommodations for their employees.¹⁵³ The GAO could not identify any studies that examined or explained these small proportions of usage, but they were able to derive some information regarding the effectiveness of the disabled access credit and the barrier removal deduction from its numerous and broad ranging interviews.¹⁵⁴

2. *Suggested options to increase usage and effectiveness of accommodation tax credits*

The GAO interviewed representatives from business, government, and disability groups, as well as scholars and tax preparers, on the usage and effectiveness of the accommodation tax provisions.¹⁵⁵ These interviews identified two primary barriers to increasing the use of the accommodation tax credits, including unfamiliarity with these

149. See *id.* at 14-15 & tbl. 5 (noting that of the \$59 million disabled access credits reported, providers of health care and other social assistance services claimed just over fifty percent).

150. *Id.* at 15 & tbl. 5, note f.

151. *Id.* at 14-15 & tbl. 5, notes d, e & f (commenting that the GAO was not able to determine the "total number of taxpayers whose businesses met the credit's small business eligibility requirements").

152. See *id.* at 14 (explaining that the total amount of credits are reported in a combined number, because tax returns do not itemize separately credits for employees and credits for clients).

153. See *id.* (noting the inherent difficulty in determining whether the credit was for clients or employees, and noting that only the total amount is revealed on the tax return).

154. See *id.* at 19 (identifying various interviewees' perceptions about the effectiveness of the credit and deduction).

155. See *id.* at 21 n.40 (enumerating the parties interviewed and providing their comments, suggestions, and feedback).

incentives and misconceptions regarding the difficulty involved in qualifying for them.¹⁵⁶ The general lack of familiarity with these incentives was the most frequently cited reason for their infrequent use.¹⁵⁷ “Without a general awareness of these [incentives], employers cannot factor them into the hiring, accommodation, or retention decisions, which may be influenced by concerns about the potential” accommodation costs of employing individuals with disabilities.¹⁵⁸ Given the lack of familiarity with these tax provisions, concern about the amount of effort required to qualify for them “may be partially based on misperceptions among businesses and others interviewed.”¹⁵⁹ Some experts commented that the complexity of the disabled access credit, including which businesses and what expenditures qualify, make it difficult for businesses to implement.¹⁶⁰

In addition to lack of familiarity with and understanding of the accommodation tax incentives, many of those interviewed recommended increasing the maximum dollar amounts allowable under these provisions by twenty-five to two hundred percent.¹⁶¹ In addition, the organizations suggested “an expansion of the eligibility requirements of the tax incentives as a means to increase their usage.”¹⁶² In particular, many business representatives favored reducing the usage limits as a means to increase the number of businesses that qualify for the disabled access credit¹⁶³ and the type of accommodations that qualify for the barrier removal deduction.¹⁶⁴

Academic experts noted that the disabled access credit applies only to small businesses implementing access requirements of the ADA,

156. *Id.* at 21.

157. *See id.* at 21-22 (noting that most businesses knew of the work opportunity credit, but were not as aware of the barrier removal deduction and the disabled access credit).

158. *Id.* at 22.

159. *See id.* at 23 (noting that the accommodation tax “incentives do not require any additional paperwork beyond claiming the credit or deduction on IRS tax forms”).

160. *See id.* (commenting that complexity and “lack of clarity” may cause companies to be wary of using these incentives because of fear of discovery of incorrect use of the incentives in an audit).

161. *Id.* at 25.

162. *See id.* at 26 (noting the restrictions cited by the interviewees that limit usage of the incentives as “the type of workers eligible[,] the size of businesses[, and] the type of accommodations”).

163. *See id.* at 27 (observing that the requirements for small businesses that qualify for the disabled access credit are inconsistent with the application of the ADA because the ADA does not apply to small businesses and the credit only applies to small businesses).

164. *See id.* (reporting that many parties were interested in expanding the accommodations to address electronic and communications barriers in the workplace).

but the ADA access requirements exclude small businesses.¹⁶⁵ As a result, smaller firms with fewer than fifteen employees and larger firms with greater than thirty employees and more than one million in gross receipts do not qualify for the credit.¹⁶⁶ The scholars explained that this severe and confusing threshold requirement limits the availability and effectiveness of the credit.¹⁶⁷

The barrier removal deduction was enacted almost thirty years ago and nearly fifteen years before the enactment of the ADA.¹⁶⁸ Not surprisingly, qualifying accommodations under the barrier removal deduction are outdated¹⁶⁹ and inconsistent with the ADA's broader and more contemporary requirements.¹⁷⁰ For example, the costs incurred by businesses to remove communication and electronic barriers for people with disabilities do not qualify for the deduction.¹⁷¹ In addition, inconsistencies among accommodations that qualify for the ADA, the barrier removal deduction and/or the disabled access credit add complexity and confusion that may deter potential users of the accommodation tax incentives.¹⁷²

3. GAO's conclusions regarding the accommodation tax incentives

The GAO made several concluding comments after reporting on the foregoing suggestions and alternatives presented by interviewed experts and business representatives.¹⁷³ First, it reported that "[e]xisting data limitations preclude a conclusive determination of how effective the three tax incentives are in increasing employment of workers with disabilities."¹⁷⁴ Second, it emphasized that the implementation of increased eligibility and credit deduction limits, improved government education and outreach efforts, and clarifying

165. *See id.* (noting that incentives are essential at small firms because these firms account for a large percentage of overall job growth).

166. *Id.*

167. *See id.* (asserting that many small businesses cannot use the disabled access credit because they are not in compliance with the ADA).

168. *Id.* at 7-8.

169. *See id.* at 8 n.10 (describing the standards for eligible architectural modifications as adapted from American National Standards Institute, American National Standards Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped (1971)).

170. *See id.* at 19 (noting that the barrier removal deduction does not apply to "communication and electronic barriers"). For example, the costs incurred by businesses to remove "communication and electronic barriers" for people with disabilities do not qualify for the deduction. *Id.*

171. *Id.*

172. *Id.* at 25.

173. *See id.* at 29 (proposing the employment of additional resources to ensure that employers are aware of the tax incentives).

174. *See id.* at 20 (adding that the studies are also limited in determining the effects of the Work Opportunity Credit).

the tax provisions would not assure a substantial improvement in the employment of workers with disabilities.¹⁷⁵ Third, the GAO noted that an increase in tax benefits reduces tax revenues, but that an increase in taxable income and a reduction of government benefits potentially mitigates the lower tax revenue.¹⁷⁶ Fourth, it stated its concern that enhancing tax incentives might increase the abuse of tax incentives.¹⁷⁷ Fifth, increasing the amount of the tax benefits may provide employers who are already claiming the incentives with enhanced benefits without increasing employment or accommodation of workers with disabilities.¹⁷⁸ Finally, the GAO summarized its report by concluding that “increasing outreach, eligibility, or the maximum dollar amount allowed to be claimed for the incentives may increase their usage; however, it is not known whether the costs of such changes would be offset by improvements in the employment and accommodation of workers with disabilities.”¹⁷⁹

*D. Redesigning the Accommodation Tax Provisions:
A Post-Integrationist Approach*

The GAO’s report evinces that the accommodation tax provisions are underutilized by businesses.¹⁸⁰ Yet, persistent unemployment and unsatiated desire to work among people with disabilities suggest that a determined untapped labor pool awaits employers.¹⁸¹ However, the ADA economically motivates employers to discriminate against the

175. *Id.* at 21.

176. *Id.* at 28 (stating that because of insufficient data concerning the effects of incentive changes on the hiring of disabled workers, the government would be forced to absorb any reduction in tax revenue).

177. *See, e.g., id.* (reporting that “[i]n April 2002, the Treasury Inspector General for Tax Administration testified that, in tax year 1999, thousands of taxpayers may have inappropriately claimed the disabled access credit, including taxpayers who did not indicate any interest in or ownership of a business on their tax return”).

178. *See* GAO TAX STUDY, *supra* note 3, at 28 (describing a concern that increasing the amount of money for the incentive will only help disabled persons who are already employed, not persons seeking employment).

179. *Id.* at 29.

180. *See id.* at 14 (stating that “[i]n 1999, a small proportion of taxpayers reported the disabled access credit on their tax returns”).

181. *See* Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314, 325-28 (2000) (citing empirical evidence that corroborates turnover and absenteeism rates of workers with disabilities as “equal to or lower than” workers without disabilities, and highlights other desirable effects of a workforce that includes employees with disabilities, such as “higher productivity, greater dedication, better identification of qualified candidates for promotion, fewer insurance claims, reduced post-injury rehabilitation costs, improved corporate culture, and more widespread use of available technologies”); *see also* Morin, *supra* note 22, at 212 (describing people with disabilities as “a vast untapped labor pool”).

individuals it is designed to protect.¹⁸² “[I]f the only difference between two applicants is that one has a disability requiring an accommodation . . . it would be economically prudent to hire the non-disabled person in order to avoid the cost.”¹⁸³ In an attempt to build a bridge to cross this gap, the accommodation tax provisions must be redesigned using a post-integrationist approach and consideration of the suggestions made in the GAO report.

1. *Applying “strategic essentialism”: Specialized treatment for people with disabilities to confer equal benefits, social choices, and power for all persons*

a. *Increased and coordinated outreach by people with disabilities and their public and private partners*

The GAO determined that the most frequently cited reason for underutilization of the accommodation tax provisions was a lack of awareness of their existence.¹⁸⁴ Consistent with the post-integrationist principle that people with disabilities must affirm their equal status, people with disabilities individually and in organized groups must take an active role in generating awareness of these incentives.¹⁸⁵ While the GAO reports that federal government agencies have been increasing their education and outreach efforts,¹⁸⁶ some disability experts and business representatives suggested that agencies foster greater coordination with disability advocacy groups, local agencies, nonprofits, and the accounting industry, to increase awareness and use of the incentives.¹⁸⁷ A number of government guides describing these tax incentives are currently available;¹⁸⁸ disability advocacy

182. See *supra* notes 85-86 and accompanying text (observing that the only disabled employees who benefit are those who are superior to employees without disabilities).

183. Edward J. McGraw, Note, *Compliance Costs of the Americans with Disabilities Act*, 18 DEL. J. CORP. L. 521, 536 (1993).

184. GAO TAX STUDY, *supra* note 3, at 21.

185. Drimmer, *supra* note 30, at 1407.

186. See GAO TAX STUDY, *supra* note 3, at 24-25 (describing various mailings, websites, and other outreach efforts of the IRS, the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), and the Department of Labor (DOL)). The report describes EEOC's publication, *The Americans with Disabilities Act: A Primer for Small Businesses*, which includes tax incentives information. *Id.* at 25.

187. *Id.* at 23 (outlining the suggestions of the business, academic, and disability representatives to reform the incentives rules).

188. *Id.* at 24. Many agencies provide incentives information through a website, a toll-free number, or both. *Id.* See also U.S. DEP'T OF JUSTICE, ADA BUSINESS CONNECTION, at www.ada.gov/business.htm (last visited Nov. 7, 2003) (on file with the American University Law Review) (providing information on the ADA and business tax incentives on behalf of the DOJ); I.R.S., TAX HIGHLIGHTS FOR PERSONS

groups and their partners should make these guides readily available to people with disabilities so that they may deliver them directly to hiring and other human resource managers during the interviewing process.¹⁸⁹ People with disabilities must proclaim their unique identity and demand specialized treatment.¹⁹⁰

The redesigned tax provisions will incorporate and expand on existing concepts in the ADA that put people with disabilities in a position to demand specialized treatment. For example, under the ADA, an employee must make any disability “known” to an employer and request an accommodation.¹⁹¹ Once an employee makes this request, the employer must select and implement an effective accommodation allowing the employee a good faith opportunity to participate in the process.¹⁹² The revised tax incentive will incorporate this structure into its design to continue to provide people with disabilities the opportunity to participate in their

WITH DISABILITIES, PUB. 907 (2002) (describing provisions providing tax benefits for people with disabilities, including a brief description of three business tax incentives, which are the disabled access credit, barrier removal deduction, and the work opportunity tax credit), available at <http://www.irs.gov/pub/irs-pdf/p907.pdf>; U.S. Dep’t of Justice, *ADA Home Page: Information and Technical Assistance on the Americans with Disabilities Act*, at www.usdoj.gov/crt/ada (last visited Nov. 7, 2003) (on file with the American University Law Review); Office of Disability Employment Policy, U.S. Dep’t of Labor, *About Us*, at <http://www.dol.gov/odep/about/about.htm> (last visited Nov. 7, 2003) (on file with the American University Law Review) (describing the Office of Disability Employment Policy’s mission to provide leadership “to increase employment opportunities for adults and youth with disabilities”); Office of Disability Employment Policy, U.S. Dep’t of Labor, *Job Accommodation Network*, at <http://www.dol.gov/odep/programs/job.htm> (last visited Nov. 7, 2003) (on file with the American University Law Review) (providing referrals on accommodating an employee with a disability); U.S. Access Board, *ADA Accessibility Guidelines for Buildings and Facilities (ADAAG)* (providing information on ADA accessibility guidelines as amended through Sept. 2002), available at <http://www.access-board.gov/adaag/html/adaag.htm>; Easter Seals, *Project Action*, at http://projectaction.easter-seals.org/site/PageServer?pagename=ESPA_homepage (last visited Nov. 7, 2003) (on file with the American University Law Review) (providing information on making transportation accessible in cooperation with the U.S. Dep’t of Transportation); see also U.S. Equal Employment Opportunity Commission, at <http://www.eeoc.gov> (last visited Nov. 7, 2003) (on file with the American University Law Review) (providing information on ADA provisions applying to employers and employees); Disability and Business Technical Assistance Centers, *ADA Technical Assistance Program*, at <http://www.adata.org> (last visited Nov. 7, 2003) (on file with the American University Law Review).

