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NOT LIKE IT WAS IN THE OLD DAYS: IS THE AMERICANS WITH DISABILITIES ACT CHANGING THE FACE OF SPORTS AS WE KNOW IT?

I. INTRODUCTION

The Americans with Disabilities Act ("ADA")\(^1\) was enacted as "comprehensive legislation to ban discrimination against persons with disabilities."\(^2\) Upon the signing of the ADA, President George H. W. Bush made a statement rejecting claims that the ADA would cause "an explosion of litigation."\(^3\) To the contrary, there has been a significant amount of litigation concerning the potential reach of the ADA.\(^4\) In the sports arena, athletes have sought ADA protection for a variety of disabilities recognized under the Act, including learning disabilities, drug and alcohol use, infection with HIV, and mobility and health impairments.\(^5\)

In the notable case *PGA Tour, Inc. v. Martin*,\(^6\) a professional golfer, Casey Martin, was granted relief under the ADA.\(^7\) Martin sued PGA Tour, Inc. after it denied Martin’s request to use a golf cart in the third round of one of its qualifying events.\(^8\) The Su-

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2. Statement by President George Bush Upon Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), reprinted in 1990 U.S.C.C.A.N. 601 [hereinafter President’s Statement]. President Bush stated that the ADA "promises to open up all aspects of American life to individu-alis with disabilities—employment opportunities, government services, public accommodations, transportation, and telecommunications." Id.
3. See id. President Bush explained, "fears that the ADA... will lead to an explosion of litigation are misplaced." Id.
7. See id. at 690 (discussing Martin’s right to use golf cart in tournaments).
8. See id. at 668-69. Martin suffers from a degenerative circulatory disorder, Klippel-Trenaunay-Weber Syndrome, which causes him severe pain in his right leg when walking. See id. at 668. As a result, walking an eighteen-hole golf course puts Martin at great risk of hemorrhaging, developing blood clots and fracturing his tibia. See id. The progression of Martin’s disease prevented him from walking an
preme Court determined that golfers fell within the ambit of ADA protection. The Court further held that allowing Martin to use a golf cart would not “fundamentally alter the nature” of the PGA Tour’s Q-school and tournaments. In a lengthy dissent, Justice Scalia opined that the majority’s individualized inquiry would result in a multitude of litigation. He argued that the Court used the expansive purposes of the ADA to increase vastly and unjustly the coverage of Title III. Scalia also described the Court’s literal reading of the statute as distorted.

Since the Martin decision, athletes have filed a handful of ADA suits that have been decided at the district and appellate court levels. Additionally, Terry Glenn, former wide receiver for the New England Patriots, filed suit under the ADA against the National Football League (“NFL”), alleging discrimination in its substance abuse policy. Are Justice Scalia’s predictions being realized? Do these cases exemplify the inevitable inundation of litigation, resulting in ubiquitous change to sports rules?

entire eighteen-hole golf course by the end of his college career at Stanford University. See id. For a further discussion of Martin, see infra notes 79-102 and accompanying text.

9. See Martin, 532 U.S. at 680-81. Golfers participating in the PGA Tour’s Q-school and tournaments were found to be “clients or customers” within the meaning of the ADA. See id. at 680. Q-school is a three-stage qualifying tournament for the PGA Tour or the Nike Tour. See id. at 665. The Court stated that although the PGA Tour “identifies one set of clients or customers that it serves (spectators at tournaments),” it is not precluded “from having another set (players in tournaments) against whom it may not discriminate.” Id. at 680.

10. See id. at 683 (“We are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration.”).

11. See Martin, 532 U.S. at 702 (Scalia, J., dissenting) (noting majority guarantees future cases must be decided on individualized factual findings). For a further discussion of Justice Scalia’s criticism of the majority’s approach, see infra notes 97-102 and accompanying text.

12. See Martin, 532 U.S. at 692 (Scalia, J., dissenting).

13. See id. at 691. Justice Scalia stated, “[t]he judgment distorts the text of Title III, the structure of the ADA, and common sense.” Id. Justice Scalia later analogized the majority’s opinion to Alice in Wonderland and Animal Farm. See id. at 705. Scalia stated that complaints about the Martin decision should be aimed at the majority and:

[It] is Alice in Wonderland determination that there are such things as judicially determinable “essential” and “nonessential” rules of a made-up game; and its Animal Farm determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one’s lack of ability... will be a handicap.

Id.

14. For a further discussion of cases decided since Martin, see infra notes 103-27 and accompanying text.

15. See Nick Cafardo, Glenn Sues NFL, Charging Discrimination, BOSTON GLOBE, Jan. 31, 2002, at E11. For a further discussion of Terry Glenn’s suit against the NFL, see infra notes 167-72 and accompanying text.
This Comment begins with a basic overview of the ADA and the purposes behind its adoption. Part II discusses several cases that laid the foundation for Martin. An explanation of the Martin case then follows, including its analysis and application of the ADA. A discussion of decisions released since Martin concludes Part II. Finally, Parts III and IV analyze the potential effects of the Martin decision to increase litigation by athletes with disabilities under the ADA and to change the way sports are played in the United States.

II. BACKGROUND

A. The ADA: Its Provisions and Application

1. Purpose

The purpose of the ADA was to combat discriminatory treatment of disabled individuals. Congress intended to reverse the historical segregation and isolation of the disabled. Additionally, Congress sought to give disabled Americans full and equal opportu-

16. For an overview of the ADA, see infra notes 21-47 and accompanying text.
17. For a discussion of opinions issued before the Martin case, see infra notes 48-78 and accompanying text.
18. For a discussion of the Martin decision, see infra notes 79-102 and accompanying text.
19. For a discussion of opinions issued after the Martin decision, see infra notes 103-27 and accompanying text.
20. For a discussion of the potential impact of the Martin decision on future litigation and on athletic rules, see infra notes 128-78 and accompanying text.
22. See Parry, supra note 4, at 2-3 (citing congressional findings of isolated and segregated disabled individuals having no legal recourse in light of continuing discrimination). Congress had the following four basic purposes for enacting the ADA:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.
nities equivalent to their able-bodied counterparts. Underlying the ADA and other disability discrimination laws is thus a policy to integrate or "mainstream" individuals with disabilities. "Mainstreaming" connotes that the disabled should be allowed to participate in programs available to the public. To achieve these goals, the ADA provides protection from discrimination in areas of employment, public services, and public accommodations.

2. Definitional Section

A definitional section precedes Title I of the ADA, which defines the term "disability." A "disability" is: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." Certain specific conditions are excluded from the ADA's coverage, such as use of illegal drugs, homosexuality, and transvestism.


24. See Rothstein, supra note 5, at 404 (noting issue of "mainstreaming" often arises in cases under ADA).

25. See id. In a footnote, Rothstein noted that the ADA does not explicitly state "mainstreaming" as a purpose. See id. This purpose may be inferred from Congress's statements that the ADA was meant to eliminate segregation of disabled individuals from society. See id. at 404 n.22.


27. See 42 U.S.C. § 12102 (1994); see also Parent, supra note 23, at 128 (stating definitional section is most important and least controversial section of ADA).

28. 42 U.S.C. § 12102(2); Karl A. Menninger II, Employment Discrimination on the Basis of Mental Disability Under the Americans with Disabilities Act, 48 AM. JUR. 3d Proof of Facts 1, 11-12 (Mary G. Leary ed., 1998) (stating Congress decided not to list conditions that would qualify as disabilities). "Congress ... chose to focus on the effects of the condition, regardless of its name. In addition, the broad definition does not preclude conditions that may be discovered in the future." Id. at 12; see also Cook, supra note 26, at 245 (mentioning athlete must demonstrate he or she falls under ADA definition of "disabled" before athlete may bring suit).

