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RECONSIDERING THE AMERICANS WITH DISABILITIES ACT

Miranda Oshige McGowan*

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* Associate Professor, University of Minnesota Law School. Many thanks to Don Dripps, Dan Farber, Phil Frickey, Suzanna Sherry, and David McGowan for helpful questions, comments, and suggestions. Special thanks to Linda Krieger for thoughtful (and helpful) criticism. Many thanks also to Rachel Baumel and Jessica Durbin for excellent research assistance.

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I. THE STORY OF THE AMERICANS WITH DISABILITIES ACT:
 REVOLUTIONARY ANTIDISCRIMINATION LAW PASSED
 OVERWHELMINGLY BY CONGRESS, THWARTED BY COURTS?

A. SO, YOU SAY THERE'S BEEN A REVOLUTION. WELL, YOU KNOW . . .

The Americans with Disabilities Act became law amidst a flurry of revolutionary rhetoric.¹ Passed in 1990 with overwhelming bipartisan support² and the active cooperation of the Bush Administration, the ADA represented the culmination of the civil rights movement with its embrace of over forty million Americans with disabilities³ and its promise that persons with disabilities would join the mainstream of American society.⁴ Members of Congress spoke reverently and admiringly about colleagues and family members who had fought valiantly against the limitations imposed by their disabilities and even more valiantly against limitations created by

¹ The New York Times, for example, in an editorial hailed the ADA as a "Law for Every American," the "most sweeping anti-discrimination measure since the Civil Rights Act of 1964." *A Law for Every American*, N.Y. TIMES, July 27, 1990, at A26. Not only would the ADA "bring 43 million handicapped people into society's mainstream," but it would also "enlarge[] civil rights, and humanity, for all Americans," the New York Times observed. *Id.* Sponsors described the ADA "as a long-overdue 'emancipation proclamation' for the disabled." Helen Dewar, *Senate Approves Disabled Rights Bill: Bush Expected to Sign Landmark Legislation*, WASH. POST, July 14, 1990, at A1. See also, Glen Elsasser, *Senate OKS Rights Bill for Disabled*, CHI. TRIB., Sept. 8, 1989, at 1 (reporting Senate approval of ADA and calling ADA "most sweeping civil rights legislation in a generation"); *Rights for Those Who Had Lacked Them*, ARK. GAZETTE, July 15, 1990, at 2C ("[H]istory may judge [the ADA] the jewel of [the Bush] Administration. With the passage of this act, the nation is indeed kinder and gentler . . . and more just, to boot.").

² The ADA was approved by 93.8% of Senators who voted (three did not vote)—100% of Senate Democrats and 86% of Senate Republicans. In the House, 93.1% of Representatives voted for the ADA (27 Representatives did not vote), with 97.9% of House Democrats and 86.2% of House Republicans voting yes. NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 304 n.30 (1997), [hereinafter NATIONAL COUNCIL ON DISABILITY]. See also Susan F. Rasky, *Bill Barring Bias Against Disabled Holds Wide Impact*, N.Y. TIMES, Aug. 14, 1989, at A1 (discussing support by both political parties); Steven A. Holmes, *Rights Bill for Disabled Is Sent to Bush*, N.Y. TIMES, July 14, 1990, at 6 (stating that bill passed Senate by 91 to 6); Steven A. Holmes, *House Approves Bill Establishing Broad Rights for Disabled People*, N.Y. TIMES, May 23, 1990, at A1 (discussing overwhelming support bill received).

³ 42 U.S.C. § 12101(a)(1) (1994).

⁴ See *id.* §§ 12101(a)(7)-(9) & 12101(b) (stating national mandate to eliminate discrimination against individuals with disabilities).

unjust stereotyping by persons without disabilities.⁵ The ADA provided an unprecedented level of protection for this “discrete and insular minority.”⁶ It directed employers to focus on a person’s *abilities*, not *disabilities*, when evaluating fitness for a job.⁷ More radically, the ADA required employers to take affirmative steps to hire otherwise qualified disabled workers by making reasonable accommodations for their disabilities.⁸ The ADA forbade employers from taking into account the cost of reasonable accommodations when making hiring decisions unless such accommodations would impose an “undue hardship” on the employer.⁹

When I first started researching the ADA, I wanted to tell a story that explained how such a revolutionary (and protective) civil rights bill was passed to benefit persons with disabilities—a bill that not only required employers to stop discriminating against persons with disabilities, but explicitly demanded that they shoulder the costs necessary to enable persons with disabilities to work. At the time, the ADA’s smooth passage and its requirement that employers make reasonable accommodations for disabilities seemed simply breathtaking. It appeared nothing short of miraculous that this new grant of civil rights to people with disabilities sailed through Congress when affirmative action was under siege, and Congressional Democrats had fought an uphill battle to overturn the Supreme Court’s narrow interpretations of Title VII.¹⁰ Congress’s ebullient

⁵ See Dewar, *supra* note 1 (reporting emotional comments of Senators Harkin, Kennedy, and Hatch about how courage of their family members who had disabilities inspired ADA).

⁶ 42 U.S.C. § 12101(a)(7).

⁷ See *id.* § 12112(a) (stating entities shall not discriminate against qualified individuals with disabilities because of such disabilities).

⁸ See *id.* § 12112(b)(5)(A) (stating that failure to make reasonable accommodations is discrimination unless entity can demonstrate undue hardship).

⁹ *Id.*

¹⁰ See Sharon LaFraniere & Tom Kenworthy, *Democrats Outline Revised Rights Bill: Republicans Scoff at Assertion that Quotas Would Be Forbidden*, WASH. POST, May 22, 1991, at A5 (discussing problems with quotas in new civil rights bill democrats proposed). Congress faced grave difficulties in passing the 1991 Civil Rights Amendments, which overturned a number of aspects of *Wards Cove*, modified the Supreme Court’s *Price Waterhouse* decision, and provided compensatory and punitive damages for certain Title VII violations. See generally 1991 U.S.C.A.N. 549-769 (containing legislative history of Civil Rights Act of 1991). See Civil Rights Act of 1991, Pub. L. No. 102-166, 42 U.S.C.S. §§ 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16 (1991). See also *The Compromise on Civil Rights*, N.Y. TIMES, Oct. 26, 1991, at 7 (“The Bush administration and Congress had sought a civil rights bill to overturn Supreme Court decisions that made it harder to sue in job discrimination

mood at the ADA's passage¹¹ and the jubilant signing ceremony for the ADA (at which President Bush heralded the ADA as the "declaration of equality" for persons with disabilities) appeared to promise true equality for Americans with disabilities.¹²