189. See *id.* at 22 (commenting that in many large businesses, while tax staff may be familiar with these tax incentives, this knowledge is not always shared with the hiring and other human resources staff).

190. See Drimmer, *supra* note 30, at 1407-08 (describing the need for people with disabilities to demand that society acknowledge them and their rights).

191. See 29 C.F.R. § 1630.9 (2003) (requiring the employee to inform the employer of any need for accommodation).

192. See, e.g., *Taylor v. Principal Fin. Group*, 93 F.3d 155, 164-65 (5th Cir. 1996) (finding responsibility for designing a reasonable accommodation shared between the employer and the employee).

specialized treatment. Moreover, the redesign will incorporate other well known provisions of the ADA¹⁹³ to avoid the confusion and complexity of an additional set of rules defining qualifying accommodations.

b. Simplification of the accommodation tax provisions should facilitate outreach and increase business usage

Complexity and lack of clarity was another criticism noted by the GAO; especially regarding the disabled access credit.¹⁹⁴ Simplification of these provisions should increase usage. If these tax provisions are simplified, people with disabilities and their employers can better understand, promote, implement and enjoy the intended benefits.¹⁹⁵ Moreover, if the tax provisions are simplified, they will be more transparent and misperceptions regarding their burden on businesses should be reduced.¹⁹⁶ To accomplish this goal, the two rather cumbersome accommodation tax provisions will be redesigned as one simplified tax credit, in the form of the new expanded disabled access credit. In addition to combining the two provisions into one streamlined tax credit, the new credit will provide tax benefits using preexisting definitions from the ADA rather than by supplementing and qualifying these existing definitions and adding unnecessary complexity and confusion.¹⁹⁷ Finally, the revised disabled access credit must not be burdensome for employers to claim. Similar to the old disabled access credit and the barrier removal deduction, the revised disabled access credit will require nothing more than claiming the tax credit annually on the IRS tax form.¹⁹⁸ The amount of the credit claimed, however, must be increased.

2. Costs of disability should be borne by society

Business representatives and disability and tax incentive experts interviewed by the GAO suggested that to increase the use and effect of the accommodation tax incentives, the incentives should be enhanced.¹⁹⁹ The suggested enhancements include raising the

193. 42 U.S.C. §§ 12101-12213 (2000).

194. GAO TAX STUDY, *supra* note 3, at 21.

195. *See id.* at 25 (describing the fear of facing an audit that uncovers the incorrect application of these complicated provisions, which results in a reduction of the provisions' usage).

196. *Id.*

197. *See* I.R.C. §§ 44(c)-(d), 190(b) (2003) (listing the definitions of terms related to the eligibility requirements for the disability tax credits).

198. *See* GAO TAX STUDY, *supra* note 3, at 23.

199. *See id.* at 21, 26.

amount of the deduction and the credit,²⁰⁰ expanding the range of businesses that qualify for the disabled access credit²⁰¹ and the type of accommodations that qualify for the barrier removal deduction.²⁰² A primary post-integrationist principle is that society, and not people with disabilities, should bear the costs of providing equal benefits for people with disabilities.²⁰³ Based on this principle, all of the suggestions made in the GAO report by the parties interviewed will be incorporated in the new disabled access credit.

The new access credit will be enhanced to reach all employers covered under the ADA.²⁰⁴ Moreover, any accommodations that employers must make to reasonably accommodate potential and current employees with disabilities²⁰⁵ under the ADA will qualify as "eligible access expenditures"²⁰⁶ without any dollar limit. Finally, the new disabled access credit will not be limited to the amount of a taxpayer's tax liability. The new credit will be a refundable tax credit.²⁰⁷ This will effectively reimburse employers, dollar for dollar, for any accommodation expenses required under the ADA irrespective of the amount of the business' tax liability. Accordingly, the redesigned tax provision shifts all employer costs of accommodation required under Title I of the ADA from private businesses and disabled people to society.

Notably, the new credit does not apply to business accommodations for any party other than potential and current employees. For example, required accommodations under Title III of the ADA made by businesses with public facilities to accommodate

200. See *id.* at 25-26 (relating that such an increase would attract more companies and reduce anxiety about costs associated with employing and accommodating persons with disabilities).

201. See *id.* at 26-27 (noting the recommendation of many business representatives to make the tax incentive available to companies with more than thirty employees and to ensure the eligibility of small businesses).

202. See *id.* (commenting that the barrier removal deduction should cover accommodations to remove certain technological barriers).

203. See Weber, *Law of Welfare*, *supra* note 3, at 954-55 (calling for government subsidies for all accommodations for workers with disabilities).

204. See 42 U.S.C. § 12111(5) (2000) (classifying employers under the ADA as those with fifteen or more employees, effective July 1994). Prior to such date, the limit was twenty-five employees. *Id.*

205. See *id.* § 12111(8) (defining a "qualified individual with a disability" under the ADA as someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

206. See *supra* notes 137-39 and accompanying text (referring to the Code's definition of "eligible access expenditures").

207. See Maule et al., *supra* note 130, at A-14 (explaining that "refundable credits are those that are allowed to the taxpayer even if they exceed the taxpayer's tax liability").

their customers with disabilities are not covered by the redesigned credit.²⁰⁸ This restriction was made to simplify and focus the credit on its purpose, which is to motivate employers to hire and retain employees with disabilities by reimbursing them for every dollar of required accommodation expenses.²⁰⁹ Businesses with public facilities that incur expenses to accommodate customers with disabilities, however, should benefit from the resulting increased customer base. As this new customer base enjoys greater levels of employment and income, businesses making accommodations for people with disabilities should reap economic benefits in increased revenues and profits.

The revised disabled access credit fully reimburses employers for all accommodation expenses incurred for potential and current employees required under Title I of the ADA.²¹⁰ Under Title I of the ADA, employers must make "reasonable accommodations."²¹¹ "Reasonable accommodations" are accommodations that do not impose an undue hardship; an undue hardship is described as a substantial expense or difficulty.²¹² As a result of the revised tax credit, employers will be required to make more accommodations for people with disabilities because fewer actions will constitute an "undue hardship." Potential and current employees with disabilities will enjoy more significant employer accommodations and less litigation regarding the scope of undue hardship.²¹³

208. See 42 U.S.C. § 12182 (2000) (setting forth the protections of Title III under the ADA for individuals with disabilities from discrimination at places of public accommodation).

209. See GAO TAX STUDY, *supra* note 3, at 1-2 (stating that the hiring, retention, and accommodation of disabled workers is the goal of the disabled access credit and other tax incentives).

210. See 42 U.S.C. § 12112(a) (2000) (outlining the protections of Title I under the ADA for individuals with disabilities from discrimination in "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment").

211. See *id.* § 12112 (noting the failure to make reasonable accommodations as an example of discrimination, which Title I of the ADA prohibits); see also *id.* § 12111(9) (describing reasonable accommodations as modifications of facilities and equipment to make them accessible to employees with disabilities and other arrangements).

212. See *id.* § 12111(10) (listing relevant factors for the determination of whether an action to accommodate an employee with a disability would impose an undue hardship on the employer).

213. See, e.g., *Developments in the Law, Employment Discrimination: The Americans With Disabilities Act: Great Progress, Greater Potential*, 109 HARV. L. REV. 1602, 1615-17 (1996) (suggesting that lack of guidance regarding the scope of "undue hardship" has resulted in uncertainty and may lead to excessive litigation); Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes 'Undue' Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 400-45 (1995) (arguing that the vagueness of the term "undue hardship" has caused uncertainty among employers and employees about what constitutes a reasonable

3. *Move from autonomy and legally enforceable rights between groups to interdependence and balancing relationships among all people*

The expansion, enhancement and simplification of the new disabled access tax credit should reduce ADA accommodation litigation,²¹⁴ because employers will know that the government will compensate them for making the necessary accommodations.²¹⁵ Reduced litigation should facilitate the building, rather than the destruction, of enabling relationships between employers and employees. In addition, businesses will no longer be motivated to offer inadequate accommodations or pass the cost of accommodations onto employees with disabilities.²¹⁶ Most importantly, employers will no longer have a financial incentive not to hire people with disabilities.²¹⁷ In fact, employers will benefit from hiring people with disabilities because any required accommodations involving universally designed and advanced technologies will be fully funded and will enable employees with and without disabilities to perform their jobs more cost-effectively, productively, and safely.²¹⁸ Consequently, the relationship between employees with disabilities and employers will be more balanced, with power shifting from employers to employees, and affording employees with disabilities more social choices and opportunities in mainstream society.

E. Revised Disabled Access Credit: New Code Section 36

In accordance with the foregoing, the current disabled access credit,²¹⁹ the barrier removal deduction,²²⁰ and all their references will be deleted entirely. These provisions will be replaced with a new refundable disabled access credit set forth in Code Section 36 in subpart C for refundable tax credits as follows:

Title 26 – Internal Revenue Code

Subtitle A – Income Taxes

accommodation under the ADA).

214. See Moss & Malin, *supra* note 30, at 225-26, 235 (describing the benefits of full-funding of accommodations, including reduced litigation).

215. See *id.* at 235 (commenting that full-funding of accommodations would significantly reduce the legal costs associated with ADA lawsuits).

216. See *id.* at 216-19, 226 (relaying the problem of cost-based discrimination by employers, including their failure to provide adequate accommodation and their discretionary ability to pass the costs of the accommodation to disabled workers).

217. See *id.* at 200-06 (discussing how employers discriminate against people with disabilities because of the increased costs of hiring and retaining them).

218. See *id.* at 206 (noting that many accommodations for people with disabilities can benefit all employees).

219. I.R.C. § 44 (2003).

220. *Id.* § 190.

Chapter 1 – Normal Taxes and Surtaxes

Subpart C – Refundable Credits (Sections 31-36)

Section 36. Expenditures to Provide Access to Disabled Individuals.

General Rule. The amount of the disabled access credit determined under this section for any taxable year shall be an amount equal to the eligible access expenditures.

Eligible Access Expenditures. For purposes of this section “eligible access expenditures” means amounts paid or incurred for the taxable year by an employer to comply with applicable requirements under Title I of the Americans with Disabilities Act of 1990 to reasonably accommodate qualified individuals with disabilities. For purposes of the preceding sentence, the terms shall have the same meaning as when used in Title I of the Americans with Disabilities Act of 1990.

Denial of Double Benefit. In the case of the amount of the credit determined under this section

no deduction or credit shall be allowed for such amount under any other provision of this chapter, and

no increase in the adjusted basis of any property shall result from such amount.

(d) **Regulations.** The Secretary shall prescribe regulations necessary to carry out the purposes of this section.

F. Conclusion: The New Refundable Disabled Access Credit, I.R.C. § 36

New Code section 36 was designed in accordance with post-integrationist principles and in response to the GAO's findings in its review of its predecessor Code sections,²²¹ the disabled access credit and the barrier removal deduction. Existing and evolving education and outreach programs sponsored by the IRS, DOL, DOJ, EEOC and disability advocacy groups must aggressively market and disseminate the revised tax provision to businesses and people with disabilities.²²²

221. See GAO TAX STUDY, *supra* note 3, at 2, 7-29 (studying existing federal tax incentives, including the extent of their use and effectiveness).

222. See *id.* at 21-25 (describing existing outreach and education programs and suggestions for expanding them). See generally OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUSTICE, TAX INCENTIVES PACKET ON THE AMERICANS WITH DISABILITIES ACT, FACT SHEET FOUR: TAX INCENTIVES FOR IMPROVING ACCESSIBILITY, *available at* <http://www.usdoj.gov/crt/ada/taxpack.htm> (last modified Aug. 14, 2003) (providing a detailed information package regarding the disabled access credit and the barrier removal deduction); NAT'L ORG. ON DISABILITY, ECONOMIC PARTICIPATION: FINDING GOOD EMPLOYEES: TAX CREDITS AND ACCESSIBILITY INFORMATION FOR EMPLOYERS AVAILABLE ONLINE (July 26, 2002), *at* <http://www.nod.org/content.cfm?id=1104> (on file with the American University Law Review) (providing

Most importantly, the GAO, disability researchers and other capable parties should monitor and report regularly on the usage and effectiveness of the new credit.²²³ The IRS should design any tax form reporting the new disabled access credit in such a manner as to provide adequate data to track the details of its use and effectiveness for meaningful and conclusive research.²²⁴ The results of the ongoing research should be used to monitor and shape the new credit to maximize its efficacy.