29. See 42 U.S.C.A. § 12211 (1994); see also Menninger, supra note 28, at 12 (discussing conditions that are excluded from scope of ADA coverage). The ADA excludes sexual disorders, including "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism [and] gender identity disorders not resulting from physical impairments." 42 U.S.C. § 12211(b)(1). The ADA also excludes "compulsive gam-
Once an athlete determines that he or she fulfills one of these criteria for being disabled, he or she must decide under which of the ADA's titles to bring suit. A disabled athlete may bring a claim under Titles I, II, or III, although a majority of these claims are brought under Titles II and III. While the definitions of the language used in the ADA have been the subject of much litigation, this Comment provides only a brief overview of the functions of three of the five titles of the ADA.

3. **Title I: Employment**

Title I proscribes discriminating against "a qualified individual with a disability" on the basis of that person's disability in any aspect of employment. A "qualified individual with a disability" is defined as someone able to perform the essential functions of a position, whether or not provided a reasonable accommodation. Title I applies to all employers with fifteen or more employees, including state and local government entities and labor organizations. A covered employer must make reasonable accommodations for the limitations of an otherwise qualified individual, unless doing so would impose an undue hardship.

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30. See Cook, supra note 26, at 245 (discussing how drafters created distinct titles to combat discrimination in specific areas).

31. See id. (noting Titles II and III together "encompass nearly every public and private entity in the country"). For a discussion of the coverage of each respective title, see supra note 26.

32. See Parry, supra note 4, at 3 (noting different areas of employment covered under ADA); see also Deborah Zuckerman et al., The ADA And People With Mental Illness: A Resource Manual For Employers 16 (1993). This title covers all areas of employment including: "recruitment, application and interview procedures; medical examinations; hiring, training, promotion, transfer; assignments, classifications, position descriptions; compensation, leave, other benefits; layoff, recall, discharge; and employer-sponsored programs, including social and recreational activities." Id.; see also 42 U.S.C. § 12112 (1994).

33. See 42 U.S.C. § 12111(8); see also Parry, supra note 4, at 3 (discussing definition of disabled individual covered under Title I).

34. See Menninger, supra note 28, at 20 (noting further that ADA prohibits discrimination in all aspects of employment); see also Parry, supra note 4, at 3 (adding that both state and local governments are covered under Title II, regardless of employer's size).

35. See 42 U.S.C. § 12112(b)(5)(A) (1994). An employer must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee." Id.; see also Parry, supra note 4, at 3 (listing seven categories of prohibited discrimination enumerated in Title I).
4. \textit{Title II: Public Service}

Title II of the ADA prohibits discrimination by public entities in the distribution of beneficial services, programs, or activities of a public entity based on an individual's disability.\textsuperscript{36} A public entity is defined as "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government."\textsuperscript{37} To determine if an entity falls under the ADA definition of a public entity, courts focus on the "amount of authority delegated to the entity from the state."\textsuperscript{38} Similar to Title I, to make a claim under Title II, a person must fall under the definition of a "qualified individual."\textsuperscript{39} This is defined as a person who meets essential eligibility requirements for a particular public service, with or without reasonable accommodations.\textsuperscript{40}

5. \textit{Title III: Public Accommodations and Privately-Operated Services}

Congress promulgated Title III to prevent discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."\textsuperscript{41} Title III is applicable to essentially any private entity that engages in commerce between two states, or between a state and a foreign nation.\textsuperscript{42} Although Title III does not provide a definition of "public accommodation," it contains a non-exhaustive list of potential "public accommodations" to give guidance to private entities in interpreting this language.\textsuperscript{43} Some of the entities covered are "restaurants, stadium..."
ums, auditoriums, bakeries, laundromats, museums, parks, schools, gymnasiums and golf courses." If an entity is found to provide a public accommodation, the ADA requires that it make "reasonable modifications" for those with disabilities, similar to the requirement under Title I. To avoid liability, an employer must show that it could not make these modifications without "fundamentally altering" the nature of the public accommodation. Title III was the section of the ADA relevant in Martin, in which the Court discussed in detail the issue of fundamental alterations.

B. Cases Arising Under the ADA: Pre-Martin

1. Cases with Successful Plaintiffs

Since the enactment of the ADA in 1990 and before the landmark case Martin in 2001, there have been many student-athlete eligibility cases that illustrate the ADA's requirement of reason-

streaming effect of breadth of Title III coverage); Rothstein, supra note 5, at 402 (noting several sports and entertainment related activities are directly covered within twelve categories). "Title III is perhaps the most ambitious section of the ADA, granting rights to disabled customers who would not otherwise have been permitted to participate in many of the central activities of mainstream society." Parent, supra note 23, at 131. "The purpose behind Title III and its attendant regulations . . . is to facilitate the removal of physical, organizational, and attitudinal barriers from places of public accommodation and commercial facilities." Id. (citing 1 Henry H. Perritt, Jr., Americans with Disabilities Act Handbook 246 (3d. ed. 1997)).

44. 42 U.S.C. § 12181(7) (1994); see also Parent, supra note 23, at 131 (noting Congress's attempt to clarify meaning of "public accommodation" by providing list).

45. See 42 U.S.C. § 12182(b)(2)(A)(ii) (1994). An employer may be required to make reasonable modifications in policies, practices or procedures to meet this statutory requirement. See id.; see also Parry, supra note 4, at 5 (indicating "public accommodations must provide goods and services in the most integrated setting appropriate to each individual's needs"). Public accommodations must provide the opportunity for persons with disabilities to participate in regular programs, even if the entity offers programs specifically for disabled persons. See id. "A person with a disability must be free to choose which program or activity to participate in." Id.

46. See Cook, supra note 26, at 253 (noting burden shifts to defendant to establish that making modification would fundamentally alter nature of accommodation); see also 42 U.S.C. § 12182(b)(2)(A)(ii) (explicating that entity must show modification would "fundamentally alter nature of goods, services, facilities, privileges, advantages or accommodations" being offered).

47. See Parent, supra note 23, at 131. "Title III is the most pertinent section of the ADA in terms of the Martin case and the law's application to professional sports." Id. In Martin, the issue was the application of Title III of the ADA to the PGA Tour's tournaments and Q-school. See PGA Tour, Inc. v. Martin, 552 U.S. 661, 675-76 (2001). For a further discussion of Martin, see infra notes 79-102 and accompanying text.
able accommodations. This Comment discusses two such cases, which represent challenges to an age limit on eligibility and to the eight-semester rule.

In Dennin v. Connecticut Interscholastic Athletic Ass’n, a nineteen-year-old high school student with Down Syndrome challenged the Connecticut Interscholastic Athletic Conference (“CIAC”) over its eligibility rule prohibiting a student-athlete from competing in high school sports unless his or her nineteenth birthday was on or after September 1st. Dennin was a member of the swim team at Trumbull High School, a CIAC school. Dennin was in special education classes and spent four, rather than the standard three, years in middle school. He therefore turned nineteen before September 1st of the 1995 to 1996 school year and consequently was denied eligibility. Dennin requested a waiver of the CIAC age eligibility rule, but was denied. He was allowed to swim with his team at all regular season meets, but only as a non-scoring swimmer. 48


50. See id. at 666 (discussing several purposes behind eligibility rule as announced by CIAC).

51. See id. (recognizing that despite being slow, Dennin’s relay team sometimes scored points for team).

52. See id. (noting Dennin was eligible for special education pursuant to Individuals with Disabilities Education Act (“IDEA”)).