There *was* indeed a story that seemed to explain the expansiveness of the ADA and the ease with which it became law. With prior civil rights bills, few members of Congress had a personal stake in their passage. Civil rights laws were other-regarding legislation, selfless legislation—that is, legislation passed to benefit relatively powerless people for the good of the country as a whole, not necessarily to benefit one's constituency and to secure reelection. Civil rights legislation was, in other words, the polar opposite of the pork-barrel policies that Congress specializes in. For example, in 1964, when Title VII was passed, barring employment discrimination on the basis of race and sex, there were only four African American Congressmen, no African American Senators,¹³ and few women in Congress.¹⁴ Because it was passed before the Voting

cases."). Congressional Democrats labored for two sessions of Congress to push these changes through Congress and secure President Bush's signature. Bush vetoed one version of the bill before it eventually became law in 1990. Michael K. Frisby, *Aides Reportedly Undercut Bush on Rights*, BOSTON GLOBE, Oct. 24, 1990, at 3. Overturning *Wards Cove* proved especially challenging as Congress sought to defend the 1991 Amendments against charges that they amounted to a "quota bill." LaFraniere & Kenworthy, *supra*; Steven A. Holmes, *Accord is Sought on Right Measure to Avert a Veto*, N.Y. TIMES, July 20, 1990, at A1; David S. Broder, *Quayle Calls for Mending GOP Fissures' on Budget, Gulf*, WASH. POST, Nov. 11, 1990, at A13 (reporting Vice President Quayle's declaration that Civil Rights Amendment was "a quota bill, notwithstanding what [Senator Kennedy] may say about it"). Compensatory and punitive damage awards were only passed with the addition of damage caps. See LaFraniere & Kenworthy, *supra* (discussing caps on damages as sticking point in getting 1991 Civil Rights Amendments passed); Sharon LaFraniere, *Civil Rights Veto Stems from Dispute over Discrimination Ruling*, WASH. POST, Oct. 24, 1990, at A6 (same); Sharon LaFraniere, *Legal Tactics Underlie Rights Clash, Congressional Battle Reflects Struggle for Courtroom Advantage*, WASH. POST, Oct. 20, 1990, at A13 (noting that White House dropped its objection to bill after punitive damages were capped at \$150,000); Adam Clymer, *For Civil Rights Bill, the Name's the Game*, N.Y. TIMES, May 5, 1991, § 4, at 1 (describing negotiations between Congressional Democrats and White House over damage caps).

¹¹ See NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 176 (quoting Senator Harkin who stated, "It may be raining outside . . . but this is truly a day of sunshine for all Americans with disabilities"); 136 CONG. REC. 17,365 (1990) (quoting Senator Hatch who stated, "I am very proud to be here this morning. I believe this legislation is going to be good for America").

¹² NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 178-79.

¹³ NORMAN J. ORNSTEIN ET. AL., VITAL STATISTICS ON CONGRESS, 1999-2000, at 38 (2000).

¹⁴ In 1964, there were twelve women in the House of Representatives and two women in the Senate. KAREN FOERSTEL, BIOGRAPHICAL DICTIONARY OF CONGRESSIONAL WOMEN 15

Rights Act (which Congress passed the following year), few African Americans had even voted for the members of Congress who worked on the law. Title VII's form was just what interest group theory would have predicted for a law with diffuse benefits and diffuse costs: a relatively vague bill left largely to courts to interpret and implement.¹⁵

The ADA, in contrast to the Civil Rights Act of 1964, was aimed at a group that had close connections with individual members of Congress and the executive branch. Almost everyone involved in the ADA had a close family member or friend who was disabled. Then-Attorney General Richard Thornburgh had a son who suffered from a developmental disability.¹⁶ One of President Bush's sons had a learning disability, and one of President Bush's uncles was quadriplegic.¹⁷ Senator Tom Harkin's brother was deaf.¹⁸ Representative Tony Coelho himself had epilepsy, which had prevented him from becoming a priest.¹⁹ Representative Steny Hoyer, who became the ADA's House Sponsor after Tony Coelho resigned from office, also had a personal connection to disability: his wife had epilepsy.²⁰ Senator Orrin Hatch's brother-in-law was a paraplegic as a result of polio.²¹ Senator Edward Kennedy's son lost a leg to cancer, and his sister had a developmental disability.²² Every member of Congress had colleagues who were disabled. The Senate Minority Leader, Bob Dole, had lost most of the use of his right arm in World War II.²³ Senator Daniel Inouye had lost his arm in the same war.²⁴

(1999).

¹⁵ See WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 54-57 (2d ed. 1995) (describing how interest group theory predicts that specificity and protectiveness of law depends on whether it imposes concentrated or diffuse benefits).

¹⁶ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 115.

¹⁷ *Id.* at 83-84.

¹⁸ Senator Tom Harkin became the ADA's main Senate sponsor when Senator Lowell Weicker lost his seat in 1988. Some were surprised at this move because Harkin was a first-term Senator, and most people expected that he would not want to do anything to jeopardize his re-election chances. His reply follows: "I didn't get elected to get re-elected. My brother is deaf. I *understand* discrimination. I understand what it means and what this country can look like in thirty years. We are doing this legislation." *Id.* at 95-96 (emphasis added).

¹⁹ *Id.* at 108.

²⁰ *Id.* at 126.

²¹ *Id.* at 103.

²² *Id.* at 97; 136 CONG. REC. 17,370 (1990) (remarks of Senator Edward Kennedy).

²³ 134 CONG. REC. 21,262 (1988) (statement of Senator Simon); TOM BROKAW, *THE*

And the memory of President Roosevelt certainly was present in the minds of many members of Congress.²⁵

Senators and representatives were also well aware of their own vulnerabilities. As a group, the elderly are far more likely to be disabled, and Congress is crammed with men in their fifties and sixties. It certainly did not escape congressional notice that the ADA would likely protect members from discrimination should disability visit them in their not-so-distant old age.²⁶ With such personal interests at stake, no wonder Congress was enthusiastic about legislation that provided "an extraordinary opportunity to bring Americans with disabilities into the mainstream of American life."²⁷

Against this background, it was not surprising that the ADA looked much more protective and detailed than the 1964 Civil Rights Act. Rather than leaving the details up to courts and agencies to fill in, Congress fashioned the ADA to resemble the administrative regulations of the Rehabilitation Act of 1973.²⁸ The ADA is chock-a-block with multi-factor tests to determine what is a reasonable accommodation²⁹ or an undue hardship.³⁰ The Act's definitions create a capacious protected class—not only persons who actually have a disability, but also persons "regarded by" employers as disabled or who in the past have had a disability.³¹ The Act broadly prohibits employers from "discriminat[ing] against . . . qualified individual[s] with a disability because of . . . [that] disability."³² The ADA's concept of discrimination is broad, too. The Act specifically describes a wide variety of actions that constitute discrimination: denying a qualified individual with a disability a

GREATEST GENERATION 341 (1998).