Irrespective of how many and to what extent businesses use the redesigned credit, it will not ensure full employment for people with disabilities. More will have to be done, including enabling an existing tax provision, known as the Work Opportunity Credit (WOC), that is designed to motivate employers to hire employees with disabilities.²²⁵

III. THE THIRD TAX PROVISION TO MOTIVATE EMPLOYERS TO HIRE PEOPLE WITH DISABILITIES

A. *The WOC*

The WOC²²⁶ provides businesses with a tax incentive to hire economically disadvantaged individuals, including qualifying people with disabilities.²²⁷ This tax incentive was enacted in 1977 as the new jobs credit,²²⁸ was renamed and modified in 1996²²⁹ and is available currently through the end of 2003.²³⁰ The WOC is structured as a

information about the disabled access credit and the barrier removal deduction, including links to the Department of Justice website and several ADA guides).

223. Congress mandated the GAO's study and report about tax incentives for employment of people with disabilities in the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860. Congress should ensure that the mandate applies to the new disabled access credit.

224. See GAO TAX STUDY, *supra* note 3, at 14, 15, 20 (noting that a lack of required data and limitations in the research methods precludes a conclusive determination of tax incentives' effectiveness in increasing employment of workers with disabilities); see also Disabled Access Credit, IRS Form 8826, available at <http://www.irs.gov/pub/irs-pdf/f8826.pdf> (last visited Oct. 30, 2003) (requiring various information and calculations to claim the annual disabled access credit).

225. See *infra* discussion Part IV.A (describing the WOC which provides incentives for employers to hire and retain people with disabilities).

226. I.R.C. § 51 (2003).

227. See GAO TAX STUDY, *supra* note 3, at 8-9 (providing a brief overview of the WOC).

228. See Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 202(b), 91 Stat. 126, 141 (adding Code Section 51, effective for taxable years beginning after December 31, 1976).

229. See Maule et al., *supra* note 130, at A-71 (reporting that the WOC's name and some qualifications and computations were modified in 1996).

230. See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1201, 110 Stat. 1755, 1768 (codified as amended at 26 U.S.C. § 51 (2000)) (enacting the

nonrefundable tax credit²³¹ of up to \$2,400 for each eligible employee.²³²

Congress enacted the WOC as an incentive for employers to hire and retain disadvantaged individuals.²³³ Accordingly, the credit is based upon first year wages²³⁴ for newly hired targeted individuals²³⁵ who remain employed for at least 120 hours.²³⁶ For newly hired eligible employees working at least 400 hours, the credit amounts to forty percent of the first \$6,000 in wages paid during the first year of employment.²³⁷ The credit is reduced to twenty five percent for eligible employees who only work for their employer 120 to 399 hours.²³⁸ The credit is zero for eligible employees who work for less than 120 hours.²³⁹

Eligible employees must be members of a targeted group.²⁴⁰ Currently there are nine targeted groups of disadvantaged workers.²⁴¹ Persons with disabilities may qualify for a targeted group if they meet the various qualifications.²⁴² Two of the categories, vocational

Work Opportunity Credit provision); Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 604, 116 Stat. 21, 59 (codified at 26 U.S.C. § 51(c)(4) (2000)) (extending the credit through 2003).

231. See I.R.C. §§ 38(b)(2), (7), (c), 51(a) (2003) (setting forth the WOC, like the disabled access credit, as part of the General Business Credit, which is nonrefundable and subject to other limitations, including not allowing it as an offset against the alternative minimum tax). A nonrefundable credit may offset a taxpayer's income tax liability and, thereby, reduce the tax liability to, but not below, zero. Maule et al., *supra* note 130, at A-14 (citing the general business credit as an example of a nonrefundable credit).

232. See I.R.C. § 51(a), (b)(3) (2003) (providing the formula for computation of the credit as forty percent of up to \$6,000 of qualified first year wages). Because an employer cannot receive a double benefit for qualifying wages, the employer must reduce its wage deduction by the amount of the claimed credit. See *id.* § 280C(a).

233. See GAO TAX STUDY, *supra* note 3, at 1-2 (commenting on Congress's "long-term and continuing interest in ensuring that people with disabilities fully participate in society and become self-sufficient").

234. See I.R.C. § 51(a), (b) (2003).

235. See *id.* § 51(a), (b)(1)-(2) (providing that the wages must be paid to individuals who are members of a targeted group during their first year of employment); see also *id.* § 51(d) (clarifying when an individual qualifies as a member of a targeted group).

236. *Id.* § 51(i)(3)(B).

237. *Id.* § 51(a), (b). The first year of employment begins with the date on which the individual starts working for the employer. *Id.* § 51(b)(2). Therefore, to receive the maximum amount of the credit, the employer must pay at least \$6,000 and the employee must work at least 400 hours during the first year of employment, which may straddle two tax years.

238. *Id.* § 51(i)(3)(A).

239. *Id.* § 51(i)(3)(B).

240. *Id.* § 51(b)(1).

241. See *id.* §§ 51(d)(1)(A)-(H), 1400L(a) (listing targeted group as including, but not limited to, qualified ex-felons, high-risk youth, food stamp recipients, summer youth employees, veterans, SSI recipients, and vocational rehabilitation referrals).

242. For example, they must qualify as a high-risk youth, qualified food stamp recipient, or qualified veteran. See *id.* § 51(d)(1)(A)-(H).

rehabilitation referrals²⁴³ and qualified SSI recipients²⁴⁴ by definition include certain individuals with disabilities. In addition to hiring individuals who satisfy the factual requirements for membership in a targeted group, employers seeking to claim the credit must receive a certification from a local designated agency that the individual is a member of a targeted group.²⁴⁵

The WOC is the third tax incentive studied by the GAO in response to Congressional mandate.²⁴⁶ Because the WOC is a tax incentive for a wide variety of disadvantaged individuals, the GAO's study of the WOC includes its usage and effectiveness for all categories of eligible individuals.²⁴⁷ The GAO could not determine the amount of the WOC used to hire and retain workers with disabilities because the IRS does not have tax data providing this specific information.²⁴⁸ However, the GAO's report includes interviews with businesses and disability experts that specifically address the efficacy of the WOC for motivating businesses to hire and retain people with disabilities.²⁴⁹

243. See *id.* § 51(d)(6) (defining vocational rehabilitation referral as "any individual who is certified by the designated local agency as [1] having a physical or mental disability that results in a substantial handicap to employment and [2] having been referred to the employer upon completion of (or while receiving) rehabilitation services").

244. See *id.* § 51(d)(9) (defining a qualified SSI recipient as "any individual who is certified by the designated local agency as receiving [SSI] benefits . . . for any month ending within the 60-day period ending on the [individual's] hiring date").

245. The certification must be received by the employer on or before the day the individual begins work for the employer or not later than twenty-one days after the individual begins work for the employer. *Id.* § 51(d)(12). Additionally, the employer must submit a written request executed by the employer and employee for certification, including a pre-screening notice prepared on or before the date the individual is offered employment. *Id.* § 51(d)(12). See also Pre-Screening Notice and Certification Request for the Work Opportunity and Welfare-to-Work Credits, Form 8850, available at <http://www.irs.gov/pub/irs-pdf/f8850.pdf> (last visited Nov. 5, 2003) (providing pre-screening notice and certification request which must be filed with the state employment security agency on or before the twenty-first calendar day after the targeted group member begins work); Maule et al., *supra* note 130, at A-76(1) (describing the details of electronic filing of the pre-screening notice and certification request).

246. GAO TAX STUDY, *supra* note 3, at 3.

247. See *id.* at 5 (noting that the WOC study reveals the impact on disadvantaged employees but not the specific effect on employees with disabilities).

248. See *id.* at 4, 10, 14, 20 (noting that tax returns only identify the total number of credits claimed).

249. See *id.* at 3, 15-17, 20 (discussing the use of interviews to provide additional information regarding the efficacy of the tax incentives because other studies were unavailable or limited).

B. GAO Report on the WOC

1. Taxpayer use of the WOC

In 1999, a diminimis percentage of taxpayers, one out of every 790 corporations and one out of every 3,450 individuals with a business affiliation claimed the WOC on their tax returns.²⁵⁰ The GAO estimates that 10,569 taxpayers reported approximately \$254 million in 1999 WOC.²⁵¹ More specifically, the GAO estimates that 8,483 individuals with a business affiliation claimed \$32 million of credits and 2,086 corporations claimed \$222 million, resulting in an average credit claimed of approximately \$106,000 per corporate taxpayer and \$3,800 per individual taxpayer.²⁵² The WOC is available for all targeted groups, including eligible workers with and without disabilities.²⁵³ Both the IRS's database and the GAO's estimates include aggregate WOC dollar amounts.²⁵⁴ As a result, even the small percentages of usage reported²⁵⁵ overstate the percentage of businesses actually benefiting from the WOC by hiring targeted workers with disabilities.²⁵⁶

While corporations were the primary beneficiary of the credit, corporations in the retail trade, hotel and food services, and nonfinancial services²⁵⁷ accounted for about three-quarters of all corporate WOC claimed in 1999.²⁵⁸ Experts explained this concentration to the GAO by citing the high employee turnover for low-skilled workers in these industries.²⁵⁹ Large corporations with total receipts of \$1 billion or more accounted for eighty percent of the corporate WOC, enjoying an estimated average WOC of \$540,000.²⁶⁰ Experts explained that the majority of the corporate

250. See *id.* at 11 tbl. 2 (noting that corporations accounted for eighty-seven percent of the total WOC reported and that their estimated average credit was twenty-five times greater than the estimated average credit for individuals).

251. *Id.*

252. *Id.*

253. See I.R.C. § 51(d) (2003) (setting forth the various categories of targeted groups).

254. See GAO TAX STUDY, *supra* note 3, at 4, 10, 14 (providing the total dollar amount of credits claimed in 1999).

255. See *id.* at 11 tbl. 2 (noting that 0.13% of corporations and .03% of individuals with a business affiliation reported use of the credit).

256. See *id.* at 4, 10 (recognizing that employers can claim the WOC for employing other types of workers and use the credit to accommodate disabled customers).

257. See *id.* at 12 tbl. 3 n.c. ("Nonfinancial services include administrative, professional, educational, and other service categories from the North American Industry Classification System.").

258. *Id.* at 12 tbl. 3.

259. *Id.* at 12.

260. *Id.* at 13 tbl. 4.

WOC is concentrated in very large corporations because they have sophisticated human resource departments that are aware of, understand and can implement the necessary administrative procedures to claim the WOC and realize the economic benefits given their significant and ongoing hiring needs.²⁶¹

In addition to reviewing the IRS' databases, the GAO reviewed several existing studies on the WOC.²⁶² A prior study by the GAO conducted in California and Texas during the late 1990s indicated that most participating employers changed their recruitment, hiring or training practices to qualify for the credit and to better train their newly hired target group members.²⁶³ However, fifty-seven percent of participating employers indicated that WOC eligibility would not increase an applicant's chance of being hired.²⁶⁴ In a DOL commissioned study, most employers indicated that tax credits played little or no role in their hiring decision, and that credit eligible workers would have been hired irrespective of their eligibility because other factors such as job skills and abilities were considered in the hiring decision.²⁶⁵ In addition, a national survey "found that private human resource managers viewed employer tax incentives as the least effective means for reducing barriers to employment for people with disabilities."²⁶⁶ However, a study of the precursor to the WOC demonstrated that the credit increased hiring and earnings of eligible workers.²⁶⁷ Surprisingly, the same study indicated that fifty to ninety-two percent of employers would have hired the eligible workers without the tax benefits.²⁶⁸

The GAO's report also included a description of the Social Security Administration's (SSA) concern about potential employer abuse of the WOC.²⁶⁹ The SSA commented that disability groups believe that the current structure of the WOC may cause a "revolving door effect"

261. See *id.* at 13 (discussing the use of in-house administrators who process the claims or hire consultants to manage the credits).

262. See *id.* at 15-19 (discussing studies on the WOC conducted by GAO and DOL, national surveys, and a study on the Targeted Jobs Tax Credit that predated the WOC).

263. See *id.* at 16 (noting that about half of the participants reported a possible correlation between training practices and increased retention of WOC eligible workers).

264. *Id.*

265. See *id.* at 16-17 (reporting that employers considered the tax credit as one of several factors when making hiring decisions).

266. *Id.* at 18-19.

267. See *id.* at 17-18 (noting that the Targeted Jobs Tax Credit provided credits even if the person hired would have been hired absent the credit incentives).

268. *Id.* at 18.

269. *Id.* at 29.

because employers are motivated to retain low-paid, unskilled workers only long enough to qualify for the credit and then repeat the process with different workers to generate more tax credit dollars.²⁷⁰ However, none of the GAO's discussions with disability groups validated this concern and its recent WOC review found that employers did not appear to be dismissing employees systematically to increase their WOCs.²⁷¹

Similar to comments made about the disabled access credit and barrier removal deduction tax provisions, interviewees noted that lack of familiarity with the WOC, its low dollar value, and administrative requirements limited its usage.²⁷² In support of the claim of lack of familiarity, another survey indicated that only fifteen percent of the supervisors of disabled workers were familiar with employer tax incentives.²⁷³ After reviewing its statistical, survey and interview findings, the GAO reported the suggestions of the government, business, and academic experts to improve usage and effectiveness of the WOC.²⁷⁴

2. *Suggested options to increase usage and effectiveness of the WOC*

While the experts interviewed suggested that lack of familiarity with the WOC reduced its overall usage, this issue was not perceived as insidious as it was with the disabled access credit and the barrier removal deduction.²⁷⁵ However, the obstacle of qualifying for the WOC and its administrative and other qualification burdens were perceived as more significant than those other tax provisions.²⁷⁶ The extra requirement of the certification process was seen as a potentially fatal impediment, particularly for smaller employers without human resource departments.²⁷⁷ However, government representatives suggested that a more streamlined electronic filing project was underway for the certification process.²⁷⁸

270. See *id.* (reporting that SSA also recommended increasing the awareness of the programs); see also *id.* at 40 app. 3 (providing the actual SSA comments to the GAO report).