53. See id. The court found that Dennin was aware of his ineligibility, which affected his “self-esteem . . . and willingness to function in a community, most of whose members are not afflicted with his limitations.” Id.

54. See Dennin, 913 F. Supp. at 666.

55. See id. (noting Dennin and his relay team could not earn points for team at swim meets).
Dennin filed his claim under Titles II and III of the ADA.56 The district court held that the denial of the waiver by the CIAC violated the ADA because Dennin was a “qualified individual with a disability.”57 This meant that he could compete in swim meets with a reasonable accommodation, namely the waiver of the eligibility rule.58 Hence, the court held that waiver of the eligibility rule constituted a reasonable accommodation, allowing Dennin to compete as a scoring swimmer.59

In another case pre-dating Martin, Washington v. Indiana High School Athletic Ass’n,60 a student-athlete challenged the eight-semester rule, which limited athletic eligibility to the first eight semesters after the student began the ninth grade.61 Washington, a student basketball player, was held back in the eighth grade and eventually

56. See id. at 670. Dennin also instituted suit under the Rehabilitation Act, 29 U.S.C. § 794 (1976). See id. at 667. The failure to waive the eligibility requirement was found to violate the Rehabilitation Act as well as the ADA. See id. at 671.

57. See id. at 670-71. The court stated that because Dennin was found to fall within the “otherwise qualified” definition of the Rehabilitation Act, he satisfied the element of “qualified individual with a disability” under Title II of the ADA. See id. at 671. This finding also satisfied the requirement under Title III that Dennin must have been denied the opportunity to participate solely because of his disability. See id. But cf. Sandison v. Mich. High Sch. Athletic Ass’n, 64 F.3d 1026, 1033 (6th Cir. 1995) (holding age limit for eligibility does not exclude students solely based on disability). See generally Adam A. Milani, Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports, 49 ALA. L. REV. 817, 859 (1998) (noting split in case law on whether neutral age limit rules can be held discriminatory). “This second line of cases [holding that neutral rules are discriminatory towards student-athletes], best exemplified by Dennin, is better reasoned and more in line with the purposes of the ADA . . . .” Id. “[The ADA] prohibit[s] rules which screen out or 'tend to screen out' persons with disabilities.” Id. (citing 42 U.S.C. § 12182(A) (1994)).

58. See Dennin, 913 F. Supp. at 670; see also Cook, supra note 26, at 251 (noting Dennin holding that waiver of age requirement would not undermine any of purposes of association’s rules).

59. See Dennin, 913 F. Supp. at 671. The court required waiver of the rule for Dennin to allow him to compete and score points for his team during the athletic season. See id.; see also Bingham v. Or. Sch. Activities Ass’n, 37 F. Supp. 2d 1189, 1205-06 (D. Or. 1999) (holding waiver of eight-semester rule was reasonable accommodation for learning disability), vacated as moot, No. 99-53366, 2001 WL 1217701 (9th Cir. Oct. 10, 2001); Johnson v. Fla. High Sch. Activities Ass’n, 899 F. Supp. 579, 586 (M.D. Fla. 1995) (holding age-requirement did not fundamentally alter nature of program, so waiver was reasonable accommodation), vacated as moot, 102 F.3d 1172 (11th Cir. 1997); Michael G. Hypes et al., Athletic Eligibility and the Americans with Disabilities Act, 73 J. PHYSICAL EDUC., RECREATION & DANCE 11, 11-14 (2002). For a further discussion of the eight-semester rule, see infra note 61 and accompanying text.

60. 181 F.3d 840 (7th Cir. 1999).

61. See id. at 842 (indicating eight-semester rule implemented to promote academics over athletics).
dropped out of school at the beginning of the eleventh grade. He re-entered school at a different high school, Central Catholic, and began playing basketball for the school. It was during his first year at this high school that he was diagnosed as learning disabled. A year and a half after Washington entered Central Catholic, his eligibility to play basketball lapsed because he had started the ninth grade eight-semesters before. Central Catholic applied to the Indiana High School Athletic Association ("IHSAA") for a waiver of the rule on behalf of Washington, but IHSAA denied both the waiver and the appeal. Washington subsequently sued IHSAA under Title II of the ADA.

The Seventh Circuit found that waiver of the eight-semester rule for Washington would not fundamentally alter the rule. Permitting Washington to count only those semesters in which he was enrolled in school towards his eligibility would not frustrate the

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62. See id. Washington constantly received failing grades and was told by a school counselor to drop out. See id. He decided to re-enter school at Central Catholic High School after playing in a three-on-three basketball tournament sponsored by the school. See id.
63. See id. The coach of the Central Catholic basketball team convinced Washington to return to high school. See id.
64. See id. Washington had been tested previously for a learning disability but was found not to have one. See id.
65. See Washington, 181 F.3d at 842.
66. See id. at 842-43 (discussing Central Catholic's request inter alia that association not consider semesters Washington was absent from school). The Seventh Circuit noted that the IHSAA had granted waivers for physical injuries in the past, which was another of the stated reasons for a waiver in Central Catholic's request. See id. at 843.
67. See id. at 843.
68. See id. at 852 (affirming district court's findings). The Seventh Circuit noted that the athletic association had granted waivers of the eight-semester rule in the past, thereby showing that a waiver in this situation would not fundamentally alter the rule. See id.
rule’s purposes. Therefore, the waiver was held to be a reasonable accommodation.

2. Cases with Unsuccessful Plaintiffs

Conversely, there have been cases predating Martin in which plaintiffs have been unsuccessful in claims brought under the ADA. One such case is Sandison v. Michigan High School Athletic Ass’n, in which the Sixth Circuit rejected a challenge to an age limit on athletic eligibility by two learning disabled students. Both students had fallen behind the school grade for most students of their age group because of their learning disabilities. The Michigan High School Athletic Association (“MHSAA”) imposed an age limit on athletic eligibility, prohibiting students from competing if they turned nineteen before September 1st of the school year during which they sought eligibility. The MHSAA’s rules did not permit waiver of this age limit, and as a result, both students sued under the ADA. The Sixth Circuit found that the MHSAA was not ex-
cluding these students from participation in sports solely by reason of disability. Additionally, the court held that waiver of this age limit would fundamentally alter the sports program. Therefore, the court concluded that the plaintiffs were unlikely to prevail on their discrimination claims under the ADA.

C. PGA Tour, Inc. v. Martin

The above cases exemplify the role the ADA played in litigation concerning high school and collegiate athletics previous to the landmark decision of PGA Tour, Inc. v. Martin in 2001. In that case, the Supreme Court effectively held that the ADA required the PGA Tour to allow Casey Martin to use a golf cart during its tournaments and qualifying rounds ("Q-school").

Casey Martin is a talented golfer suffering from a degenerative circulatory disorder, Klippel-Trenaunay-Weber Syndrome, which obstructs the backflow of blood from Martin’s right leg to his

76. See id. at 1031. The court held that "plaintiffs' respective learning disability [did] not prevent the two students from meeting the age requirement; the passage of time [did]." Id. at 1033. "[T]he plaintiffs [could not] meet the age requirement solely by reason of their dates of birth, not solely by reason of disability." Id. (internal quotations omitted); see also Larochelle, supra note 70, at 309 (discussing exclusion "solely by disability" requirement in context of Rehabilitation Act, though requirement is same under Title II of ADA).