²⁴ BROKAW, *supra* note 23, at 349-54.

²⁵ *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 21 (1989) (statement of Senator Harkin).

²⁶ See 135 CONG. REC. 19,902 (1989) (remarks of Senator Conrad).

²⁷ 136 CONG. REC. 10,869 (1990) (remarks of Representative Edwards).

²⁸ Compare, e.g., 42 U.S.C. §§ 12102(2), 12111(9)-(10) (1994), with 29 C.F.R. §§ 1613.702(a), 1613.702(f), 1613.704 (1979) (using similar language).

²⁹ 42 U.S.C. § 12111(9).

³⁰ *Id.* § 12111(10).

³¹ *Id.* § 12102(2)(C).

³² *Id.* § 12112(a).

reasonable accommodation;³³ refusing to hire someone because of his need for a reasonable accommodation;³⁴ using tests that screen out or tend to screen out persons with disabilities (unless the tests are job-related and necessary to the conduct of the business);³⁵ using tests that do not adequately test the skills of a person with a disability;³⁶ or using standards or criteria “that have the effect of discrimination on the basis of disability.”³⁷ The ADA is much stronger medicine than Title VII’s general, vague, and negative command not to “discriminate” in employment (but never defining “discriminate”) because of an “individual’s race, color, religion, sex, or national origin” (but never defining those terms either) and not to “segregate or classify” employees on those bases.³⁸ In short, the ADA appears to make a revolutionary break with the old ways of thinking about discrimination while charting a new course of affirmative obligations to ensure real equality.

B. IF THERE WAS A REVOLUTION, DID THE COURTS BETRAY IT?

The ADA regulates an enormous range of activities. Besides prohibiting employment discrimination,³⁹ which is the main focus of this article, the ADA also requires equal access for persons with disabilities to most forms of public transportation⁴⁰ and to all sorts of public accommodations and services provided by public or private entities.⁴¹ The ADA also requires telephone services to be provided in textual form so they are accessible to and usable by persons with hearing impairments. The ADA, in short, requires that most

³³ *Id.* § 12112(b)(5)(A).

³⁴ *Id.* § 12112(b)(5)(B).

³⁵ *Id.* § 12112(b)(6).

³⁶ *Id.* § 12112(b)(7). For example, an employer cannot require a person with quadriplegia to take a pen and paper test or give a blind person a printed version of a test, unless, of course, writing with a pen or seeing is a job requirement.

³⁷ *Id.* § 12112(b)(3)(A).

³⁸ *Id.* § 2000e-2(a)(1)-(2).

³⁹ *See id.* § 12112(b) (setting forth standards of employment of disabled persons).

⁴⁰ *See id.* § 12143 (stating that public entities operating fixed route transportation systems must accommodate individuals with disabilities).

⁴¹ *See id.* §§ 12182-12184 (stating that public services cannot discriminate whether operated by public or private entity).

aspects of public life change to permit the inclusion and equal participation of persons with disabilities.

If the ADA was meant to be a revolutionary remaking of America, then the judicial interpretation and implementation of the ADA's employment title has been nothing less than a betrayal of the ADA's promise. Under this view, judges, less concerned with justice than with protecting business interests and controlling the size of court dockets, have stingily and begrudgingly construed what were supposed to be sweeping antidiscrimination protections.⁴²

The apparent dissonance between the courts' interpretations of the ADA and the story of the ADA's revolutionary origins and purpose is disturbing. How can it be, as one ADA commentator has shown, that plaintiffs lose over 93% of cases under the ADA at or before trial (as compared to 22% of employment discrimination cases generally)?⁴³ How can it be that someone who walks with a limp,⁴⁴ someone with vision in only one eye,⁴⁵ or someone with hemophilia⁴⁶ is not disabled and thus not protected by the ADA from disability discrimination? And how can courts make most of these determina-

⁴² See, e.g., Erwin Chemerinsky, *Unfulfilled Promise: The Americans with Disabilities Act*, 35 TRIAL 88, 88 (Sept. 1999) (discussing largely frustrating results for plaintiffs suing under ADA); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (giving statistics that demonstrate low success of plaintiffs suing under ADA); Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 328 (1997) (stating that excessive judicial scrutiny is often cause for failure of claims); Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 414 (1997) (arguing that ADA has fallen victim to special treatment mentality associated with affirmative action resulting in unnecessary complexity and difficulties in litigating ADA cases); Paula E. Berg, *Ill/legal: Interrogating the Meaning and Function of the Category Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 1, 16-17, 18-22 (1999) (discussing biomedical proof hurdles that heighten plaintiffs' ordinary burden of proving disability under ADA); James P. Colgate, Note, *If You Build It Can They Sue? Architects' Liability Under Title III of the ADA*, 68 FORDHAM L. REV. 137, 142-43, 162-63 (1999) (noting that courts are leaning towards narrow, "plain meaning" interpretations of ADA, which often contradicts more generous legislative intent).

⁴³ Colker, *supra* note 42, at 100 n.10.

⁴⁴ Kelly v. Drexel Univ., 94 F.3d 102, 108 (3d Cir. 1996) (holding that plaintiff with degenerative hip disease who walked with limp was not disabled under ADA).

⁴⁵ Still v. Freeport-McMoran, Inc., 120 F.3d 50, 52 (5th Cir. 1997) (holding that plaintiff with only one eye is not disabled under ADA).

⁴⁶ Bridges v. City of Bossier, 92 F.3d 329, 334 (5th Cir. 1996) (holding that plaintiff with hemophilia is not disabled under ADA).

tions about disability, which is a *factual* inquiry, at or before summary judgment?⁴⁷

1. *Sutton and the Issue of Corrective Measures.* According to the story of judicial betrayal, the Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*⁴⁸ and its companion cases, *Albertsons, Inc. v. Kirkingburg*⁴⁹ and *Murphy v. United Parcel Service, Inc.*,⁵⁰ were the coup de grace.⁵¹ In *Sutton*, the Supreme Court severely cut the number of persons covered by the ADA, rejecting the majority approach taken by the circuits for determining whether a person is disabled under (and thus protected by) the ADA.⁵² *Sutton* involved twin sisters who had severe myopia, correctable to 20-20 vision with glasses.⁵³ United Air Lines rejected them for pilot positions because their *uncorrected* vision was worse than 20-100, United's minimum vision standard.⁵⁴ The *Sutton* plaintiffs argued that the ADA covered them because (1) they had a disability (severe myopia) and (2) United "regarded" them as "having a disability" (unable to fly planes).⁵⁵ United's refusal to hire them was "discriminat[ion] against a qualified individual with a disability because of the disability,"⁵⁶ according to the *Sutton* plaintiffs.⁵⁷

The Supreme Court's opinion in *Sutton* addressed two questions: what it means to *have* a disability, and what *being regarded as* disabled means.⁵⁸ These questions are significant because the ADA requires plaintiffs to prove that the statute actually applies to them. For the most part, other civil rights statutes protect everyone from discrimination on the basis of prohibited categories, such as sex,

⁴⁷ Colker, *supra* note 42, at 101, 110-16.