271. *Id.* at 29.

272. *Id.* at 17.

273. *Id.* at 18.

274. See *id.* at 18 (noting that existing data fails to reveal the precise effectiveness of the tax incentives).

275. See *id.* at 21-22 (reporting that business representatives in particular were more unfamiliar with the other two tax credit programs).

276. See *id.* at 22 (discussing the heavy burden of processing the paperwork required to claim the credit).

277. See *id.* (noting that the paperwork may be perceived as a complex and intolerable burden to small businesses).

278. See *id.* at 22 n.42 (noting that proposed legislation seeks to WOC with the Welfare-to-Work credit).

As with the other tax incentives, most interviewees favored expanding the maximum dollar amount of the WOC and its coverage to increase its usage and effectiveness.²⁷⁹ The experts reasoned that a more valuable WOC would attract greater attention and increased usage from businesses by altering the perception that the WOC's administrative and accommodation costs outweigh its benefits.²⁸⁰ Many organizations suggested including a broader spectrum of workers with disabilities in the targeted groups, such as Social Security Disability Insurance recipients, even though they acknowledged that these recipients would not necessarily be economically disadvantaged.²⁸¹ While most of the organizations focused on expansion of the credit to increase its incentive, the GAO cautioned that increased tax incentives might result in decreased tax revenues, increased employer misuse, and windfalls, with no assurance of any increase in the employment of people with disabilities.²⁸² Finally, the GAO concluded its report with little confidence in the conclusiveness of its findings.²⁸³

3. GAO's conclusions regarding the WOC

The GAO's general conclusions have been presented in the discussion of the accommodation tax incentives, but the following comments on its study of the WOC highlight the inconclusiveness of the GAO's findings: (1) existing data limitations and "limitations in the studies' research methods do not allow for directly measuring the effectiveness of the incentives;"²⁸⁴ (2) surveys and interviews "that specifically ask an employer whether a tax incentive caused them to hire or accommodate an eligible individual can understate the effect of the incentive, because employers may respond negatively if they do not want to appear to discriminate in their employment practices," while asking more general questions lacks precision and "may lead to

279. See *id.* at 25 ("suggesting increases of twenty-five to two hundred percent . . . to capture the attention of businesses").

280. See *id.* (noting that the cost of accommodating an employee with a disability is sometimes greater than the amount covered by the tax incentives).

281. See *id.* at 26 (pointing out that the U.S. House of Representatives recently passed legislation adding SSDI recipients as a new targeted group for purposes of the WOC).

282. See *id.* at 28-29 (suggesting that increased incentives may result in higher government costs without any increase in employment or accommodation of workers with disabilities).

283. *Id.* at 29. See *infra* Part IV.B.3 (discussing the GAO's conclusions).

284. See GAO TAX STUDY, *supra* note 3, at 20 (noting that three critical limitations in the WOTC studies and databases preclude conclusive assessments of the effectiveness of the tax incentives).

overestimating the effect of the incentives.”²⁸⁵ Despite the GAO’s lack of confidence in its conclusions, the report collected many suggestions to increase usage and effectiveness of the WOC including (A) improve and coordinate outreach and education efforts; (B) decrease administrative burden and complexity in eligibility requirements; (C) ensure that employer incentives are to hire and retain rather than rotate employees through a revolving door; and (D) increase the dollar value of incentives and the type of workers covered.²⁸⁶ The GAO ends its report by warning readers that there is “no assurance of a substantial improvement in the employment of workers with disabilities.”²⁸⁷ Nevertheless, using these findings, suggestions, and a post-integrationist approach, the unequivocal goal is to substantially improve the employment of workers with disabilities.

C. Redesigning the WOC: A Post-Integrationist Approach

1. *Applying “strategic essentialism”: Specialized treatment for people with disabilities to confer equal benefits, social choices, and power for all persons*
 - a. *Increased and coordinated outreach by people with disabilities and their public and private partners*

The GAO report confirms that while awareness of tax incentives to enable work for people with disabilities is a significant problem in general, most organizations and businesses are familiar with the WOC.²⁸⁸ This familiarity may stem from the fact that the WOC covers a broad range of individuals and thereby has gained extensive exposure.²⁸⁹ The redesigned WOC will expand the definition of eligible employees to all qualified individuals with disabilities as defined under the ADA.²⁹⁰ This expansion will have to be promoted and marketed to businesses to encourage increased employment of people with disabilities. People with disabilities and their public and

285. *Id.* at 20-21.

286. *Id.* at 21.

287. *Id.*

288. *Id.*

289. *See supra* Part IV.A (discussing the provisions of the WOC).

290. *See* 42 U.S.C. § 12111(8) (2000) (defining a qualified individual with a disability as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”); *see also* Weber, *Law of Welfare*, *supra* note 3, at 952-53 (suggesting that expansion of the existing WOC to include all workers with disabilities would make the subsidies more beneficial).

private partners and organizations should take the lead role in marketing this expansion and effecting this increase. Consistent with the post-integrationist principle that they must embrace their unique identity while affirming equal citizenship, people with disabilities should have an active role in demanding recognition and jobs.²⁹¹ The expansion of the WOC should be celebrated and promoted as one piece of a strategic plan to ensure specialized treatment for people with disabilities and confer equal benefits, social choices, and power for all persons.

b. Simplification of the WOC should facilitate outreach, increase business usage, and equalize benefits

In addition to expansion of the WOC's coverage, the WOC will be simplified and its administrative requirements will be restructured.²⁹² The WOC's two targeted groups that include a subset of people with disabilities, vocational rehabilitation referrals, and qualified SSI recipients,²⁹³ will be deleted and one broad category will be added, including all qualified individuals with disabilities as defined in the ADA.²⁹⁴ This simplification should facilitate promotion and outreach.²⁹⁵ Most businesses are already aware of the ADA and its definition of qualified individuals with disabilities.²⁹⁶ Outreach efforts could bootstrap awareness of and information programs on the ADA into the awareness program for the enhanced WOC for people with

291. See Drimmer, *supra* note 30, at 1407 (discussing goals for ending the subordination of persons with disabilities).

292. See I.R.C. § 51(d)(12) (2003) (outlining the WOC's rules for certification).

293. See *id.* § 51(d)(1)(E), (H) (setting forth targeted groups specifically including people with disabilities).

294. See 42 U.S.C. § 12111(8) (2000) (defining a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

295. While this definition is intended to simplify the WOC and bootstrap familiarity of the term from ADA exposure, the "disability" definition in the ADA has been the subject of controversy and litigation. See Eichhorn, *supra* note 4, at 1408 (arguing that the "disability" definition in the ADA "has undercut its effectiveness as a guarantor of civil rights"); see also Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 51 (1999) (arguing that to end inequality for people with disabilities "will depend on society's embrace of a far more inclusive concept of justice and a much broader emancipatory vision than the one embodied in antidiscrimination law" and its narrow definition of disability).

296. See THE NAT'L ORG. ON DISABILITY, 2002 N.O.D. ANNUAL REPORT: TELLING THE WORLD ABOUT AMERICA'S DISABILITY AGENDA 3 (May 14, 2003) (finding that more than seventy-five percent of Americans have heard of the ADA and ninety-three percent of those Americans support the ADA), available at <http://www.nod.org/pdf/files/2002annrpt.pdf>.

disabilities.²⁹⁷ This expansion of the WOC is broader than the suggestions described in the GAO's report, but it is consistent with post-integrationist principles of affirmatively equalizing opportunities and benefits for people with disabilities.²⁹⁸

To simplify the administrative requirements and empower people with disabilities (and other members of target groups),²⁹⁹ the WOC certification administrative process will be shifted to the targeted group members, including people with disabilities.³⁰⁰ People with disabilities will have the opportunity to take charge of their rights and benefits by obtaining their own certificate of targeted group status from designated local agencies.³⁰¹ By shifting this responsibility to people with disabilities (and other target group members) rather than to their employers, people with disabilities will hold the power over this benefit in their able hands. Thus, in the job search process, a person with a disability can decide, based upon his or her own unique circumstances, whether to present or withhold the qualifying certificate. In this manner, people with disabilities will be on the front line of marketing this benefit and themselves to potential employers and will control the employer's opportunity to enjoy WOC tax benefits.³⁰² Employers will no longer have an excuse that the burdens of the WOC outweigh its costs because they will merely

297. See GAO TAX STUDY, *supra* note 3, at 23-24 (describing government agencies' efforts to coordinate ADA outreach efforts with each other).

298. "Strengthening current affirmative action efforts will help American society address the problems of past and present disability discrimination, especially unconscious discrimination." Weber, *Employment Policy*, *supra* note 3, at 159. See *id.* at 159-74 (arguing for strengthening and expanding affirmative action for persons with disabilities by requiring job set-asides in public and private entities for people with disabilities); Weber, *Law of Welfare*, *supra* note 3, at 952-53 (setting forth a post-integrationist proposal to broaden the WOC's coverage of people with disabilities, to increase the amount of qualifying wages, and to offer the credit as a cash subsidy to encourage entities that do not pay corporate taxes to hire people with disabilities).

299. While the WOC applies to numerous targeted groups, this redesign focuses on enhancing the WOC for people with disabilities.

300. Although this redesign may be seen as shifting a burden from employers to people with disabilities, people with disabilities routinely interact with government agencies. Those who are unfamiliar with the agencies should benefit from being forced to work with government agencies that may provide assistance above and beyond the WOC eligible certificate. For a comparable certification program, the IRS is implementing a certification program for EITC eligibility. See I.R.S., Announcement 2003-40, 2003-26 I.R.B. 1132, available at <http://www.irs.gov/newsroom/article/0,,id=110298,00.html> (last visited Oct. 26, 2003) (announcing the program and soliciting public comment).

301. See I.R.C. § 51(d)(10) (2003) (setting forth the definition of designated local agency).

302. See *id.* § 51(a) (stating that under the WOC, employers can receive a tax credit equal to forty percent of the qualified first-year wages for employing an individual with a disability).

receive and store certificates presented to them by WOC eligible individuals and claim the credit on their annual income tax returns.

The proposal to shift the administrative responsibility to all members of targeted groups should shift some power from employers to the members of targeted groups. However, this modification will not engender specialized treatment for people with disabilities relative to other target group members. To provide jobs, equal benefits, and social choices for people with disabilities, the WOC incentive amount for hiring people with disabilities must be increased.³⁰³

2. *Costs of disability should be borne by society*

In addition to expanding the scope of the WOC's coverage for people with disabilities, the amount of the WOC for hiring people with disabilities will be increased as suggested by GAO interviewees.³⁰⁴ Consistent with post-integrationist principles, the cost of disability should be borne by society. Therefore, the redesigned WOC will be more than twice as generous for people with disabilities than for targeted group members without disabilities. The enhanced incentive is structured by an increase in the amount of qualified wages from \$6,000 to \$12,000 for people with disabilities to encourage employers to pay larger salaries. The credit percentage will remain the same at forty percent. To ensure that employers are motivated to retain people with disabilities, rather than rotate them through a revolving door, the WOC will also be extended from covering the first year wages³⁰⁵ to the first two years of wages. Under the redesigned WOC, employers could receive up to a \$4,800 WOC for the first and second year of employment of a person with a disability, for a total benefit of \$9,600.³⁰⁶ The benefits available with respect to other members of targeted groups would remain the same.³⁰⁷ This enhanced WOC should encourage the hiring of people with disabilities. This approach is consistent with the idea that

303. See Weber, *Law of Welfare*, *supra* note 3, at 952-53 (setting forth a post-integrationist proposal for enhancing the WOC by increasing its coverage and dollar amount).

304. See *supra* notes 161, 279 and accompanying text.

305. See I.R.C. § 51(b)(2) (2003) (defining "qualified first-year wages" as those paid during the one-year period beginning the first day of employment).

306. This amount of credit would be available with respect to employees with disabilities who received at least \$12,000 of qualifying wages, I.R.C. § 51(c), and worked at least 400 hours during each of two, one-year periods commencing the day the individual begins work for the employer.

307. See GAO TAX STUDY, *supra* note 3, at 9 (stating that employers can receive a tax credit of up to \$2,400 for each eligible employee under the WOC).

specialized treatment is necessary to achieve true integration of people with disabilities into the workplace and mainstream society.³⁰⁸

3. *Move from autonomy and legally enforceable rights between groups to interdependence and balancing relationships among all people*

The redesign of the WOC, including its simplification, administrative restructuring, and coverage and value enhancements, should encourage employers to hire people with disabilities. Most significantly, employers will have a financial incentive to hire and retain such people. Moreover, people with disabilities will have more control and power in their relationships with their employers. They will be on the front line of promoting themselves and a meaningful tax incentive, which provides them affirmative action for their own equality. Consequently, the relationship between employees with disabilities and employers will be more balanced, with power shifting from employers to employees with disabilities. As a result of this affirmative action, people with disabilities will have more social choices and equal benefits in mainstream society.