77. See Sandison, 64 F.3d at 1035. The court explained its holding by saying: Due to the usual ages of first-year high school students, high school sports programs generally involve competitors between fourteen and eighteen years of age. Removing the age restriction injects into competition students older than the vast majority of other students, and . . . older students are generally more physically mature than younger students. Expanding the sports program to include older students works a fundamental alteration.

Id. The court also held that waiver of the age limit would place an undue burden on coaches and physicians to determine on an individual basis whether a student over the age of nineteen truly had a competitive advantage that would fundamentally alter the program. See id.; Cook, supra note 26, at 249 (explaining Sandison holding that waiver would require coaches to make unfairness determination regarding athletes); see also Frye v. Mich. High Sch. Athletic Ass'n, No. 95-1266, 1997 WL 441805, at *3 (6th Cir. Aug. 5, 1997) (holding McPherson v. Mich. High Sch. Athletic Ass'n dispositive); McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 462 (6th Cir. 1997) (finding Sandison holding dispositive in instant case). The Sixth Circuit in McPherson found that a waiver of an eight-semester rule would be a fundamental alteration of a high school sports program. See id. at 462. For a discussion of a case holding that waiver of the eight-semester rule was not a fundamental alteration of a sports program, see supra notes 60-70 and accompanying text.

78. See Sandison, 64 F.3d at 1035 (upholding age limit on athletic eligibility).
80. See id. at 690. For an explanation of Q-school, see supra note 9.
heart. When Martin became a professional golfer and entered the PGA Tour's Q-school, he was presented with a specific set of rules that applied only to the Q-school. These rules (“Conditions of Competition and Local Rules,” also known as “hard card”) permitted use of golf carts during the first two of the qualifying rounds, but required walking the third. Martin requested a waiver of the “walking rule” for the third round of Q-school because of his degenerative condition, but the PGA Tour subsequently denied it. Consequently, Martin filed suit against the PGA Tour for disallowing him use of a golf cart, alleging violation of the ADA.

The district court found that allowing Martin to use a golf cart would be a reasonable modification. The Ninth Circuit affirmed this holding, declaring that allowing Martin the use of a golf cart would not fundamentally alter the game of golf. After hearing the case to resolve the conflict between the Ninth and Seventh Circuits, the Supreme Court agreed with the Ninth Circuit.

81. See id. at 668. The disease is progressive and causes severe pain in Martin’s right leg. See id. Toward the end of Martin’s college career, he became unable to walk an entire eighteen-hole golf course due to the pain. See id. Walking long distances produced a “significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation [may] be required.” Id.

82. See id. at 669.

83. See id. at 666-67. The “hard card” for the PGA Tour and the Nike Tour requires golfers to walk the course during tournaments, but not during open qualifying rounds, which are held one week before each tournament. See id.

84. See Martin, 532 U.S. at 669. Martin provided medical records along with his request for waiver of the walking rule. See id. The PGA Tour declined to look at the medical records in its denial of a waiver for Martin. See id.

85. See id. Martin sued under Title III of the ADA. See id. at 676.

86. See id. at 690. The district court stated, “it would not fundamentally alter the nature of the PGA Tour’s game to accommodate [Martin] with a cart.” Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1252 (D. Or. 1998); see also Cook, supra note 26, at 263 (discussing reasoning behind district court holding). “[T]he court explained that when the severity of Martin’s disability is taken into consideration, walking any amount of distance, even from a cart to a ball, causes him to endure greater fatigue than a normal person.” Id. “[T]he real fatigue that PGA golfers battle is not walking eighteen holes, but rather the mental aspect of playing the game of golf.” Id. (citing PGA Tour, 994 F. Supp. at 1251).

87. See Martin v. PGA Tour, Inc., 204 F.3d 994, 1001 (9th Cir. 2000). “All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability.” Id. at 1000.

88. See Martin, 532 U.S. at 690. In Olinger v. United States Golf Ass’n, the Seventh Circuit held that allowing Olinger to ride in a golf cart during the United States Open qualifying rounds would fundamentally alter the nature of the competitions, and therefore was not a reasonable accommodation under the ADA. See Olinger, 205 F.3d 1001, 1006-07 (7th Cir. 2000); see also Steven A. Holzbaur, Note, Driving into the Rough: Conflicting Decisions on the Rights of Disabled Golfers in Martin v. PGA Tour, Inc. and Olinger v. United States Golf Ass’n, 46 VILL. L. REV. 171, 173 (2001) (discussing conflicting holdings in Seventh and Ninth Circuits).
The Court stated that requiring the PGA Tour to allow Martin to use a cart could constitute a fundamental alteration to the nature of the tournaments and qualifying rounds in two ways.\(^8\) The requirement would be a fundamental alteration within the meaning of the ADA if it altered "an essential aspect of the game of golf [to the point] that it would be unacceptable even if it affected all competitors equally."\(^9\) Alternatively, a fundamental alteration could result from a "less significant change that has only a peripheral impact on the game itself" if it gave the disabled player an advantage over other competitors.\(^9\) Despite these possibilities, the Court ruled in favor of Martin, stating, "[w]e are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration" in either of the aforementioned ways.\(^9\) In addition, the Court found that walking was not an essential aspect of the game of golf.\(^9\) In response to the PGA Tour’s argument that walking "inject[s] the element of fatigue into the skill of shotmaking," the Supreme Court found that Martin suffered much more fatigue using a golf cart than normal golfers do without such use.\(^9\) This rationale also demonstrated why Martin’s use of a golf cart would not give him a competitive advantage over other golfers.\(^9\)

Notwithstanding the administrative burden imposed by its holding, the Court held that the ADA required an individualized inquiry into whether a reasonable modification could be made for

89. See Martin, 532 U.S. at 682. The Court noted that Title III of the ADA requires three inquiries: "whether the requested modification is reasonable, whether it is necessary for the disabled individual, and whether it would fundamentally alter the nature of the competition." Id. at 683 n.38 (internal quotations omitted) (emphasis added).

90. Id. at 682. The Court provided as an example of this type of a fundamental alteration the changing of the diameter of the hole from three to six inches. See id.

91. Id. at 682-83. Despite having a slight effect on the game itself, an advantage given to the disabled player would change the nature of the competition itself. See id.

92. Id. at 683 (noting modification sought by petitioner was reasonable and necessary).

93. See id. at 685. The Court described the essence of golf as "shot-making – using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible." Id. at 683. The walking rule was found to be non-essential in the PGA Tour’s tournaments, as they are allowed in the first two stages of the qualifying round, and also in the Senior PGA Tour events, which is limited to golfers over the age of fifty. See id. at 685.

94. Martin, 532 U.S. at 690. Additionally, in countering the fatigue argument by the PGA Tour, the Court proposed, "golf is a low intensity activity[;] fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients." Id. at 687.

95. See id. at 690 (explaining purpose of walking rule to "subject players to fatigue" would not be compromised by allowing Martin to use golf cart).
each disabled athlete. In his dissent, Justice Scalia argued that the administrative burden should not be dismissed as negligible. Scalia was concerned because the majority's two-part analysis was not a part of the statute, and necessarily would require a case-by-case inquiry. With respect to the second part of the test (whether the requested modification would give the disabled athlete a competitive advantage), Scalia said, "the Court guarantees that future cases of this sort will have to be decided on the basis of individualized factual findings." Scalia predicted that as a result, cases similar to Martin's "will be numerous, and a rich source of lucrative litigation." Furthermore, Scalia criticized the first part of the majority's test, claiming it inappropriate for the Supreme Court to decide what is and what is not essential to the game of golf.