⁴⁸ 527 U.S. 471 (1999).

⁴⁹ 527 U.S. 555 (1999).

⁵⁰ 527 U.S. 516 (1999).

⁵¹ See Chemerinsky, *supra* note 42, at 88-89 (describing how difficult it has been under ADA for plaintiffs to state successful claims and explaining that Supreme Court's 1999 ADA decisions "significantly curtail the reach of the ADA and . . . make successful litigation under the act even more difficult").

⁵² *Sutton*, 527 U.S. at 475.

⁵³ *Id.*

⁵⁴ *Id.* at 476.

⁵⁵ *Id.*

⁵⁶ 42 U.S.C. § 12112(a) (1994).

⁵⁷ *Sutton*, 527 U.S. at 476.

⁵⁸ *Id.* at 481, 489.

race, or national origin. The ADA only protects "qualified individual[s] with a disability" from disability discrimination.⁵⁹ Disability, in turn, is defined as: *first*, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;"⁶⁰ *second*, "a record of such an impairment;"⁶¹ or *third*, "being regarded as having such an impairment."⁶²

The first question before the Court—what it means to *have* a disability—in essence asked, did the ADA apply to the *Sutton* plaintiffs because they were legally blind when they took off their glasses?⁶³ The Supreme Court in *Sutton* held that the answer was no.⁶⁴ Determining whether a person has a disability requires a court to take into account any corrective or mitigating measures a person uses when evaluating the restrictions a person's impairment imposes on her.⁶⁵ The *Sutton* plaintiffs' vision limitations must be evaluated with their glasses on.⁶⁶

What about Mr. Kirkingburg, who had vision in only one eye, but who could nevertheless gauge distances and sense depth because his brain unconsciously compensated for the loss of the eye?⁶⁷ He did not *use* corrective measures. Though the Court did not decide whether Mr. Kirkingburg was disabled,⁶⁸ the Court suggested that because Mr. Kirkingburg functioned about as well as someone who has vision in two eyes, that he had vision in only one eye did not itself establish that he had a disability.⁶⁹

2. *Sutton, Murphy and Discrimination Against Persons "Regarded as" Disabled.* The second question put to the Court in *Sutton* and *Murphy*⁷⁰ also asked what it means for a person to be "regarded

⁵⁹ 42 U.S.C. § 12112(a).

⁶⁰ *Id.* § 12102(2)(A).

⁶¹ *Id.* § 12102(2)(B).

⁶² *Id.* § 12102(2)(C).

⁶³ *Sutton*, 527 U.S. at 481.

⁶⁴ *Id.* at 482.

⁶⁵ *Id.*

⁶⁶ *Id.* at 488.

⁶⁷ *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 558-59 (1999).

⁶⁸ *See id.* at 562, 567-78 (dismissing case on grounds that firing Mr. Kirkingburg for failing to comply with Department of Transportation regulations was not discrimination on basis of disability).

⁶⁹ *Id.* at 564-67.

⁷⁰ *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

as disabled.” The Court held that for a person to be protected by the ADA under the “regarded as” prong, an employer must *mistakenly* perceive that the person has an impairment that substantially limits a major life activity.⁷¹ United Air Lines did not “regard” the *Sutton* plaintiffs as “disabled” when it turned them down for jobs as pilots because it only considered them incapable of flying large, commercial passenger jets.⁷² “Regarding someone as incapable of flying large passenger jets” is not the same as “regarding someone as disabled” because flying big passenger jets is not a major life activity, the Court reasoned.⁷³ The *Sutton* plaintiffs were still qualified to fly for regional airlines and cargo airlines.⁷⁴ Similarly, UPS did not “regard” Mr. Murphy as “disabled” when it dismissed him from his position as a mechanic for commercial vehicles due to his high blood pressure.⁷⁵ UPS only “regarded” him as unfit for jobs that required driving commercial vehicles.⁷⁶ Mr. Murphy had no evidence that UPS regarded him as generally unfit for other mechanic positions.⁷⁷

C. JUDICIAL REACTIONARIES, OR RIGHT RESULTS FOR WRONG REASONS?

Was the ADA’s revolutionary remaking of America betrayed by the courts? Do *Sutton* and its companion cases eviscerate the ADA, leaving millions in need of protection from discrimination on the basis of their physical or mental impairments out in the cold?⁷⁸

⁷¹ *Kirkingburg*, 527 U.S. at 521-22 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 476 (1999)).

⁷² *Sutton*, 527 U.S. at 476.

⁷³ *Id.* at 493.

⁷⁴ *Id.*

⁷⁵ *Murphy*, 527 U.S. at 524.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See generally Chemerinsky, *supra* note 42 (arguing that those cases diminish likelihood of successful litigation under ADA because of Court’s narrow interpretation of “disability”); Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do about It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 160-61 (2000) (describing “large, gaping wound” in ADA inflicted by *Sutton* and its companion cases); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000) (stating that “only by starkly dismissing” and refusing to follow ADA’s history and regulations could Court have reached its conclusions in *Sutton*).

The ADA certainly protects far fewer Americans if courts take into account the measures they use to correct or mitigate impairments. The *Sutton* Court definitely wanted to limit the number of people who could demand reasonable accommodations under the ADA or challenge an employer's qualification standards.⁷⁹ But does the fact that the *Sutton* trilogy limits the ADA's application mean that *Sutton* betrayed the ADA?

A surprising answer may lie in the ADA's progress and evolution through Congress. The story of the ADA as a revolutionary antidiscrimination law was likely overblown. The ADA does not and was not intended to completely remake the American workplace. It was not intended to require employers to provide reasonable accommodations to all workers with physical and mental impairments. The ADA's goals, while still lofty and ambitious, are in fact somewhat more limited than the revolutionary rhetoric initially suggested. The ADA's language, purposes, and legislative history suggest that the ADA was primarily meant to guarantee the civil rights of people with disabilities by moving them into the mainstream of American social, political, and economic life and by ending their isolation and segregation. This purpose, in turn, may be served by requiring employers to provide reasonable accommodations for the much smaller group of persons who are functionally disabled in their daily lives.⁸⁰ Persons who can largely correct or control their physical or mental impairments with medication or other corrective measures may have an impairment but may not be functionally disabled.