D. *The Redesigned WOC*

1. *The strategic plan for the redesigned WOC*

The redesigned WOC is intended to motivate employers to hire and retain people with disabilities using post-integrationist principles and the GAO's findings.³⁰⁹ After its enactment by Congress, the redesigned WOC must be marketed aggressively to people with disabilities and their advocacy groups and businesses.³¹⁰ People with disabilities will be effectively marketing the WOC to employers when they promote themselves and all their attributes, including a certificate showing they are WOC eligible. In addition, the WOC and the disabled access credit should continue to be promoted in coordinated outreach and education programs.³¹¹

308. See Weber, *Law of Welfare*, *supra* note 3, at 915-19 (suggesting that the integrationist principle of reasonable accommodation is inadequate to overcome the subordination of persons with disabilities).

309. See *supra* Part IV.C (describing the proposed redesigned WOC).

310. See GAO TAX STUDY, *supra* note 3, at 21-25 (describing the importance of outreach efforts to promote the advantages of hiring employees with disabilities); see, e.g., OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUSTICE, FACT SHEET 4: TAX INCENTIVES FOR IMPROVING ACCESSIBILITY (July 6, 2001) (providing detailed information package regarding the disabled access credit and the barrier removal deduction), available at <http://www.usdoj.gov/crt/ada/taxpack.htm>.

311. See GAO TAX STUDY, *supra* note 3, at 24 (describing outreach efforts sponsored by the IRS, DOL, DOJ, EEOC, and SSA).

As with the disabled access credit, Congress should mandate that the GAO and other competent researchers monitor and report regularly on the usage and effectiveness of the redesigned WOC.³¹² The IRS's database does not currently capture this data because the credit is presented in the aggregate, including the WOC with respect to all members of targeted groups.³¹³ Because of this lack of data, the GAO could not determine the WOC's usage and effectiveness for people with disabilities.³¹⁴ The IRS should work with researchers to design tax reporting documents to capture detailed data about the usage and effectiveness of the redesigned WOC for people with disabilities.³¹⁵ The results of the ongoing research should be used to monitor routinely and recreate the redesigned WOC to maximize its progress toward the goal of increased and long-term employment for people with disabilities "to bring persons with disabilities into the economic and social mainstream of American life."³¹⁶

2. *The redesigned WOC tax provision*

The redesigned WOC would include the changes described above as follows: First, the targeted groups of "vocational rehabilitation referral[s]"³¹⁷ and "qualified SSI recipient[s]"³¹⁸ and all references thereto should be deleted and replaced with a new targeted group entitled "a qualified individual[s] with a disability." The new targeted group, "a qualified individual with a disability," will be defined as such term is defined in the ADA.³¹⁹

Second, the "special rules for certification"³²⁰ will be modified to shift the administrative requirements and the power to control the

312. Congress mandated the GAO's study and report of the tax incentives for employment of people with disabilities in the Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860. Congress should ensure that the mandate applies to the redesigned WOC.

313. GAO TAX STUDY, *supra* note 3, at 14 (noting lack of data for the WOC because employers can use it for a wide variety of qualifying employees).

314. *See id.* at 5 (discussing limitations of the GAO study).

315. *Id.*; *see also* Internal Revenue Service, Work Opportunity Credit, Form 5884, available at <http://www.irs.gov/pub/irs-pdf/f5884.pdf> (last visited Oct. 27, 2003) (setting forth procedure for calculating, claiming and reporting the WOC).

316. *See* H.R. REP. NO. 101-485, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303-04 (stating the purpose of the Americans with Disabilities Act).

317. *See* I.R.C. § 51(d)(1)(E), (d)(6) (2003) (defining "vocational rehabilitation referral").

318. *See id.* § 51(d)(1)(H), (d)(9) (describing a "qualified SSI recipient" as an individual who receives Supplemental Security Income benefits).

319. *See* 42 U.S.C. § 12111(8) (2000) (characterizing a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

320. *See* I.R.C. § 51(d)(12) (2003) (setting forth the "special rules for

incentive to each member of a targeted group, including people with disabilities. The person with a disability will be required to deliver to her employer certification from a "designated local agency"³²¹ that such individual is a member of a targeted group.³²² The timing and procedural requirements for obtaining, delivering, and maintaining the certificate will have to be developed and managed to make the process administratively practicable and acceptable for people with disabilities by designating local agencies and employers.³²³

Third, the limit on the amount of "qualified wages"³²⁴ will be increased for qualifying people with disabilities from \$6,000³²⁵ to \$12,000. The increased limit will provide a maximum WOC of \$4,800 to employers who employ a "qualified individual with a disability"³²⁶ with "qualified first-year wages"³²⁷ of at least \$12,000 who performs 400 or more hours of service during the first-year period.³²⁸ Finally, a new term "qualified second-year wages" will have to be added for purposes of computing the WOC for qualifying people with disabilities for their second year of employment by the same employer. The limit for "qualified second-year wages" will also be \$12,000. The credit percentage allowable for up to \$12,000 of "qualified second-year wages" will be consistent with the applicable

certification").

321. See *id.* § 51(d)(11) (defining "designated local agency").

322. See *id.* § 51(d)(12)(A) (setting forth the current administrative procedures with respect to the certification process).

323. The IRS is testing a certification program for EITC eligibility. See Announcement 2003-40, 2003-26 I.R.B. 1132 (announcing the program and soliciting public comments); see also Leslie Book, *EITC Noncompliance: What We Don't Know Can Hurt Them*, 99 TAX NOTES 1821 (2003) (examining the recent controversy surrounding the IRS' EITC Verification Initiative). In response to concern about the exclusionary components of the certification process, IRS Commissioner Mark W. Everson has refocused the certification program to better serve taxpayers and ensure eligibility. The Commissioner announced a five-point EITC initiative including a certification effort to substantiate certain EITC qualifications and increasing outreach efforts and making the credit requirements easier to understand. National Taxpayer Advocate Nina Olsen said: "The IRS initiative has twin objectives: (1) to reduce overpayments and (2) to improve participation in the EITC program. I am pleased that improving the participation rate remains an equally important priority. I believe the certification pilot will be very helpful in achieving both of these goals." *IRS Announces Steps to Improve EITC Administration, Seeks Public Comment*, IR-2003-78 (June 13, 2003), available at <http://www.irs.gov/newsroom/article/0,,id=110297,00.html>. For an example of a Canadian certification program, see generally Duff, *supra* note 105, at 823-24 (discussing Canada's disability tax credit and its requirement for a certificate regarding a person's impairment from a qualified medical practitioner).

324. See I.R.C. § 51(b)(1) (2003) (defining "qualified wages").

325. *Id.* § 51(b)(3).

326. *Supra* note 319.

327. See I.R.C. § 51(b)(2) (2003) (defining "qualified first-year wages").

328. See *id.* § 51(i)(3), (a) (setting forth the percentages of qualified first-year wages required in determining the amount of work opportunity credit).

percentages for “qualified first-year wages”: forty percent for individuals who work 400 or more hours;³²⁹ twenty-five percent for individuals who work 399 to 120 hours;³³⁰ and no credit for individuals who work 120 or fewer hours.³³¹

3. *Conclusions regarding the redesigned WOC*

The redesigned WOC, together with the new disabled access credit, are pieces of a strategic plan to ensure full employment for people with disabilities. These two tax provisions are designed to motivate employers to hire, retain, and accommodate people with disabilities. Additional pieces of the plan will have to be formulated, designed, implemented, and marketed to people with disabilities, advocacy groups, government agencies, legislative bodies, and businesses. A third piece of the strategic plan is a tax incentive to motivate people with disabilities to work. The new incentive evolves from the expansion of an existing tax provision, which Congress enacted to motivate low-income taxpayers to work.³³²

IV. TAX PROVISION TO ENCOURAGE PEOPLE WITH DISABILITIES TO WORK: EXPANSION OF THE EITC—A POST-INTEGRATIONIST APPROACH

Congress enacted the EITC in 1975³³³ to ensure that poverty-level individuals who work do not pay any federal income or payroll taxes.³³⁴ While most of these individuals do not pay any federal income tax because of their low-income levels, they are subject to regressive Social Security payroll taxes.³³⁵ The EITC reimburses Social Security payroll taxes paid by low-income workers with a refundable tax credit.³³⁶ The EITC generally provides a cash tax refund for working poor families.³³⁷

329. *Id.*

330. *See id.* § 51(i)(3)(a) (directing the reduction of credit for individuals who perform at least one hundred hours, but less than four hundred hours of service).

331. *See id.* § 51(i)(3)(b) (denying credit for individuals performing fewer than 120 hours of service).

332. *See id.* § 32 (setting forth the earned income tax credit).

333. *See* Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204, 89 Stat. 26, 30-32 (1975) (codified as amended at I.R.C. § 32 (1975)).

334. *See* James E. Williamson & Francine J. Lipman, *The New Earned Income Tax Credit: Too Complex for the Targeted Taxpayers*, 57 TAX NOTES 789, 790-94 (1992) (describing the legislative intent and legislative history of the EITC).

335. Jonathan Barry Forman, *How to Reduce the Compliance Burden of the Earned Income Credit on Low-Income Workers and on the Internal Revenue Service*, 48 OKLA. L. REV. 63, 68, 74-76 (1995).

336. *See id.*; *Hearing Before the Subcomm. on Transp., Treasury, and Indep. Agencies of the House Comm. on Appropriations*, 108th Cong. (2003) [hereinafter *2003 Hearing*] Federal Document Clearing House, May 20, 2003, available in LEXIS, Legis History, CNGTST File (testimony of John Snow, Secretary, Department of Treasury) (stating

Most notably, through the EITC, Congress has created a significant incentive to work.³³⁸ The EITC increases the value of work for low-income individuals, especially for individuals who are unemployed.³³⁹ The EITC is the largest and most successful welfare-work program,³⁴⁰ enjoying broad bipartisan support³⁴¹ and reaching “more than eighty percent of its target population” with “lower administrative costs than any other welfare program.”³⁴² In addition to being cost-effective, such cash transfers promote the dignity and sense of equality of the recipient.³⁴³

Given the staggering rate of unemployment among people with disabilities, the EITC should provide significant motivation to unemployed people with disabilities to work.³⁴⁴ However, the current structure of the EITC likely results in diminished work incentives for people with disabilities.³⁴⁵ Workers with and without disabilities are eligible for the EITC if they satisfy certain earned and other income level requirements.³⁴⁶ In addition, while the EITC is available to

Congress's long-term objectives for the EITC to offset the impact of Social Security and to encourage employment rather than dependence on welfare); Williamson & Lipman, *supra* note 334 and accompanying text.

337. Williamson & Lipman, *supra* note 334, at 790-91 & n.8.

338. See Bruce D. Meyer & Dan T. Rosenbaum, *Making Single Mothers Work: Recent Tax and Welfare Policy and its Effects*, 53 NAT'L TAX J. 1027, 1032 (2000) (attributing the last decade's dramatic growth in single mother employment to EITC work incentives); see also 2003 Hearing, *supra* note 336 (describing congressional intent behind EITC).

339. See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 548 & n.57 (1995) (explaining that while the incentive exists for individuals currently in the work force, the incentive is most significant to motivate the unemployed to work).

340. See, e.g., Book, *supra* note 323, at 1821 (stating that the \$30 billion in 2002 EITC benefits paid to approximately twenty million taxpayers was “the most important federal transfer program lifting millions of children and families out of poverty”); Announcement 2003-40, 2003-26 I.R.B. 1132 (announcing that the 2001 “EIC lifted 3.9 million people out of poverty”).

341. See Martha B. Coven, *The Freedom to Spend: The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847, 910 (2002) (noting that President Gerald Ford signed EITC into law, President Ronald Reagan supported it, and President George W. Bush spoke favorably about it, while Congress has generally given it bipartisan support).

342. See Forman, *supra* note 335, at 67 (describing EITC as “a whoppingly successful program”).

343. See Coven, *supra* note 341, at 890-91 (making compelling and passionate arguments for cash-based public assistance by emphasizing that recipient-control of public assistance enhances a recipient's sense of control over their life, coupled with a freedom from the stigma attached to public assistance).

344. Alstott, *supra* note 339, at 548 & n.57.

345. See Weber, *Law of Welfare*, *supra* note 3, at 948-49 (proposing a disabled worker tax credit (DWTC) to replace the EITC because of its inadequacy to provide incentives for people with disabilities).