96. See id. at 690-91. The Court related that:

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

97. See id. at 702-03 (Scalia, J., dissenting) (discussing ramifications of majority opinion).

98. See id. at 699-703. For a discussion on the two-part test announced by the majority used to determine whether a modification creates a fundamental alteration, see supra notes 89-91 and accompanying text. For a discussion of Scalia's criticism of the first part of the majority's test, see infra note 101-02 and accompanying text.

99. Martin, 532 U.S. at 702 (Scalia, J., dissenting). Scalia further remarked that the statute does not support the majority's requirement of an individualized inquiry. See id. at 703. "The statute seeks to assure that a disabled person's disability will not deny him equal access to . . . competitive sporting events - not that his disability will not deny him an equal chance to win competitive sporting events." Id. "The latter is quite impossible, since the very nature of [a] competitive sport is the measurement, by uniform rules, of unevenly distributed excellence." Id. Scalia predicted the majority's "even[ing] out" effect would "destroy the game." See id.

100. Id. at 702-03 (providing example of parents of little league player trying to convince judge that son's attention deficit disorder makes it twenty-five percent more difficult to hit pitched ball).

101. See id. at 700. Scalia refuted the first part of the majority's analysis, involving the question of whether an essential aspect of the game had been altered due to the modification. See id. He explained that it was for the PGA Tour to decide its own rules, and in this case, the entity had decided to mandate walking as one of the requirements of its tournaments and qualifying rounds. See id. "[T]here is no basis on which anyone - not even the Supreme Court of the United States - can pronounce one or another of [the rules] to be nonessential if the rulemaker deems it to be essential." Id. (internal quotations omitted). Scalia then assumed that it was necessary for the Court to review what was and was not essential to the game of golf. See id. He named this inquiry an "awesome responsibility." See id. "It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power
brazen fashion, the Justice declared that all rules are essentially arbitrary, and that their only support is from the ruling body that has implemented them.102

D. Cases Since Martin

Since the announcement of the two-part analysis in Martin and Justice Scalia’s adamant criticism of it, there have been several cases involving athletes’ suing under the ADA.103 These cases suggest that Martin will have a litigious effect on disabled athletes, as prophesied in Justice Scalia’s dissent.104

In Cruz v. Pennsylvania Interscholastic Athletic Ass’n,105 a nineteen-year-old special education student challenged an age limit on athletic eligibility.106 The age limit deemed students ineligible to participate in sports if they reached the age of nineteen before July 1st of the school year for which they sought eligibility.107 Luis Cruz was a learning disabled, special education student and was not enrolled in a specific grade.108 He had played several high school sports until his high school, Ridley High, realized that he exceeded
the PIAA's age limit. Ridley requested a waiver of the age limit, which PIAA unanimously rejected. Cruz subsequently brought suit against PIAA under Title II of the ADA. The district court found that waiver of the age limit for Cruz would not work a fundamental alteration to either football or track. Moreover, the court dismissed PIAA's concerns about the administrative burden of conducting individualized inquiries for requested waivers. The court held that PIAA must implement a process to consider Cruz's application for waiver of the age limit to allow his participation in football and track. Most notably, the court did not require PIAA to

109. See id. at 489. Cruz played football, wrestled, and ran track. See id. at 491. Cruz turned nineteen exactly twenty-eight days before the July 1st deadline. See id. at 489.

110. See id. (indicating PIAA notified Ridley High School of its decision next day).

111. See id. at 489 (stating Cruz also sought preliminary injunction to enjoin PIAA from enforcing age limit against him).

112. See id. at 499 (noting individualized basis for inquiry of whether waiver would be fundamental alteration). The court cited the three-part inquiry mandated by Title III of the ADA, as set forth by the Supreme Court in Martin. See id. The court held the same inquiry should be applied in the instant case, despite being brought under Title II. See id. Applying the Martin three-part inquiry, the court found that modification of the age rule was necessary for Cruz to be able to play football and run track, and that modification would not fundamentally alter the nature of the competition in either of these sports. See id. These are the second and third parts, respectively. See id. In deciding whether a modification would be reasonable (the first part of the inquiry), the court found that it must determine whether the modification was essential to the sport. See id. The court decided that a rule was essential if its waiver would fundamentally alter the nature of the sport. See id. The waiver was held not to be a fundamental alteration of football or track, but the court left undecided the question of whether the same could be said of wrestling. See id. The court found that Cruz may have had a competitive advantage in wrestling based on his outstanding dual meet record. See id. at 493. Competitive advantage was the second factor listed in Martin, which in fact, if present, would fundamentally alter the nature of a sport. See PGA Tour, Inc. v. Martin, 552 U.S. 661, 682-83 (2001). For a further discussion of the three-part inquiry discussed in Martin, see supra note 89. For a further discussion of the two-prong, fundamental alteration test in Martin, see supra notes 89-91 and accompanying text.

113. See Cruz, 157 F. Supp. 2d at 500. The court noted that consideration of the administrative burden was a factor in deciding whether a modification would be reasonable within the meaning of Title II. See id. at 499. PIAA complained of the hardship of having to access individually whether granting a waiver would fundamentally alter the nature of the sport. See id. It was argued that the inquiry would involve "complex fact-finding as well as extremely difficult judgments." Id. The court rejected these contentions and pointed to several other waiver systems that PIAA had in place, namely transfer and eight-semester rule waivers. See id. at 500. Additionally, the court stated, "[t]he statistics to date suggest that there may not be many occasions for the age waiver to be requested." Id. The court concluded by finding that the waiver process would not place an undue burden on PIAA. See id.

114. See id. at 500 (stating age limit could not be applied to Cruz without individualized inquiry).
permit Cruz to participate in the athletic season; instead, it mandated an individual inquiry of Cruz's waiver applications.\textsuperscript{115}

In contrast, in \textit{Kuketz v. MDC Fitness Corporation},\textsuperscript{116} a state court rejected a similar challenge under Title III by a racquetball player in a wheelchair.\textsuperscript{117} Stephen Kuketz, a paraplegic, was a nationally ranked wheelchair racquetball player.\textsuperscript{118} He joined Brockton Athletic Club ("Club") and subsequently requested to play in the Men's "A" Level Tournament League.\textsuperscript{119} He asserted that he should be allowed two bounces to hit the ball, as opposed to one bounce allowed footed players.\textsuperscript{120} The Club disallowed him to play in the league, suggesting that he play in a novice league with footed players, or that the Club would set up a wheelchair league for him and others who were interested.\textsuperscript{121} Kuketz refused to accept these substitutes and filed suit under Title III of the ADA, alleging his request would not fundamentally alter the nature of the sport.\textsuperscript{122}

The Massachusetts Superior Court found that allowing Kuketz to play in the league under his requested conditions would work a fundamental alteration to the nature of racquetball competition.\textsuperscript{123} In applying the \textit{Martin} two-prong test for determining fundamental alterations, the court found that hitting the ball before the second bounce was essential to racquetball.\textsuperscript{124} Furthermore, the court stated that a two-bounce allowance might give Kuketz a competitive advantage.