People with largely correctable physical or mental impairments, as well as people who have had impairments in the past, *do* need protection from discrimination based on animus toward them, false stereotypes, and assumptions about their impairments. The legislative history makes plain Congress's commitment to tearing down barriers created by discriminatory attitudes—animus, stereotypes, assumptions, and over-generalizations—about physical and mental impairments. The Court's holding in *Sutton* on the

⁷⁹ *Sutton*, 527 U.S. at 482-88.

⁸⁰ See *infra* notes 307-318 and accompanying text (discussing functional approach to ADA).

“regarded as” issue decimates protection for persons with physical or mental impairments who are subject to irrational and arbitrary discrimination based on stereotypes or animus about their conditions. The Court admits as much, noting that under its reading of the ADA, employers may freely discriminate among persons with physical and mental impairments if the impairments are not substantially limiting.⁸¹

This Article will proceed as follows. Part II explores the ADA’s goals and aspirations based on the ADA’s evolution through Congress, its legislative history, and the history of federal disability policy in general. This Part argues that the ADA has two main goals: first, to guarantee the civil rights of persons with disabilities by enabling them to participate fully in American society; and second, to protect persons with physical or mental impairments from discrimination based on inaccurate, negative stereotypes and attitudes. The ADA was not designed to require employers to provide reasonable accommodations to all workers with physical or mental impairments. It was, however, designed to provide reasonable accommodations to those persons with impairments that impose actual, functional limitations on the way they conduct their lives.

Part III argues that the Supreme Court’s conclusion in *Sutton* on the issue of corrective measures fits well within the first goal of the ADA—to ensure full participation in American economic, political, and social life regardless of disability. Though the Court does not justify its conclusion on this ground, Part III explains how the Court’s conclusion may be more compatible with the ADA’s aims than the EEOC Guidelines’ recommendation that disability be evaluated without regard to corrective measures.

Part IV takes a far more critical view of the Court’s interpretation of what it means to be “regarded as having such an impairment.”⁸² By extension, much of this discussion also bears on what it means to have “a record of such an impairment.”⁸³ Part IV argues that *Sutton* eviscerates the ADA’s ability to eliminate attitudinal

⁸¹ *Sutton*, 527 U.S. at 490-91.

⁸² 42 U.S.C. § 12102(2)(C) (1994).

⁸³ *Id.* § 12102(2)(B).

barriers against persons with physical and mental impairments. The Court's interpretation gives employers a free hand to make decisions based on unfounded fears and inaccurate, negative stereotypes about physical and mental impairments. While the Court may have been right that the *Sutton* plaintiffs and Mr. Murphy did not have valid ADA claims, the Supreme Court's interpretation of "regarded as" was more cramped than it needed to be to reach that result.

Part IV also proposes an alternative definition of "regarded as," which would include persons perceived by an employer to have physical or mental impairments as defined by EEOC regulations. All such persons should be protected from disparate treatment based on unverified stereotypes or generalizations about impairments. Expanding the ADA to forbid such discrimination will not mean that employers would have to justify every performance standard or hiring criterion. Nor would it result in the usual parade of ADA horrors—blind bus drivers or pilots and tin-eared tenors. Employers would still have relative freedom to hire the best person for the job and to set job criteria and requirements. Interpreted in this manner, the ADA would require employers to provide reasonable accommodations to a relatively narrow class of people. The ADA would, however, more broadly forbid employers from relying on stereotypes about physical or mental impairments.

II. WHAT IS THE ADA DESIGNED TO ACCOMPLISH?

Though it may seem a hopelessly retro, Legal Process notion (so last century), I am one of those people who still believes that a law's purpose and the mischief it was designed to ameliorate are, as a general matter, useful aids to interpreting statutes. At the very least, a statute's purposes are definitely helpful in figuring out what vague or ambiguous provisions of a statute mean.⁸⁴ No one can

⁸⁴ Even Justice Scalia and Judge Easterbrook agree with using a statute's purpose in this manner. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (stating that purpose and legislative history may be consulted to determine if Congress meant to use word in seemingly absurd way); *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (explaining that words in statute cannot be divorced from context in which they were uttered).

dispute that the ADA contains several ambiguous provisions. Congress also seems to agree that judges should use the ADA's purpose when interpreting its provisions: Congress codified an extensive purpose section in the text of the ADA that sets out the ADA's goals and aspirations.⁸⁵

A. THE ADA WAS DESIGNED TO END THE ISOLATION AND SEGREGATION OF PEOPLE WITH DISABILITIES AND ENSURE THEIR CIVIL RIGHT TO FULL PARTICIPATION AND MEMBERSHIP IN AMERICAN SOCIETY

The ADA takes aim at a number of the ways in which persons with disabilities are discriminated against and marginalized economically, socially, and politically. Discrimination in employment, which is the main subject of this Article, comprises only one of the ADA's several titles. The ADA's other titles require that persons with disabilities have equal access to most public transportation, public accommodations and services, government services and buildings, and telephones.⁸⁶ Read as a whole, the ADA tries to end the isolation and segregation of disabled persons by, among other things, requiring public transportation systems to provide access to persons with mobility impairments and existing public buildings to ensure physical access to their services.⁸⁷ New public buildings, public transportation services, and public accommodations must be built so that persons with disabilities have equal and easy access to them.⁸⁸ Existing public accommodations must be made accessible unless such modifications are not "readily achievable."⁸⁹ Public accommodations must provide disabled persons with services and goods in the same place and manner in which nondisabled persons receive them, unless it is impossible for them to do so.⁹⁰ Telephone systems must be adapted so that deaf persons

⁸⁵ See generally 42 U.S.C. § 12101 (laying out purposes and goals of ADA).

⁸⁶ See *id.* §§ 12131-12189 (setting forth ADA provisions regarding public services, public accommodations, and services operated by private entities).

⁸⁷ *Id.* § 12182.

⁸⁸ *Id.* §§ 12146, 12183, 12184.

⁸⁹ *Id.* §§ 12147(a), 12183(a)(2) (requiring alteration to maximum extent feasible).

⁹⁰ See *id.* § 12182 (proscribing discrimination based on disability in full and equal enjoyment of places of public accommodation).

or persons with hearing impairments can use them.⁹¹ In sum, the ADA aims to make it possible for persons with disabilities to shop, visit museums and theaters, attend meetings at city hall, go to restaurants, and take public transportation—to go to all of the places and to do all of the things persons without disabilities do without a second thought.