346. See I.R.C. § 32(c) (2003) (setting forth special rules to qualify for the EITC, including earned income levels). The EITC increases as earned income levels increase and then begins to phase out completely as income levels reach higher

persons with or without a qualifying child, the benefits provided to persons without a qualifying child are extraordinarily less than the benefits provided to persons with one or more qualifying children.³⁴⁷ Accordingly, low-income workers with and without disabilities without qualifying children receive little or no motivation to work under the EITC. Indeed, many low-income workers with disabilities are motivated not to work.³⁴⁸

Persons with disabilities who desire to work face daily barriers including humiliating discrimination in a society designed for and controlled by able-bodied people.³⁴⁹ Some of these work disincentives are economic, such as heightened work costs, diminished earning capacity, loss of SSI, Medicaid, and other government benefits as earned income levels increase.³⁵⁰ These significant economic disincentives to work are unique to people with disabilities and rationally discourage any motivation to work.³⁵¹ However, work provides the opportunity for self-sufficiency through wages, a

levels. *Id.* § 32(b).

347. For tax year 2003, the maximum EITC is \$382 for a person without a qualifying child (for income levels less than \$11,230 (\$12,230 for married filing jointly)); \$2,547 for a person with one qualifying child (for income levels less than \$29,666 (\$30,666 for married filing jointly)); and \$4,204 for a person with two or more qualifying children (for income levels less than \$33,692 (\$34,692 for married filing jointly)). See INTERNAL REVENUE SERVICE, EARNED INCOME CREDIT (EIC), PUBLICATION 596, Appendix, 2003 Earned Income Credit (EIC) Table, available at <http://www.irs.gov/pub/ire-pdf/p596.pdf>; see also INT. REV. SERV., DEP'T OF TREASURY, KLEINROCK'S TAXEXPERT ANALYSIS AND EXPLANATION § 1.8 (2003) (setting forth 2003 EITC phaseout amounts); see also I.R.C. § 32(b) (2003) (setting forth earned income amounts and phaseout percentages for eligible individuals with and without qualifying children). See generally *id.* § 32 (setting forth the earned income credit).

348. See Weber, *Law of Welfare*, *supra* note 3, at 948-49 (describing the work disincentive effects for people with disabilities including heightened work costs, diminished earning capacity, and government benefit programs such as SSI for people with disabilities).

349. See Weber, *Employment Policy*, *supra* note 3, at 131-34 (describing the discrimination that disabled individuals face in the workplace); see also *id.* at 123 (describing a "well-dressed business traveler, sitting in an airport in her wheelchair with a styrofoam cup full of coffee in her hand," humiliated beyond comprehension by another traveler smiling and dropping a quarter into her styrofoam cup).

350. See Weber, *Law of Welfare*, *supra* note 3, at 948-49 & nn.387-88 (commenting that a worker must find a high enough paying job to have an economic incentive to give up valuable government benefits).

351. People with disabilities often need unique and expensive support to find and maintain employment, including special education, training and technology, health care, transportation services and equipment, vocational rehabilitation, and personal assistance services. Moreover, loss of government benefits—such as SSI, Medicare, or Medicaid—that can accompany employment, could make certain employment opportunities too costly. See generally U.S. DEP'T OF HEALTH & HUMAN SERVICES ET AL., RESEARCH ON EMPLOYMENT SUPPORTS FOR PEOPLE WITH DISABILITIES: SUMMARY OF FOCUS GROUP FINDINGS (Sept. 2001) (setting forth findings from a study on the value of a broad range of employment support for people with disabilities), available at <http://aspe.os.dhhs.gov/daltcp/reports/fgfind.htm>.

productive role in society, enhanced self-esteem and self-worth, order, sources of friendship, and social support.³⁵² The EITC must be expanded for people with disabilities to offset their significant disincentives to work³⁵³ and open the door to mainstream society. The EITC will be expanded using the following post-integrationist principles.³⁵⁴

A. Applying "Strategic Essentialism": Specialized Treatment for People with Disabilities to Confer Equal Benefits, Social Choices, and Power for All Persons

Because of the uniqueness of people with disabilities, specialized treatment beyond simple integration and reasonable accommodation is required to equalize the rights and well being of those with and without disabilities.³⁵⁵ People with disabilities deserve equal benefits, including the benefits of work.³⁵⁶ The cash EITC work incentives currently available to workers with disabilities must be enhanced to offset the significant disincentive costs of work borne by people with disabilities.

The expanded EITC will provide an enhanced incentive to individuals with "disabilities" as such term is defined under the ADA.³⁵⁷ This modification, which is consistent with the modifications made to the new disabled access credit and the redesigned WOC provides uniformity in these three provisions and should facilitate promotion and outreach of all three tax incentives. Most people with disabilities are well aware of the ADA and its definition of disability.³⁵⁸

352. See Weber, *Employment Policy*, *supra* note 3, at 129-30 (describing the many rewards of work beyond wages); see also Blanck & Marti, *supra* note 43, at 400 (explaining that individuals with disabilities who enjoy integrated and positive employment outcomes report greater life satisfaction and increased self-esteem).

353. See Burkhauser, *supra* note 30, at 81-83 (noting that the ADA can help people with developed job skills, but people with both disabilities and poor job skills are "doubly disadvantaged" and most in need of a disabled worker tax credit).

354. See discussion *supra* Part II.C (providing the framework of the post-integrationist principles).

355. See Weber, *Law of Welfare*, *supra* note 3, at 913; see also Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 554 (2001) (concluding that narrow interpretations of formal equality perpetuate discrimination of people with disabilities "by refusing to recognize that the 'same' treatment can itself be discriminatory").

356. See Kearney, *supra* note 49, at 60-61 (noting that to allow a person with a disability to enjoy the full benefits of the business world, a greater burden than mere reasonable accommodation may be placed on businesses, which may be required to bear certain expenses that can be avoided currently through a claim of undue hardship).

357. See 42 U.S.C. § 12102(2) (2000) (defining disability).

358. See THE NAT'L ORG. ON DISABILITY, 2002 N.O.D. ANNUAL REPORT: TELLING THE WORLD ABOUT AMERICA'S DISABILITY AGENDA (MAY 14, 2003), at <http://www.nod.org/>

Because people with disabilities must claim the credit on their individual income tax returns, outreach efforts targeted to people with disabilities could bootstrap awareness of and information programs on the ADA and the EITC into the awareness program for the enhanced EITC for individuals with disabilities. The IRS has a significant outreach and education program for the EITC targeting the working poor.³⁵⁹ These existing programs could incorporate and be used to highlight the expanded EITC for people with disabilities.

B. Costs of Disability Should be Borne By Society

The expanded EITC will shift some of the additional costs of work from people with disabilities to society. Society has exacerbated the cost of disabilities by creating inaccessible communities and fostering intolerance and discrimination; now society must pay the full price of undoing its damage.³⁶⁰ The expanded EITC is intended to reimburse people with disabilities for some or all of their additional costs of working.

EITC benefits will be enhanced for individuals with disabilities by modifying how they are characterized for purposes of qualifying for and determining the amount of their credit.³⁶¹ The structure of the EITC will be modified so that for purposes of the EITC an individual with a disability, as such term is defined under the ADA,³⁶² will be deemed to have at least one qualifying child in addition to any actual qualifying children³⁶³ as defined under the Code. Under the EITC, eligible individuals with one qualifying child receive larger benefits

content.cfm?id=1367 (on file with the American University Law Review) (finding that more than seventy-five percent of Americans have heard of the ADA and ninety-three percent of those Americans support the ADA).

359. See 2003 Hearing, *supra* note 336, ¶ 40 (testifying that in 1997 Congress authorized \$716 million for a five-year EITC compliance improvement; similarly, Congress authorized \$145 million in 2003 and \$153 million in 2004, including EITC outreach and education); Book, *supra* note 323, at 1821-22 (describing seven-year \$1 billion EITC compliance program including outreach and education); *IRS Announces Steps to Improve EITC Administration, Seeks Public Comment*, IR-2003-78 (June 13, 2003) (stating that IRS Commissioner Mark W. Everson has undertaken new EITC initiatives which include increasing outreach efforts).

360. See Moss & Malin, *supra* note 30, at 219-21 (arguing for full funding of disability accommodations); Weber, *Law of Welfare*, *supra* note 3, at 915 (describing oppression of people with disabilities due to their suffering of "the bulk—or in some cases the totality—of the costs of disability"); Weber, *Employment Policy*, *supra* note 3, at 162-67 (describing the need to strengthen and expand affirmative action for people with disabilities to combat "the conscious and unconscious discrimination that keeps qualified individuals with disabilities out of work and in poverty").

361. See I.R.C. § 32(c)(1)(A)(i) (2003) (establishing the definition of "eligible individuals" to include any individual who has a qualifying child for the taxable year).

362. See 42 U.S.C. § 12102(2) (2000) (defining disability).

363. See I.R.C. § 32(c)(3) (2003) (defining "qualified child").

than individuals without any qualifying children and individuals with two or more qualifying children³⁶⁴ receive larger benefits than individuals with one qualifying child.³⁶⁵ Moreover, a person with at least one qualifying child does not have to satisfy other eligibility requirements including an age requirement and a U.S. residency requirement.³⁶⁶

As a result of the characterization of an individual with a disability as an individual with at least one qualifying child, more people with disabilities will qualify for the EITC and their EITC benefits will be increased.³⁶⁷ For example, currently, a working individual with a disability under twenty-five or sixty-five or older with no qualifying children would be ineligible for the current EITC irrespective of their income levels.³⁶⁸ However, under the expanded EITC they would be eligible if their income level was under the threshold amounts for eligible individuals with one qualifying child. A twenty-four year old person with a disability and with no actual qualifying children would be deemed to have one qualifying child and would qualify for up to \$2,547 in expanded EITC benefits if his or her earned income level was less than \$29,666 (\$30,666 if married filing jointly) as compared to not qualifying for any EITC benefits.³⁶⁹

These expanded EITC benefits will be even larger if a person with a disability actually has one or more qualifying children.³⁷⁰ Under the expanded EITC, a person with a disability with one or more qualifying children will be characterized as a person with two or more qualifying children,³⁷¹ resulting in the opportunity to receive the

364. See *id.* § 32(b), (a) (illustrating how the EITC percentages, amounts, and phase-out thresholds are divided into three categories which provide different EITC benefits from the smallest benefits for eligible individuals with no qualifying children to larger benefits for eligible individuals with one qualifying child to the largest benefits for eligible individuals with two or more qualifying children).

365. See *id.* § 32(b) (describing percentages and amounts of the credits for eligible individuals without any qualifying children, with one qualifying child, and with two or more qualifying children).

366. See *id.* § 32(c) (A) (ii) (setting forth eligibility requirements for any individual who does not have a qualifying child for the year).

367. See *id.* (setting standards that allow additional individuals to be added to the group who may claim one child, thereby increasing the overall number of people receiving benefits).

368. *Id.*

369. See Kleinrock, *supra* note 347, § 1.8 (noting the 2003 EITC dollar amounts).

370. See I.R.C. § 32(b) (2003) (setting forth a higher percentage and amount for eligible individuals with one qualifying child, both higher still for individuals with two or more qualifying children).

371. Under the expanded EITC, an individual with a disability will be deemed to have one qualifying child in addition to any actual qualifying children. Therefore, if an individual with a disability has one qualifying child, for purposes of the EITC she will be deemed to have two qualifying children; similarly, an individual with a disability with two qualifying children will be deemed to have three qualifying

highest EITC benefits of up to \$4,204 and a higher phase-out threshold of \$33,692 (up to \$34,692 if married filing jointly).³⁷² The expanded EITC, like the current EITC, will be indexed for inflation so that the benefits will increase as the costs of disability increase.³⁷³ The expanded EITC should shift some of the costs of disability from people with disabilities to society and mitigate the disincentives to work for people with disabilities.

C. Move from Autonomy and Legally Enforceable Rights Between Groups to Interdependence and Balancing Relationships Among All People

In addition to mitigating disincentives for workers with disabilities, the expanded EITC may motivate people with disabilities to move from autonomy to interdependence.

This goal should be accomplished through the same eligibility certification requirement for the WOC.³⁷⁴ People with disabilities will be required to obtain a certificate from a designated local agency evidencing their disability status.³⁷⁵ This same certificate will qualify them for the WOC, for the benefit of their employers, and for the EITC, for their own benefit. While the certificate qualifies them as "an individual with a disability," if their income levels are above the phase-out threshold or they fail to satisfy other EITC requirements they will not receive any EITC benefits.³⁷⁶

While the certificate requirement may seem onerous, it will be structured in such a manner as to ensure that the process is administratively practicable and acceptable for people with disabilities, designated local agencies, and other relevant government agencies.³⁷⁷ The certificate will qualify a person with a disability for both WOC eligibility and for EITC eligibility for an appropriate time period. The certification process is intended to emancipate and not compromise people with disabilities. People with disabilities routinely interact with government agencies. For those people with disabilities who are not familiar with these agencies, they should

children. See I.R.C. § 32(c)(3) (2003) (stating current eligibility requirements).

372. See Kleinrock, *supra* note 347, § 1.8 (reporting the 2003 EITC dollar amounts).

373. See I.R.C. § 32(j) (2003) (stating the requirement to make dollar amount adjustments for inflation).

374. See *supra* Part V.A.1.a (describing some of the requirements of the WOC).

375. See generally I.R.C. § 51(d)(12) (2003) (setting forth certificate requirement for the WOC).

376. See *id.* § 32(b), (c)(1), (k) (establishing phase-out percentages and amounts and other EITC requirements, such as the identification number requirement and the disallowance for prior fraudulent or reckless claims).