\begin{itemize}
\item \textsuperscript{115} See id. It was ordered that PIAA must not apply the age limit to Cruz, unless decided through a waiver rule that allows for individual consideration of his waiver applications. See id. Furthermore, the court found that if Cruz's application was not considered on an individual basis, he would automatically be eligible for the upcoming school year. See id. at 500-01.
\item \textsuperscript{117} See id. at *4 (holding two bounces for wheelchair racquetball player would constitute fundamental alteration of competition).
\item \textsuperscript{118} See id. at *1. Kuketz had been in a wheelchair since 1991. See id. He became a nationally ranked player in 1995 after winning a sufficient number of tournaments. See id.
\item \textsuperscript{119} See id. (indicating "A" League was competition among Club's finest footed racquetball players).
\item \textsuperscript{120} See id.
\item \textsuperscript{121} See id. at *1 (stating manager of Club told Kuketz she would set up wheelchair league if he could find other wheelchair players to play in league).
\item \textsuperscript{122} See id. (alleging in complaint Club discriminated against him because of his disability). The court explained that Kuketz was in effect making two requests: "(1) he need[ed] to play in a wheelchair, rather than on foot; and (2) he need[ed] to be given two bounces rather than one." Id. at *2.
\item \textsuperscript{123} See id. at *3. The court compared the use of a golf cart by Casey Martin, which was not a fundamental alteration, to that of a wheelchair player being allowed two bounces in racquetball. See id.
\item \textsuperscript{124} See id. The court explained that while the essence of golf was hitting the ball, the essence of racquetball was hitting a moving ball before the second
\end{itemize}
advantage over the footed players.125 Interestingly, the court described what the world would be like if it interpreted the ADA as Kuketz requested.126 This slippery slope argument envisioning all the changes that could occur in the sporting world under the ADA is reminiscent of Scalia’s dissenting opinion addressing the far-reaching effects of cases like Martin.127

III. Analysis

A. Will the Decision in Martin Change the Face of Sports As We Know It?

1. Changing The Rules

Justice Scalia harshly criticized the two-prong, fundamental alteration test announced by the Martin majority.128 With respect to the first prong (whether the modification would alter an essential aspect of the sport), Scalia was vehement in his opposition to judicial discretion in determining what is essential to sports.129 All rules were arbitrary, according to Scalia, and it was for the entity to decide its rules.130 Scalia went so far as to exude sarcasm, saying

bounce. See id. Hence, allowing two bounces would fundamentally alter the essential nature of the game. See id.

125. See id. "It is impossible to determine whether the second bounce exactly offsets [the] disadvantage [of being in a wheelchair] or leaves [Kuketz] with a slight advantage." Id.

126. See Kuketz, 2001 WL 993565, at *4 (discussing changes that would be mandated in baseball, golf, and basketball). "The law permits leagues and clubs to organize baseball, golf and basketball leagues that play their respective games in accordance with the game’s official rules without running afoul of the ADA." Id.

127. See id.; John W. Parry, Supreme Court Rules in Martin, Penry, and Buckhannon Cases, 25 MENTAL & PHYSICAL DISABILITY L. REP. 517, 517 (2001). "The two [Martin] dissenters [Scalia and Thomas], however, took the court's little step approach . . . predicting the metaphorical end of civilization. As in Animal Farm . . . society will be forced to retrofit all activities and functions to guarantee that 'no one's lack of ability . . . will be a handicap.'" Id. (quoting Scalia's dissent in Martin, 532 U.S. 661, 705 (2001) (internal quotations omitted)); see also Andrew I. Warden, Comment, Driving the Green: The Impact of PGA Tour, Inc. v. Martin on Disabled Athletes and the Future of Competitive Sports, 80 N.C. L. REV. 643, 646 (2002) (stating "critics have opined that the sky is falling because Martin represents the end of equality and uniformity in sports" (internal quotations omitted)).


129. See id. at 700. Scalia discussed how there is no requirement for the PGA Tour to play a "classic, essential" form of golf. See id. at 699. It was free to make up its own rules based on how it decided the game should be played. See id. at 699-700. "If members of the public do not like the . . . rules - if they feel that these rules do not truly test the individual's skill at real golf they can withdraw their patronage." Id. at 700 (internal quotations omitted).

130. See id. (noting "the rules are the rules" and it was for rulemaker to decide them based on what it determined essential); see also Parent, supra note 23, at 140.
that the Supreme Court had been presented with the "awesome responsibility" of deciding "What Is Golf." 131 Scalia dispensed with this notion by calling it "unprincipled" and therefore unhelpful and non-dispositive to future cases. 132 Regarding the second prong of the test (whether the modification would give a specific athlete a competitive advantage), Scalia believed it necessarily would require every case to become an "individualized inquiry." 133 Most likely, making individualized determinations as to each disabled athlete would result in individualized exceptions to all rules of competitive sports. 134 Furthermore, this step would create the appearance that the ADA required disabled individuals to be given an "equal chance to win competitive sporting events," rather than the true requirement of "equal access" to these events. 135 Yet, competitive sports are supposed to measure the "unevenly distributed excellence" of athletes. 136 The evening-out of this natural distribution through the grant of reasonable modifications would result in the destruction of the entire concept (arguing deference should be given to employer, membership organization, or professional body in their determinations of standards and rules since they are experts in their particular fields, and know necessary standards required for successful completion of event or job).

131. See Martin, 532 U.S. at 700 (Scalia, J., dissenting). Scalia regarded the case as presenting the "age-old jurisprudential question, for which . . . years of study in the law have so well prepared [the Justices]: Is someone riding around a golf course from shot to shot really a golfer?" Id.

132. See id. at 702. For a further discussion of the first prong of the majority's test, see supra notes 90, 101-02 and accompanying text.

133. See Martin, 532 U.S. at 702 (Scalia, J., dissenting) (calling second prong "most expansive and destructive feature" of majority opinion). For a further discussion of the second prong of the majority's test and Scalia's criticism of this prong, see supra notes 91, 99-100 and accompanying text.

134. See Warden, supra note 127, at 686 (denoting individualized exceptions to rules provokes most common criticism of Martin decision); see also Kelly Collier Cleland, Sports and the ADA After PGA Tour v. Martin, 89 ILL. B.J. 480, 484 (2001) (discussing how courts will have to decide where to draw line on reasonable modifications and how varied competitive rules will be modified).

135. See Martin, 532 U.S. at 709 (Scalia, J., dissenting) (stating statute requires only equal access to play in sports); see also Parent, supra note 29, at 143 (discussing decision of Magistrate Judge Coffin, Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998)). "Coffin's holdings in Martin have helped water down the intent of the ADA, which was to ensure that disabled Americans receive basic opportunities." Id. Being able to pursue the game of golf recreationally or professionally is something that certainly should be guaranteed to everyone. See id. In reality, though, playing on the PGA Tour is a privilege, and should be given only to those who can meet its qualifications. See id.

136. See Martin, 532 U.S. at 703 (Scalia, J., dissenting) (explaining how "handicaps" used in social games of golf, which even out varying abilities, are not used in professional golf).
of competitive games. Tim Finchem, the PGA Tour Commissioner agreed, stating, "[w]hen you change the rule for one player in an athletic sport, you are inherently changing the landscape of that sport." Thus, Scalia predicted, the doomsday of sports is upon us now that courts are equipped with the power to equalize competition between the non-disabled and disabled athletes.