The major theme that emerges from the ADA, when read as a whole, is that the economic dependence, social isolation, and segregation of people with disabilities must end. This theme appears prominently in the ADA's purpose section, which finds that persons with disabilities have long been shut out of the public, social, and economic realms of American life.⁹² This segregation, isolation, and dependence, the ADA proclaims, deprive persons with disabilities of basic civil rights and of the personal independence America promises to its people.⁹³ Persons with disabilities must be integrated into all aspects of mainstream American life.⁹⁴

Fundamentally, the ADA guarantees the civil rights of individuals with disabilities. Being able to accomplish ordinary tasks with ease and to move freely about are inextricably bound to issues of equal citizenship. As Robert Funk, the former director of the Disability Rights Education and Defense Fund, explains,

[T]he goal of disability civil rights [is] . . . [f]or individual disabled people . . . accessible public transportation, community based independent living support services, sign language interpreters, . . . adequate housing, . . . communication access and aids, and appropriate and adequate employment.

For all disabled persons, however, the ultimate [civil rights] goal is the freedom to choose, to belong, to participate, to have dignity, and the opportunity to achieve. . . .

⁹¹ See 47 U.S.C. § 225 (1994) (requiring common carriers to provide services for hearing impaired).

⁹² 42 U.S.C. § 12101(a)(2).

⁹³ See *id.* § 12101(a)(7),(9) (stating that perception of disabled persons denies them opportunities afforded all Americans).

⁹⁴ *Id.* § 12101(8).

The existence of a caste status coupled with stereotypes and prejudices have led to an organized society that was designed without consideration of the human potential of disabled people and without disabled people's participation. It is a society that is segregated and discriminatory in law and in fact.⁹⁵

The ADA is not just good public policy. It is a matter of guaranteeing essential civil rights.

The ADA ensures the civil rights of people with disabilities by changing the world people with disabilities live in. It does not attempt to change a person's disability. The ADA exemplifies the idea that mental and physical impairments do not themselves cause disability or isolate, segregate, and render such persons dependent. Instead, disability—the inability to engage in some activity important to life and the isolation and segregation that often result—is caused by external factors: “intentional exclusion,” physical barriers caused by unthinking design in buildings (stairs instead of ramps or elevators without braille pads on elevators doors), public transportation (drivers not announcing stops), and technology (phones that transmit only voices, not typed messages), as well as attitudes that treat people with disabilities as though they were different and needed coddling and special care.⁹⁶ Separate but equal facilities for the disabled do not solve the problem. Separate facilities transmit the message that disabled persons are inferior to and dependent on “normal” persons, just as separate facilities in previous decades stigmatized African Americans.⁹⁷ Architectural and design barriers built without the needs of persons with disabilities in mind *create* disability, not merely aggravate it.⁹⁸

⁹⁵ Robert Funk, *Disability Rights: From Caste to Class in the Context of Civil Rights*, in *IMAGES OF THE DISABLED, DISABLING IMAGES* 7, 24 (Alan Gartner & Tom Joe eds., 1987) [hereinafter *IMAGES*].

⁹⁶ 42 U.S.C. § 12101(a)(5).

⁹⁷ See Harlan Hahn, *Civil Rights for Disabled Americans*, in *IMAGES*, *supra* note 95, at 181, 186-94.

⁹⁸ See *id.*, in *IMAGES*, at 181, 187.

Disability, in this sense, is a function of social practices—the way buildings are built, information is communicated, jobs and workplaces are organized, and public services are provided. Disability is not inevitably caused by physical or mental impairments. Many places in the world are essentially off-limits to persons with disabilities unless able-bodied people help them navigate in the world. This exclusion communicates that persons with disabilities are inferior and should be kept out.⁹⁹ The ADA aims to make it easier for people with disabilities to engage more easily and independently in a wide range of activities.

The ADA's "functional," civil rights approach to disability is premised on the notion that people with disabilities spend a lifetime " 'overcoming not what God wrought but what man imposed by custom and law.' "¹⁰⁰ Before the ADA, America's disability policy had generally equated "disability with incapacity."¹⁰¹ Earlier policies tried to fix or manage disabilities, justifying control over a disabled person's life with the "good intentions" of doing what was best for the disabled person.¹⁰² The unchallenged assumption that disabilities needed to be fixed or managed meant that persons with disabilities were assumed to be innately inferior to "normal" persons. Their natural inferiority in turn justified "the exclusion and segregation of disabled people from all aspects of life."¹⁰³ The ADA rejects the idea that disability means incapacity and inferiority. It recognizes that "[t]he social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability."¹⁰⁴ Under past American policy, "being paralyzed [unnecessarily] . . . meant far

⁹⁹ See Funk, *supra* note 95, at 24-25 (describing how social practices and way we construct our physical environment create and aggravate disability); see ANITA SILVERSET AL., *Introduction*, in *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 1 (1998) (describing how author and friend were left outside grocery store to wait in rain for store manager to open "handicapped" entrance, which had been padlocked to keep people from stealing grocery carts).

¹⁰⁰ S. REP. NO. 101-116, at 11 (1989), reprinted in 1 *LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT 109* [hereinafter *LEGISLATIVE HISTORY*].

¹⁰¹ *Id.* at 15, reprinted in 1 *LEGISLATIVE HISTORY*, *supra* note 100, at 113 (quoting testimony of Arlene Mayerson of Disabilities Rights Education and Defense Fund).

¹⁰² *Id.* at 15-16, reprinted in 1 *LEGISLATIVE HISTORY*, *supra* note 100, at 113-14.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

more than being unable to walk—it . . . meant being excluded from public schools, being denied employment opportunities and being deemed an 'unfit parent.'¹⁰⁵

Physical and attitudinal barriers have often prevented persons with disabilities from working, too, forcing persons with disabilities into economic dependency on their families or on the government. Harlan Hahn, a political scientist who founded the Program in Disability and Society at the University of Southern California, describes the feeling of isolation that persons with disabilities often experience:

One of the most unpleasant features of the lifestyles of . . . disabled individuals . . . is the pervasive sense of physical and social isolation produced not only by the restrictions of the built environment but also by the aversive reactions of the nondisabled that often consign them to the role of distant friends or even mascots rather than to a more intimate status as peers, competitors, or mates.¹⁰⁶

The ADA responds to the fact that "stereotypic assumptions"¹⁰⁷ about the abilities of persons with disabilities too often determine the opportunities such persons have, rather than their actual talents or capabilities. Stereotypes rob them of the opportunity fully "to participate in, and contribute to, [our] society."¹⁰⁸

Vicious circles ensue. Limited access to public spaces or the inability to use standard-issue office equipment without some adaptation, combined with condescending attitudes and outright discrimination against persons with disabilities surely contributed to the staggeringly high rate of unemployment among persons with disabilities in the early 1990s.¹⁰⁹ "[N]ot working is perhaps the

¹⁰⁵ *Id.* at 16 reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 114.

¹⁰⁶ Hahn, *supra* note 97, at 198.