377. See *id.* § 32(b) (describing the structure of the phase-out requirement).

benefit from being motivated to work with government agencies that may provide assistance above and beyond the WOC and EITC eligibility certificate.

Most importantly, the certificate should deter IRS audits or litigation over perceived EITC fraud. The government is very concerned that EITC fraud is costing taxpayers million of dollars.³⁷⁸ As a result, EITC recipients are subject to considerable government scrutiny including increased audits and tax litigation.³⁷⁹ In fact, the IRS is presently implementing its own pre-certification program for EITC eligible individuals.³⁸⁰ The prerequisite of a certification program for people with disabilities should discourage EITC audits and litigation and satisfy legislators and the person on the street that the enhanced EITC for people with disabilities is not an invitation for greater fraud.

Consistent with post-integrationist principles, people with disabilities should work toward developing interdependent relationships to achieve their goals rather than fighting autonomously in courtroom battles that pit people with disabilities against people without disabilities.³⁸¹ One scholar notes, "If the needs of the people involved can be addressed by an alteration of the relationship, that solution may be preferable to one resulting from the sorting out of conflicting rights."³⁸² Achieving equality is not simply courtroom battles or the treatment of disability as a private matter to be protected by confidentiality provisions. It requires "identifying the relationships that affect the well-being of persons with disabilities, examining the justice of the relationships, and

378. See Announcement 2003-40, 2003-26 I.R.B. 1132 (estimating that out of \$31.3 billion in 1999 EITC claims between \$8.5 and \$9.9 billion or between 27 and 31.7% of total EITC claims were erroneous), available at <http://www.irs.gov/newsroom/article/0,,id=110298,00.html> (last visited Nov. 8, 2003); 2003 Hearing, *supra* note 336, ¶¶ 37, 39-41 (describing the significant and long-term noncompliance problems with the EITC); Book, *supra* note 323, at 1821, 1823-24 (describing the EITC's longstanding weakness of noncompliance).

379. See Internal Revenue Service, *Earned Income Tax Credit (EITC) Program Effectiveness and Program Management FY 1998-FY 2002*, Doc 2002-5236, 2002 TNT 41-12, 3-4 (Mar. 1, 2002) (detailing the IRS' compliance efforts including education, outreach, and civil and criminal penalties).

380. See 2003 Hearing, *supra* note 336, ¶¶ 41-51 (describing a significant EITC initiative including certification of EITC qualifying individuals); see also Book, *supra* note 323, at 1822-28 (critiquing the IRS's EITC verification initiative, including the certification process).

381. See Moss & Malin, *supra* note 30, at 209-15 (enumerating the limitations of lawsuits as an antidiscrimination tool including low odds for plaintiffs with disabilities, unavailability of compensatory and punitive damages, high cost of suing, and decreasing returns over time).

382. See Weber, *Law of Welfare*, *supra* note 3, at 918 (describing Martha Minow's work on inclusion, exclusion, and law).

modifying them to increase social choices and balance power among the persons involved.³⁸³ The certification requirement, if properly structured with input from people with disabilities, the IRS, and other relevant organizations, should assist in providing meaningful dollars for people with disabilities.³⁸⁴

The expanded EITC should mitigate the disincentives to work for people with disabilities and facilitate the realization of legitimate equality. The expanded EITC, the new disabled access credit and the redesigned WOC are part of a strategic plan to move people with disabilities into mainstream society. These three enabled tax provisions will impose societal costs and generate societal benefits.

V. THREE ENABLED TAX PROVISIONS: SOCIETAL BENEFITS VERSUS SOCIETAL COSTS

A. *Societal Benefits*

Society benefits if people with disabilities work. Society spends at least \$120 billion dollars in annual costs supporting individuals with disabilities.³⁸⁵ If people with disabilities work, studies show that taxpayer burdens are decreased and the national economy is enhanced.³⁸⁶ Increased employment translates into increased consumer spending and tax revenues.³⁸⁷ As one researcher noted:

383. *Id.* at 918 (citing sources that urge people with disabilities not to struggle for integration, but for power); see also Kearney, *supra* note 49, at 61 (applying the post-integrationist social relationship model to smoking bans in businesses and determining that the primary consideration would be the perspective of the person with the disability).

384. See Kearney, *supra* note 49, at 61 (illustrating how policy should be centered on providing money efficiently to the disabled).

385. See Stein, *supra* note 23, at 1676; President George H.W. Bush, *Remarks on Signing the Americans with Disabilities Act of 1990* (July 26, 1990) (noting that "when you add together Federal, State, local, and private funds, it costs almost \$200 billion annually to support Americans with disabilities—in effect, to keep them dependent"), available at <http://bushlibrary.tamu.edu/papers/1990/90072600.html>; *Background*, *supra* note 3 (asserting that direct government and private payment costs of supporting unemployed people with disabilities is estimated to be \$232 billion annually in addition to \$195 billion lost annually in earnings and taxes).

386. See, e.g., Stein, *supra* note 23, at 1676 & n.26 (citing surveys which found that for every disabled person hired in California, the taxpayers saved an average of \$629 per month and that the federal government saved almost \$2 million by employing 270 people with disabilities).

387. See Senator Tom Harkin, *The Americans with Disabilities Act: Four Years Later—Commentary on Blanck*, 79 IOWA L. REV. 935, 937 (1994) (noting that the benefits from increased employment of people with disabilities include reduced dependence on the Social Security system, increased spending on consumer goods, and increased tax revenues); see also THE NAT'L ORG. ON DISABILITY, ECONOMIC PARTICIPATION: SUCCESS STORIES: PUTTING LIFE'S LESSONS TO WORK: HIRING AND MANAGING PEOPLE WITH DISABILITIES (Aug. 13, 2001), at <http://www.nod.org/content.cfm?id=324> (on file

One report estimated that for every one million disabled people employed, there would be as much as a \$21.2 billion average increase in earned income, a \$2.1 billion decrease in means-tested cash income payments, a \$286 million annual decrease in the use of food stamps, a \$1.8 billion decrease in Supplemental Security Income payments, 284,000 fewer people using Medicaid and 166,000 fewer people using Medicare.³⁸⁸

An integrated workplace promotes innovation and efficiency.³⁸⁹ The accommodation of workers with disabilities benefits all members of society by providing progressive goods for public use and consumption.³⁹⁰ Efficiency-enhancing technologies developed for people with disabilities can be used by all employees to enhance the workplace experience and bottom line.³⁹¹

Society benefits from the employment of people with disabilities through economic benefits realized by tapping a vast, determined, and dedicated labor pool.³⁹² Quantitative data, surveys, and anecdotal accounts evidence that workers with disabilities have lower turnover and absenteeism rates, higher productivity, and greater dedication, resulting in economics savings in recruitment, training, and replacement expenses.³⁹³ Professor Peter Blanck describes additional

with the American University Law Review) [hereinafter NAT'L ORG. ON DISABILITY, PUTTING LIFE'S LESSONS TO WORK] (describing the \$796 billion in annual aggregate spending power of people with disabilities).

388. See Stein, *supra* note 23, at 1676 n.25 (citing Rutgers University economist Douglas Kruse).

389. See Moss & Malin, *supra* note 30, at 206, 233 (noting the collective societal enjoyment of such improvements spurred by workplace accommodations).

390. See, e.g., *id.* at 206 n.58 (noting that computer enhancements of voice-recognition and speech synthesis benefit disabled and non-disabled persons both in and out of the workplace).

391. See Stein, *supra* note 23, at 1675-76 (observing that efficiency-enhancing technologies have been shown to enable employees with and without disabilities to perform jobs productively, cost-effectively, and safely).

392. See Moss & Malin, *supra* note 30, at 233 (explaining that an integrated workforce should "lessen the bigoted tastes that impose inefficient inflexibility on employers' labor-market decisions"); see also Morin, *supra* note 22, at 212 (reporting from studies showing that "previously unemployed individuals with disabilities become among the most dedicated and conscientious employees," directly affecting business profitability by decreasing turnover costs); Stein, *supra* note 181, at 325-28 (describing the utilities of employing workers with disabilities).

393. See NAT'L ORG. ON DISABILITY, PUTTING LIFE'S LESSONS TO WORK, *supra* note 387 (recounting one manager's experience hiring and working with interns with disabilities); Stein, *supra* note 184, at 325-26 (reporting results of one study where "sixty percent of disabled workers remained with their job placement as opposed to only forty percent of abled-bodied workers, and that the average cost of each job turnover was \$2,800" and also citing several studies providing empirical evidence that corroborates that workers with disabilities have "absenteeism rates equal to or lower than their non-disabled peers"); THE NAT'L ORG. ON DISABILITY, THE TOP 10 REASONS TO HIRE PEOPLE WITH DISABILITIES (June 28, 2001) (stating one of the ten reasons to hire people with disabilities is that people with disabilities "have equal or higher job performance ratings, higher retention rates and lower absenteeism"), at

“ripple effects” providing substantial economic benefits, including reduced insurance claims, post-injury rehabilitation and workers’ compensation costs, enhanced corporate culture and injury prevention, and better identification of qualified candidates.³⁹⁴

Society benefits from valuing the identity achieved from productivity versus one achieved from “being excused from productivity.”³⁹⁵ When people with disabilities are in “a position to exercise all the responsibilities of citizenship;” “have a ‘right’ to work;” and “achieve dignity through labor and productivity,” society raises the collective good.³⁹⁶ Enabling work for people with disabilities will bring all members of society rich quantitative and qualitative rewards.

B. Societal Costs

The aggregate tax revenue costs to society of the three enabled tax provisions are considerable.³⁹⁷ The new disabled access credit would fully reimburse businesses for all of their ADA required accommodations through a refundable tax credit.³⁹⁸ While the effects of a publicly funded program are unpredictable, one proposal for full government funding of accommodations required under the ADA estimates that aggregate public outlays would range from \$1.1-\$2.2 billion.³⁹⁹ Interestingly, studies show that reasonable “accommodation costs are recurrently nonexistent, minimal, or even cost effective for the providing employers”⁴⁰⁰ and are no greater than

<http://www.nod.org/content.cfm?id=319> (on file with the American University Law Review); see also sources cited *supra* note 392 (enumerating some of the benefits of hiring individuals with disabilities); Blanck & Marti, *supra* note 43, at 376-80 (interpreting various studies as demonstrative of the benefits of employing individuals with disabilities); Stein, *supra* note 23, at 1675-76 (describing the benefits of workplace accommodations).

394. See Stein, *supra* note 23, at 1675-76 (examining the studies of Professor Peter Blanck, *inter alia*, listing these desirable consequences as emanating from accommodations); Stein, *supra* note 181, at 325-27 (citing the studies of Professor Blanck, *inter alia*, as attributing these positive external benefits to the implementation of accommodations); Tucker, *supra* note 10, at 930 (describing evidence supporting no increased costs of insurance or worker’s compensation after hiring workers with disabilities and that workers with disabilities were found to be better workers than workers without disabilities).

395. Stein, *supra* note 181, at 327.

396. *Id.*

397. See GAO TAX STUDY, *supra* note 3, at 28 (suggesting that expanding incentives to employ workers with disabilities will decrease tax revenues and increase potential misuse).

398. See *supra* Part III.B (describing the disabled tax credit).

399. See Moss & Malin, *supra* note 30, at 231-32 & n.217 (providing a detailed explanation of the cost estimates for a fully-funded accommodations program).

400. Stein, *supra* note 23, at 1674. See, e.g., *id.* at 1674-75 (citing the leading study results from Sears, Roebuck & Co. from 1978-97 as finding that nearly all

the costs of acclimating non-disabled workers.⁴⁰¹ Unfortunately, these studies may merely confirm pervasive employer discrimination against people with disabilities who require expensive accommodations.⁴⁰²

While no similar estimates exist for the redesigned WOC and it is generally impossible to estimate how many unemployed workers with disabilities would be hired; a two-year cost of employing eight million working-age unemployed people with disabilities—including wages and/or compliance with the certification and filing requirements of WOC⁴⁰³—may be in excess of \$64 billion.⁴⁰⁴ Even more challenging to estimate is the expanded EITC. If the expanded EITC benefits six

accommodations were at minimal average costs (from 1978-92 = \$121 and from 1993-96 = \$45) and seventy-two percent required no cost; seventeen percent were less than \$100; ten percent were less than \$500 and one percent required between \$500 and \$1000). "One federally funded agency found that for every dollar spent on accommodation, companies saved \$50, on average in net benefits. Thus, although more than one-half of accommodations cost less than \$500, in two-thirds of these cases, companies enjoyed net benefits exceeding \$5,000." *Id.* See also Tucker, *supra* note 10, at 930 (noting studies indicating low or no costs of accommodations). But see Bonnie O'Day, *Economics Versus Civil Rights*, 3 CORNELL J.L. & PUB. POL'Y 291, 299 (1994) (citing accommodations study demonstrating "that fourteen percent of accommodations cost more than \$2,000 and that one accommodation costs over \$18,000"). Persons with more severe disabilities may require more expensive accommodations, and the overall statistics may disguise this greater cost and discrimination that may result from it. *Id.* at 299-300.

401. Stein, *supra* note 23, at 1674; Tucker, *supra* note 10, at 930 (reporting that seventy-five percent of managers experienced average costs of employing a person with a disability to be approximately equal to the cost of hiring a person without a disability).