In *Kuketz*, the court also found that exceptions and alterations to the Official Rules of Racquetball would be fundamental. The ADA did not require the court to depart from the Official Rules to permit a wheelchair racquetball player two bounces because to do so would alter the nature of the racquetball competition. The Club in that case offered to establish a separate league with a two-bounce rule, but the court concluded that the ADA did not mandate that either. The court forecasted how various sports would be modified forever if the ADA required, according to Kuketz's interpretation, alteration of competitive rules whenever a disabled athlete wished to participate. For example, "[i]n baseball, if a hitter in a wheelchair came to a plate, the ADA would require first base to be moved closer to home plate so that the hitter could..."

137. See id. (noting judicial evening-out of God-given gifts was not intent of Congress). Decisions like *Martin* "distort the competition" in such a way that people who were previously deemed unqualified are now able to participate. See Parent, *supra* note 23, at 145. Thus the standards that once defined the game itself are compromised as to certain disabled individuals. See id.

138. Parent, *supra* note 23, at 142 (quoting Tim Finchem from remarks made at press conference). Finchem further stated, "[i]f there is anything fundamental about athletic sport it is that you have the same rules for all competitors." Id.

139. See *Martin*, 532 U.S. at 705 (Scalia, J., dissenting). Scalia stated that the majority essentially held that "fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one's lack of ability will be a handicap." Id.

140. See *Kuketz* v. MDC Fitness Corp., No. CIV.A. 98-0114-A, 2001 WL 993565, at *3 (Mass. Super. Aug. 17, 2001). The Official Rules of Racquetball were modified to include separate rules for wheelchair racquetball. See id. These rules were meant to apply only where all players were in wheelchairs. See id. Thus, allowing two bounces for wheelchair players, while other players were on foot, would work a variation to the Official Rules. See id.

141. See id. For a further discussion of *Kuketz*, see *supra* notes 117-27 and accompanying text.

142. See *Kuketz*, 2001 WL 993565, at *3 (stating club is free to establish wheelchair racquetball league but not required to do so under ADA). The court stated, "[i]t may be terrific for leagues and clubs to provide these opportunities so that wheelchair players can compete meaningfully against footed players, but the ADA does not require them to depart from the official rules whenever a wheelchair player or team wants to play a footed player." Id. at *4.

143. See id. at *4 (providing examples of different alterations that would be required in baseball, golf, and basketball).
reach first base in roughly the time it would take a footed player to run ninety feet.”

Nevertheless, counterarguments exist against the “slippery-slope” predictions of colossal change to sports resulting from ADA claims. Scalia’s argument has been termed the “chicken little” approach because he predicted that the sky would fall after the Supreme Court’s decision in Martin. Yet, proponents of the Martin decision have found sufficient guidance within the standards provided by the majority opinion to curtail large amounts of litigation and resulting changes to sports rules. The fundamental alteration standard is extolled as limiting judicial changes to only those rules that are non-essential and therefore peripheral, and also to modifications that will not alter the nature of the competition. Additionally, the Supreme Court required an inquiry into the purpose of the rule at issue to determine whether it would be compromised by granting the modification. Supporters of Martin have labeled these standards as striking the correct balance between adequate consideration of accommodations for the disabled and maintenance of the integrity of competitive athletics.

144. Id. (noting law allows organizations to play respective games in accordance with that game’s official rules).
145. See Roy R. Galewski, Note, The Casey Martin and Ford Olinger Cases: The Supreme Court Takes a Swing at ADA Uncertainty, 21 PACE L. REV. 411, 412-13 (2001) (discussing arguments for and against use of golf carts in tournaments). The slippery slope argument suggests that Martin has opened a “Pandora’s Box with far-reaching effects.” See id.; see also Rothstein, supra note 5, at 433. “[T]hose who suggest . . . that the decision in the Martin case portends tremendous change in American sports, are mistaken.” Id. For a discussion of these counterarguments, see infra notes 146-50 and accompanying text.
146. See Warden, supra note 127, at 646 (noting “Chicken Littles” have opined that Martin represents end of equality and uniformity in sports).
147. See id. at 647. By requiring an individualized inquiry in each case, the Martin decision ensures qualified disabled individuals will have the opportunity to partake in competitive sports, while limiting the chance that rules will become a “collection of individualized exceptions.” See id.; see also Cleland, supra note 134, at 484 (discussing how Martin standard strikes appropriate balance between “competition’s goal of equality and fair play with the athlete’s desire to fully participate”).
148. See Cleland, supra note 134, at 483. The requisite reasonableness of the modification combined with the necessity of finding that the modification will not work a fundamental alteration sufficiently curtails a court’s changing the rules of competition. See id.
149. See Warden, supra note 127, at 688-90 (noting court’s finding that Martin’s fatigue outweighed that of competitors justified waiver because purpose of walking rule, to maintain fatigue as part of golf, would not be compromised).
150. See id. at 688-91 (describing standards as “set of strict criteria” that are consistent with ADA). “[T]he [Supreme] Court . . . crafted an analytical framework that will ensure the integrity of competitive sports for years to come.” Id. at 691.

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Conversely, those that disagree with the *Martin* decision criticize this standard precisely because it does not provide sufficient limitation on judicial change. Specifically, these critics disagree that walking is a non-essential element of golf, and furthermore, find that use of a golf cart during PGA tournaments will alter completely the nature of those competitions. What these counter-arguments also ignore is that the Supreme Court's two-prong, fundamental alteration test still mandates a case-by-case inquiry. Therefore, as the judicial system must decide piecemeal which rules as applied to individual disabled plaintiffs will work a fundamental alteration, the result will be a mere collection of scattered rules applied to the non-disabled and their exceptions as applied to some, but not all the disabled. Moreover, a modification to an athletic rule almost always will frustrate its purpose, so as to render this allegedly limiting standard equally toothless.

2. Is the “Individualized Inquiry” Called for in *Martin* Truly an “Undue Burden” That Opened the Floodgates to Increased Litigation?

The majority in *Martin* admitted that its opinion might place an administrative burden on those subject to the ADA due to the individualized inquiry imposed. Nonetheless, the majority reas-

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151. See *Martin*, 532 U.S. at 702 (Scalia, J., dissenting) (stating it was impossible to find any of game's arbitrary rules to be essential and that essential prong of majority's test was "unprincipled"); see also *Kuketz v. MDC Fitness Corp.*, No. CIV.A. 98-0114-A, 2001 WL 993565, at *3 (Mass. Super. Aug. 17, 2001) (finding it impossible to determine whether requested modification would exactly offset disability so that athlete was not given competitive advantage under second part of *Martin* fundamental alteration test).

152. See *Martin*, 532 U.S. at 670 (citing testimony from several of greatest golfers in history). Arnold Palmer, Jack Nicklaus, and Ken Venturi all testified that they believed use of a golf cart in PGA Tour and Nike Tour events would fundamentally alter the nature of those competitions. See *id.* at 670-71.

153. See *id.* at 688. The majority stated, "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration." *Id.*

154. See *Cleland*, *supra* note 134, at 484 (stating courts will be presented with more requests for modifications as result of *Martin*). The courts will be forced to make individualized inquiries into these claims and draw lines for each individual plaintiff on what will and will not work as a fundamental alteration. *See id.* But see *Warden*, *supra* note 127, at 687 (stating only tangential rules will be subject to alteration, with foundational rules left untouched).

155. See *Warden*, *supra* note 127, at 689 (discussing how future plaintiffs will have difficulty proving purpose of rule not frustrated by requested modification).