¹⁰⁷ 42 U.S.C. § 12101(a)(7) (1994).

¹⁰⁸ *Id.*

¹⁰⁹ *Cf.* H.R. REP. NO. 101-485, pt. 2, at 42 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 315 ("Discrimination produces fear and reluctance to participate on the part of people with disabilities. Fear of mistreatment and discrimination, and the existence of architectural, transportation, and communication barriers, are critical reasons why

truest definition of what it means to be disabled in America.”¹¹⁰ At the time Congress was deliberating on the ADA, “[t]wo-thirds of all disabled Americans between the age of 16 and 64 [were] not working at all; yet, a large majority of those not working say that they want to work. . . . [A]bout 8.2 million people with disabilities want to work but cannot find a job.”¹¹¹ Unfortunately, the high unemployment rate for persons with disabilities persists. In 1995, 74% of all Americans aged 21-64 with a severe disability and 23% of persons with minor disabilities were not employed in 1995, compared with only 18% of Americans who had no disabilities.¹¹²

The consequences of such high rates of unemployment are far-reaching. In order to receive federal government benefits, unemployed persons with disabilities must prove that they are unable to work—that is, they must admit and prove that they are wholly dependent on the largesse of others.¹¹³ Dependence means that many have little control over how they conduct their lives. Being cut out of the workforce has profound social consequences, too. Most of us make most of our social contacts and friends through work.¹¹⁴ As a practical matter, people who do not work outside the home are much more likely to be isolated from people who are not their caregivers or family members.

individuals with disabilities do not participate [in American life] to the same extent as nondisabled people . . .”).

¹¹⁰ S. REP. NO. 101-116, at 9 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 107.

¹¹¹ *Id.*

¹¹² JOHN M. MCNEIL, U.S. DEPT OF COMMERCE, SERIES P70-61, CURRENT POPULATION REPORTS, AMERICANS WITH DISABILITIES: 1994-95, at 7 (1997).

¹¹³ See 42 U.S.C. § 423(a),(d) (1994) (providing that individual is entitled to disability benefits if he is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months”); 20 C.F.R. §§ 404.315, 404.321(c)(3), 404.1505 (1999) (defining eligibility based on disability for supplemental social security benefits in terms of complete inability to engage in “substantial gainful activity” due to medically identifiable physical or mental impairment).

¹¹⁴ See Cynthia L. Estlund, *Working Together: The Workplace in Civil Society* (Columbia Law School, Public Law & Public Theory Working Paper, Paper No. 3) (visited Nov. 11, 2000) <http://papers.ssrn.com/paper.taf?abstract_id=1988'3> (“The workplace is . . . a uniquely important locus of associational life in a diverse democratic society.”); see generally ARLIE HOCHSCHILD, *THE TIME BIND* 35-52 (1997) (discussing importance of social interaction and contact in workplace).

Moreover, it is no great secret that American notions of individual worth and merit are tightly bound to success at work.¹¹⁵ Indeed, it would not be an exaggeration to say that in the United States, a person's identity is largely constituted by what she does for a living.¹¹⁶ People who do not work are thought to be a drain on society, not productive, contributing members of society.¹¹⁷ America's love affair with work along with American ideals of individuality and independence, means that many see persons with disabili-

¹¹⁵ GARY L. ALBRECHT, *THE DISABILITY BUSINESS: REHABILITATION IN AMERICA* 119 (1992) ("The work principle incorporates the value of citizens achieving their places in society, a meritocracy. According to this principle, each citizen's position in society is earned. Consequently the value of individual work in American society gave rise to a disability-rehabilitation system based on the goal of employment for . . . individuals . . .").

¹¹⁶ "[W]ork, rather than leisure, can give [Americans] what they are looking for: an outlet for self-expression as well as material rewards." Seymour Martin Lipset, *The Work Ethic—Then and Now*, 98 *PUB. INTEREST* 61, 64 (1990); see also Michael Maccoby, *The Managerial Work Ethic in America*, in *THE WORK ETHIC—A CRITICAL ANALYSIS* 183, 188 (Jack Barbash et al. eds., 1983) [hereinafter *THE WORK ETHIC*]. Historically work has formed a central part of the American self-image. An observer of American life in the 1830s commented that

[t]here is, probably, no people on earth with whom business constitutes pleasure, and industry amusement, in an equal degree with the inhabitants of the United States of America. Active occupation is not only the principal source of their happiness, and the foundation of their national greatness, but they are absolutely wretched without it, and instead of the "dolce far niente," know but the horrors of idleness. Business is the very soul of an American.

Id. The American love for work has not ebbed over time. For example, many believe that it is crucial to "find[] personal fulfillment and satisfaction in one's job." Shoshana Zuboff, *The Work Ethic and Work Organization*, in *THE WORK ETHIC*, *supra*, at 153, 168. In the late 1970s and early 1980s studies indicated that 38% of Americans reported that work was their main satisfaction in life and that 76% would not be happier if they never had to work. Oliver Clarke, *The Work Ethic: An International Perspective*, in *THE WORK ETHIC*, *supra*, at 121, 125. Additionally, "88 percent of all American workers feel it is personally important to work hard and to do their best jobs, 78 percent report an inner need to do their very best regardless of pay." Paul Andrisani & Herbert S. Parnes, *Commitment to the Work Ethic and Success in the Labor Market: A Review of Research and Findings*, in *THE WORK ETHIC*, *supra*, at 101, 116. In 1978, 75% reported they would prefer to work even if they could live comfortably without doing so.

¹¹⁷ See ALBRECHT, *supra* note 115, at 15-16 (stating that working affects whether person with disability is perceived as contributing member of society); CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* 57, 110, 111 (arguing that American public policy demonstrates attitude that disabled persons who are unable to work are of diminished and lesser value); Joseph F. Quinn, *The Work Ethic and Retirement*, in *THE WORK ETHIC*, *supra*, at 87, 89 ("The work ethic is usually defined in terms of values or beliefs . . . that work is important, virtuous . . . [and] that it dignifies the worker, . . . and makes him or her a better person . . .").

ties who do not work and rely on others for economic support as less than fully human. All too often, unemployed people with disabilities share the same dim view of themselves.¹¹⁸ To many with disabilities, " 'the most precious thing in the world' " is " 'a paying job.' "¹¹⁹ "Roles marked by isolation, lack of social support and social networks, low social esteem [and] a concomitant feeling of powerlessness . . . and purposelessness" leave persons with disabilities especially vulnerable to feelings of worthlessness.¹²⁰ Compounding matters, work usually means the difference between living independently¹²¹ and having control over basic aspects of living. Most of us take such basic independence completely for granted and cannot imagine living without it.