402. See O'Day, *supra* note 370, at 300 (asserting that accommodation costs are skewed by hiring persons who can easily be accommodated); Weber, *Law of Welfare*, *supra* note 3, at 907 (suggesting that low accommodation cost data may merely reflect that employers are not hiring individuals who require major accommodations); see also THE NAT'L ORG. ON DISABILITY, ECONOMIC PARTICIPATION: FACTS & STATISTICS, EMPLOYMENT RATES OF PEOPLE WITH DISABILITIES (July 24, 2001) (reporting that thirty-six percent of employed people with disabilities have experienced discrimination in the workplace, including denial of a job (fifty-one percent); denial of a workplace accommodation (forty percent); and refusal of a job interview (twenty-two percent)), at <http://www.nod.org/content.cfm?id=134> (on file with the American University Law Review).

403. When the ADA was being debated by Congress, the Senate Committee on Labor and Human Resources determined that "about 8.2 million people with disabilities want to work but cannot find a job." S. REP. NO. 101-16, at 107 (1989). Senator Bob Dole proposed to provide employment to eight million people with disabilities to increase employment for people with disabilities to the level of employment for people without disabilities by the year 2000. Dole, *supra* note 9, at 929-30. In accordance with this information, we will assume that eight million people with disabilities are newly employed.

404. If eight million workers with disabilities receive average qualifying wages of \$10,000 per year for at least two years and work at least 400 hours for each of the two years, their employer's WOC will be \$32 billion for each of the two years of their employment. However, some of these individuals may have been eligible for the WOC under the old system and, therefore, this estimate may include some costs that would have been incurred.

million workers with disabilities or approximately forty-five percent of the thirteen million workers with disabilities⁴⁰⁵ with an additional \$1,700 per year,⁴⁰⁶ the annual tax revenue cost would be approximately \$8.4 billion.⁴⁰⁷ In sum, using these admittedly rough estimates, the quantifiable annual estimated benefits of approximately \$44 billion should outweigh the quantifiable annual estimated costs of approximately \$43 billion of these enhanced tax provisions.⁴⁰⁸ Moreover, after the initial year of the disabled access credit and the first two years of the WOC, the costs of these credits for accommodations and new hires should decrease appreciably, generating potentially meaningful net cost savings.⁴⁰⁹

405. If we assume that of the eight million new working people with disabilities and the five million already working, approximately forty-five percent would have income levels that are EITC eligible. See Brian Balkovic, *Individual Income Tax Returns, Preliminary Data, 2001*, in I.R.S., STATISTICS OF INCOME BULLETIN, WINTER 2002-2003, 143, 146 (2001), available at <http://www.irs.gov/pub/irs-soi/01inprel.pdf> (last modified Apr. 2003) [hereinafter *Preliminary Data, 2001*] (placing the number of 2001 EITC tax returns at 19,810,008 as compared to 130,456,253 total tax returns filed (that is, fifteen percent) and multiplying such percentage by three (for three times more likely to live in poverty)); 2000 N.O.D./HARRIS SURVEY, *supra* note 6 (noting that people with disabilities are three times more likely to live in poverty than people without disabilities).

406. In 2001, the average EITC was about \$1,700. See *Preliminary Data, 2001*, *supra* note 405, at 146 (reporting approximately 19.8 million EITCs totaling approximately \$33.8 billion). Working individuals without children, however, would have received much smaller EITC refunds. The maximum amount available in 2001 to taxpayers with no qualifying children was \$364. *Id.* at 141. The average EITC to elderly or disabled was \$220 (about 141,000 EITCs totaling \$31 million). *Id.* at 145. A likely current average of approximately \$300 under the existing system would mean that the increase in cost would be approximately \$1,400 per working individual. See also Michael A. O'Connor, *Tax Preparation Services for Lower-Income Filers: A Glass Half Full, or Half Empty?*, 90 TAX NOTES 231, 234-35 (2001) (describing 1999 average EITC refund as \$1,655).

407. An average increase of \$1,400 in EITC refund multiplied by six million EITC recipients equals \$8,400,000,000.

408. The estimated costs for the new disabled access credit are approximately \$2 billion. The two-year WOC may cost approximately \$32 billion per year and the annual cost of the EITC would be an additional cost of approximately \$8.4 billion. Therefore, the total additional annual costs are approximately \$42.4 billion. The government's estimated cost savings of employing eight million people with disabilities are approximately \$44 billion per year (additional tax revenue on \$21.2 billion of income is approximately ten percent of one-half of such income or \$1.06 billion, plus \$2.1 billion reduced cash transfer payments, plus \$286 million in reduced food stamp costs, plus \$1.8 billion in reduced SSI, plus approximately \$225 million estimated for the reduced cost of Medicare and Medicaid for 450,000 people with disabilities (estimated at \$500 each), or approximately \$5.5 billion for every one million employed people with disabilities). These estimated cost savings are derived from estimates made by Douglas Kruse, a Rutgers University economist. See Stein, *supra* note 24, at 1676 n.25. Accordingly, the first year of employment would generate additional net savings of \$1.6 billion (\$44 billion of savings and \$42.4 billion in costs).

409. The second year of employment would generate a net savings of more than \$1.6 billion (\$44 billion in net savings of less than \$42.4 billion in costs (given the probable reduction in disabled access credit)). While after the initial two-year period

However, only government costs and benefits that could be roughly estimated are included in the analysis. In addition to the many benefits enumerated above that were not quantified and included in the cost-benefit formula, there are additional costs. In its report, the GAO noted concern about unintended consequences of increased benefits under the tax incentives it reviewed.⁴¹⁰ Specifically, the GAO noted that with increased tax benefits come the potential for increased taxpayer misuse and windfalls.⁴¹¹ Taxpayer windfalls arise when the government funds an activity that the parties would have engaged in anyway.⁴¹² Taxpayer misuse and windfalls are an inevitable cost of any benefit program.⁴¹³ Taxpayer misuse, including fraud, is discouraged in our tax system through penalties, civil and criminal, audits and litigation.⁴¹⁴ Because the proposed incentives are part of our tax system, these checks and balances would apply to any taxpayer misuse of the new and redesigned provisions.⁴¹⁵ Moreover, the proposed certification program implemented in the expanded EITC should minimize any EITC fraud.⁴¹⁶

Taxpayer windfalls, also called "buying the base," are inherent costs of any incentive program due to target inefficiency.⁴¹⁷ Rarely can programs be structured to target solely the activities that would not have occurred but for the incentive.⁴¹⁸ If the costs of a program, including taxpayer windfalls, outweigh the benefits, the program is

the WOC will generate some costs, it should be significantly less than \$40 billion per year. Therefore, the third and subsequent years should generate more significant net cost savings (\$44 billion in savings net of \$8.4 billion in enhanced EITC plus some amount of WOC).

410. GAO TAX STUDY, *supra* note 3, at 28-29.

411. *See id.* at 28 (specifically citing misuse of the disabled access credit and potential windfalls for employers benefiting from increased WOC on employees that they have already hired).

412. Moss & Malin, *supra* note 30, at 234.

413. *See* Book, *supra* note 323, at 1826 (discussing frustration with focus on taxpayer noncompliance at the risk of failure to deliver benefits to eligible low-income taxpayers); *see also* Moss & Malin, *supra* note 30, at 234-35 (noting the inevitability of two potential flaws in full funding of accommodations—fraud and "buying the base" (windfalls)).

414. *See, e.g.*, I.R.C. §§ 6651, 6663, 7201, 7206, 7207 (2003) (setting forth criminal and civil penalties for fraud and willful evasion of tax, imposing fines and imprisonment or both).

415. *See* Book, *supra* note 323, at 1826 ("[T]he tax system has traditionally been thought of as a place for rough justice, where precision is sacrificed for efficiency.").

416. For details about the expanded EITC proposals, *see supra* notes 388-91 and accompanying text.

417. *See* Moss & Malin, *supra* note 30, at 234-35; Jerry Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 232 (1994) (questioning whether full funding would actually encourage accommodation of employees with disabilities that would not have occurred without it).

418. Mashaw, *supra* note 429, at 232.

ineffective and should be modified or eliminated.⁴¹⁹ The GAO will evaluate the new and redesigned tax provisions on an ongoing basis; if the results of the GAO's study indicate that some or all of the provisions are ineffective, Congress must act to remedy the identified problems.⁴²⁰

CONCLUSION

The new disabled access credit, the redesigned WOC, and the expanded EITC are three pieces of a much greater strategic plan to enable work for people with disabilities. More than thirteen years after President Bush signed the ADA into law—promising equal opportunity, full participation, independent living, and economic self-sufficiency—people with disabilities are still waiting.⁴²¹ While there has been minimal systematic study of post-ADA employment, the news has not been good.⁴²² In fact, it is dismal. Studies evidence a significant decline in “the overall post-ADA employment rate of workers with disabilities relative to workers without disabilities.”⁴²³ As Senator Dole observed, “[s]omething is clearly wrong.”⁴²⁴

Labor Secretary Elaine Chao recently clarified the direction needed, stating: “All barriers, including those that are attitudinal, need to be eliminated to empower Americans with disabilities to become a greater part of the 21st Century workforce.”⁴²⁵ Systemic and ongoing research is needed to understand, identify, and remove barriers that keep people with disabilities out of mainstream employment and, consequently, many other aspects of life.⁴²⁶

419. *Id.*; see Moss & Malin, *supra* note 30, at 234-35 (suggesting that the flaws of accommodation funding may be mitigated through the use of criminal penalties).

420. See Dole, *supra* note 9, at 929 (commenting that “[i]f the federal government passed out a lot of medicine and few people became well, we might think new medicine was needed”).

421. See 42 U.S.C. § 12101(a)(8) (2000) (setting forth the mandate of equality for people with disabilities); see also Dole, *supra* note 9, at 926-27 (quoting poet Archibald MacLeish as stating that, “America was always promises”).

422. See Stein, *supra* note 23, at 1677-780 (presenting employment and wage effect studies); Weber, *Employment Policy*, *supra* note 3, at 128 & n.20 (stating that the 31% rate of employment for working-age people with disabilities has actually declined since 1986 and citing studies indicating decreases in same-sex study from 1991-93 from 34% to 30.2% for men, and from 25.9% to 23.6% for women).

423. Stein, *supra* note 23, at 1672-73.

424. Dole, *supra* note 9, at 929.

425. THE NAT'L ORG. ON DISABILITY, 2002 N.O.D. ANNUAL REPORT 7 (May 14, 2003), at <http://www.nod.org/pdffiles/2002annrpt.pdf> (on file with the American University Law Review) (quoting Labor Secretary Elaine Chao, Chair of the Presidential Task Force on the Employment of Adults with Disabilities).

426. See Stein, *supra* note 23, at 1684-87 (describing the need for more research, including greater qualitative and quantitative studies, to understand the disincentives that keep people with disabilities out of the workplace); see also Blanck & Marti, *supra*

Catalysts of change, including tax incentives to motivate employers to hire, accommodate, and retain people with disabilities and to encourage people with disabilities to seek work, should be analyzed, shaped, implemented, and reviewed. Congress and President George W. Bush should consider keeping America's promises to the fifty-four million Americans with disabilities⁴²⁷ and enact the new disabled access credit, the redesigned WOC and the expanded EITC. As we inch closer toward realizing the goal of equality for people with disabilities, we may find that America is not a land of empty promises, but rather the Promised Land.⁴²⁸

note 43, at 396-97 (summarizing the need for study of attitudes and behavior associated with Title I implementation and of long-term evaluation of the emerging disabled workforce).

427. See Dole, *supra* note 9, at 933 (commenting that "America's biggest promise—a job—is too often an empty promise to people with disabilities"); Eichhorn, *supra* note 4, at 1407 (quoting the promise President Bush made while signing the ADA "to open up all aspects of American life to individuals with disabilities").

428. The path to the Promised Land has been long-riddled with oppressive obstacles, but we can learn valuable lessons from those that have gone ahead. For a brilliant analysis of the oppression of people with disabilities and of African Americans, see Leonard Kriegle, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro*, 38 AM. SCHOLAR 412 (1969).

More than thirty-five years ago, before an impassioned crowd in Memphis, Tennessee, Dr. Martin Luther King, Jr. preached his vision of the Promised Land. On the day before he was assassinated, Dr. King observed that we were in the midst of a "human rights revolution, [and] if something isn't done and done in a hurry to bring the colored peoples of the world out of their long years of poverty, their long years of hurt and neglect, the whole world is doomed." A CALL TO CONSCIENCE, THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 209-10 (Clayborne Carson & Kris Shepard eds., 2001) (providing the complete speech from Dr. Martin Luther King, Jr., titled I've Been to the Mountaintop, on April 3, 1968).

But he proclaimed, "we don't have to live like we are forced to live." *Id.* at 210. Amidst relentless threats, oppression and violence, Martin Luther King, Jr., challenged his followers not to engage in negative protests or violence, but rather to impose a forceful, nonviolent economic strike. In return for their commitment, Dr. King gave this dispirited group hope, vision and a promise, proclaiming: "I've been to the mountaintop And I've looked over, and I've seen the Promised Land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the Promised Land." *Id.* at 222-23.