156. See *Martin*, 532 U.S. at 690 (stating this administrative burden could be avoided by implementing general rules). In contrast, general policies applied uniformly would have the effect of discriminating against the disabled, which is pre-
sured that the ADA required individualized considerations of the requested modification and the underlying purpose of the challenged rule. Tangentially, the Court noted that this burden was by no means substantial because evidence demonstrated that only Casey Martin and two other golfers had challenged the walking rule in the three years previous to the Court's decision. In Cruz, the court dismissed an argument that administration for waiver requests made by student athletes would be an undue burden. The PIAA argued that a process to evaluate waivers would entail "complex fact-finding as well as extremely difficult judgments." It was concluded that PIAA had waiver processes for other rules, which exemplified the entity's ability to make these difficult decisions. Furthermore, in accord with the Martin majority, the district court found that recent statistics show that PIAA would be presented with few requests for waiver; thus, review of these requests would not create an unreasonable administrative burden.

On the contrary, the national attention devoted to the Martin decision may very well amplify the number of waiver requests that are made by athletes. This will undoubtedly increase the administrative burden placed on these organizations in considering each of these requests on an individualized basis. Additionally, it is indeed difficult to decide whether a rule is essential or whether a

cisely what the ADA was meant to combat. See id. For a further discussion on the purposes of the ADA, see supra note 22 and accompanying text.

157. See Martin, 532 U.S. at 690-91 (discussing congressional intent in enacting ADA).

158. See id. at 690 n.53.


160. Cruz, 157 F. Supp. 2d at 499 (arguing judgments as to "leadership skills, motivational abilities, physical maturity, benefits of experience, quickness, agility, strength, and sport-specific abilities" are very difficult to measure).

161. See id. at 500 (noting PIAA's apparent ability to consider transfer and eight-term waivers suggests that age waiver process would not be undue burdensome).

162. See id. (citing findings of fact that PIAA received approximately two to three waiver requests annually for past twenty years); see also Milani, supra note 57, at 885-86 (indicating district and appellate courts should find that individual analysis will not be undue burden).

163. See Cleland, supra note 134, at 484 (asserting slippery-slope argument is tempting whenever decision like Martin is made).

164. See McPherson v. Mich. High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 462 (6th Cir. 1997). The Sixth Circuit determined that the plaintiff's request of waiver processes for all those learning disabled students remaining in school for more than eight semesters "would have the potential of opening the floodgates for waivers." Id. Increasing the number of waiver requests and subsequent reviews of them would "increase the cost of making assessments as well as increase the impor-
particular athlete will gain a competitive advantage through the granting of a modification. As some of these challenges will end up in the court system inevitably, the Martin decision may well have opened the floodgates to increased litigation over what constitutes a fundamental alteration.

B. Drug Tests, Signing Bonuses, and Terry Glenn

In addition to the potential increased litigation over fundamental alterations, Martin may have paved the way for ADA claims with insincere motives. Terry Glenn sued the NFL in a Manhattan federal district court in January 2002, claiming discrimination based on his disability of chronic depression in violation of the ADA. Glenn was suspended for four games after missing a drug test in accordance with the NFL’s substance abuse policy. He claimed that his disability caused him to be unable to comply with...
the NFL’s policy.\textsuperscript{169} While the argument may be valid, commentators have opined that Glenn sued the NFL in order to obtain the eleven million dollar signing bonus the NFL withheld from him for violation of the substance abuse policy.\textsuperscript{170} Cases like Glenn’s could push the Martin door open further for athletes who want to resist being suspended.\textsuperscript{171} There is substantial motivation to fight for eleven million dollars, and using an ADA suit for leverage to regain this money is certainly a “very dangerous precedent.”\textsuperscript{172}

IV. IMPACT

A. In the Wake of Martin

Since the Martin decision, it has become clear that entities must decide whether and to what extent their rules and policies must be altered to accommodate the disabled to satisfy the Martin standards.\textsuperscript{173} For example, ClubCorp, which operates over two hundred golf courses, country clubs, and private business clubs and resorts around the world, released guidelines for the general golf industry to follow to comply with the ADA.\textsuperscript{174} The guidelines suggest changes with respect to planning and design of golf courses, safety, access to facilities, and playability of the course itself.\textsuperscript{175} In addition, Martin has affected not only athletic organizations, but also employers and public entities that are subject to ADA regulation, albeit under different titles of the ADA than that applied in Martin.\textsuperscript{176} The Supreme Court decision exemplifies a lack of deference for the employer’s decisions on rules and policies that even

\textsuperscript{169} See id. (discussing how Glenn alleged chronic depression “prevented him from following the league’s substance abuse policy”).

\textsuperscript{170} See Football; Glenn Is All Wrong; He Must Play to Expect Pay, BOSTON HERALD, Nov. 30, 2001, available at 2001 WL 3818006 (stating Glenn’s problems with Patriots management is matter of money).

\textsuperscript{171} See Jerry Magee, Patriots’ Glenn Could Go to Court to Blame Depression for Behavior, S.D. TRIB., Dec. 2, 2001, available at 2001 WL 27303807 (noting jury finding for Glenn could cause other players faced with suspension to argue that they also suffer from mental disability).

\textsuperscript{172} See id. (quoting James Godes, associate of San Diego law firm Foley and Lardner). Godes stated that many players will argue similarly to Glenn to avoid taking drug tests or facing the consequences of failed tests. See id.

\textsuperscript{173} See Galewski, supra note 145, at 438 (stating Martin decision has “done more than [just] create uproar in sports world”).

\textsuperscript{174} See Golf Guidelines, PARAPLEGIA NEWS, Nov. 1, 2001, at 41 (announcing ClubCorp’s release of guidelines to assist golf industry in compliance with ADA).

\textsuperscript{175} See id. (noting various changes proposed in guidelines).

\textsuperscript{176} See Littler Mendelson, Fore! Golf Case Has ADA Implications for Others, 11 No. 10 Md. EMP. L. LETTER, July 2001, at 4. Although the Supreme Court found that Title I did not apply to Martin, the Court’s discussion on fundamental alterations will prove useful to employers with respect to what future courts may find to
indiscriminately affect disabled employees. Thus, employers must revise their rules and employee policies to ensure compliance with ADA and the Martin standards.

B. Justice Scalia’s Prophecy May Be Correct

At the very least, the Martin decision has elucidated that the ADA is applicable to all sports in some way. Yet, the case may have much broader implications for the future of athletic rules as well as the docket caseload for the judicial system. At this point, we may wonder whether the sports of today will be a mere twinkling of a memory tomorrow. Perhaps the prophecy of Justice Scalia will be realized, but the true answer to the question lies in the future. One aspect that does seem clear at the present moment is that the Martin decision has made it very possible for the image of golfers walking the green of an eighteen-hole golf course to become a twinking memory in all of our minds much sooner than we think.

Amy M. Kearney

be essential functions of jobs or whether accommodations will alter a particular job. See id.

177. See id. (warning employers should beware of adverse publicity received by PGA Tour as result of Martin case).

178. See id. (listing steps employers should take in wake of Martin to insulate themselves against future litigation); see also Parry, supra note 4, at 56-64 (discussing ways employers can change different aspects of employment to comply with ADA with respect to persons with mental disabilities); Hypes, supra note 59, at 14 (giving risk management tips to entities subject to ADA regulation to avoid litigation).

179. See Cook, supra note 26, at 263 (describing immediate effect of Martin to elevate awareness of ADA’s reach).

180. For a further discussion of the projected impact of the Martin decision, see supra notes 128-78 and accompanying text.