The ADA explicitly recognizes that persons with disabilities cannot fully exercise their civil rights as citizens or fully participate in American society. Discrimination and arbitrary barriers preclude persons with disabilities from being (and being perceived as) economically productive, full-fledged members of our society.¹²² The ADA's purpose section outlines the myriad ways that persons with disabilities are kept from taking part in American social, political and economic life. "Individuals with disabilities are a discrete and

¹¹⁸ 42 U.S.C. § 12101(a)(6) (1994) ("[C]ensus data, national polls, and other studies have documented that people with disabilities . . . occupy an inferior status in society, and are severely disadvantaged socially, vocationally, economically, and educationally."); see also S. REP. NO. 101-116, at 8-9 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 106-07 (referring to testimony of Justin Dart, chairperson of Task Force on the Rights and Empowerment of Americans with Disabilities, where he stated, "Although America has recorded great progress in the area of disability during the past few decades, our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right."); cf. Oliver Clarke, *The Work Ethic: An International Perspective*, in *THE WORK ETHIC*, *supra*, at 121, 122 ("[F]or most people, work is an activity necessary to achieve even a humble standard of living, that through it the worker secures a certain status in society, and that it can satisfy . . . the need to be associated with others in carrying out a purposeful task. These positive values are mirrored in the loss of self-esteem and the isolation that often follow loss of a job.").

¹¹⁹ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 87 (quoting testimony before Congress by Mary Linden, disability activist who uses wheelchair).

¹²⁰ SILVERS ET AL., *supra* note 99, at 13, 40.

¹²¹ ALBRECHT, *supra* note 115, at 15-16 ("Work is critically important to persons with disabilities because it affects their ability to maintain independent living arrangements, financial solvency, [and] access to employee health benefits.").

¹²² See 42 U.S.C. § 12101(a)(3), (5)-(9) (outlining nature of discrimination against individuals with disabilities and its effects).

insular minority who have been faced with restrictions and limitations . . . [and] purposeful unequal treatment, and relegated to a position of political powerlessness in our society” based on their disabilities.¹²³ “[S]tereotypic assumptions not truly indicative of [their] individual abilit[ies]” prevent them from “participat[ing] in, and contribut[ing] to, society.”¹²⁴ Unfair discrimination has deprived people with disabilities from pursuing “the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.”¹²⁵ “[C]ensus data, national polls, and other studies have documented that people with disabilities . . . occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.”¹²⁶

The ADA was passed to fulfill “the Nation’s proper goals” by assuring persons with disabilities “equality of opportunity, full-participation, independent living, and economic self-sufficiency.”¹²⁷ The ADA, in short, enforces the civil rights of persons with disabilities to participate fully and on an equal footing with others in the economic, political, and social realms of our society.

The ADA’s goals of ensuring the civil rights of and ending the dependence and isolation of persons with disabilities, as well as the critical importance of moving into the workplace and off the dole persons who, with reasonable accommodations, could work, were trumpeted over and over again during deliberations over the ADA. Justin Dart, an important leader in the disability rights community and the person behind the ADA’s initial development, spoke perhaps the most passionately of all. He came before Congress as “an active Republican, a fiscal conservative and above all, an advocate for the principles of individual responsibility, individual productivity and

¹²³ *Id.* § 12101(a)(7).

¹²⁴ *Id.*

¹²⁵ *Id.* § 12101(a)(9).

¹²⁶ *Id.* § 12101(a)(6).

¹²⁷ *Id.* § 12101(a)(8).

individual rights which have made America brave."¹²⁸ Mr. Dart argued,

[We] are already paying unaffordable and rapidly escalating billions in public and private funds to maintain ever increasing millions of potentially productive Americans in unjust, unwanted dependency.

....

There is blatant infringement of personal rights. There is the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society. . . . [T]hese problems will never even begin to be solved until this Nation makes a clear, enforceable statement of law that people with disabilities have the same inalienable rights as other people.¹²⁹

People with disabilities, Mr. Dart proclaimed, merely demand

to be recognized as equal human beings, to have equal opportunities to succeed or to fail in the productive mainstream of society. Forty-three million Americans with disabilities respectfully demand full citizenship. We will struggle, united, for however long it takes to achieve that legitimate goal, and we will remember the patriots who stood with us at this historic crossroads.¹³⁰

¹²⁸ *Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the Subcomms. on Select Education and Employment Opportunities of the House Comm. on Education and Labor*, 101st Cong. 400 (1989), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 100, at 1324 (statement of Justin Dart, Chairman of Task Force on Rights and Empowerment of Americans with Disabilities).

¹²⁹ *Id.* at 401-02, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 100, at 1325-26.

¹³⁰ *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 20 (1989) (statement of Justin Dart).

The irony of paying persons with disabilities *not to work*, when with reasonable accommodations many of them *could* work, was not lost on Congress: "Persons with disabilities want to be productive, self-supporting, and tax-paying participants in society This bill will grant them that dignity and that right."¹³¹ The ADA was essential because:

[P]ersons with disabilities are still too often *shut out* of the economic and social mainstream of American life. The unreasonable and, in most cases, unthinking failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, public services, and telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit from the richness of American society.¹³²

President Bush declared at the Republican Convention in 1988, "I am going to do whatever it takes to make sure the disabled are included in the mainstream. For too long, they have been left out, but they are not going to be left out anymore."¹³³ The ADA means to make these rights real.¹³⁴

B. A DRAMATIC BREAK WITH DISABILITY POLICY OF THE PAST: THE ADA ALTERS THE DISABLING ENVIRONMENT, NOT THE INDIVIDUAL

When President Bush signed the ADA into law, he likened its effect to the fall of the Berlin Wall the year before. The ADA took "a sledgehammer to [the] wall . . . which has, for too many generations, separated [disabled] Americans from the freedom they

¹³¹ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 126.

¹³² *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 201-02 (1989), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 100, at 2021-22 (statement of Dick Thornburgh, Attorney General of United States) (emphasis added).

¹³³ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 84.

¹³⁴ S. REP. NO. 101-116, at 20 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 118.

could glimpse, but not grasp. . . . Let the shameful wall of exclusion finally come tumbling down.'¹³⁵

The ADA increases the accessibility of buildings, public accommodations, public transportation, and telephones by changing how buildings are constructed, how public accommodations provide services, how buses are manufactured, and how telephone systems are configured. This tack reflects the understanding that disability, social isolation, unemployment, and dependence are *created by* the configuration of our physical environment. "Mandating accessibility—requiring that cities ramp curbs, that television sets contain caption decoders . . .—further the idea that where exclusionary circumstance bars the disabled, their isolation must be remedied by an environment made more accommodating to them," rather than making a person with disabilities adapt to the inhospitable environment.¹³⁶

Similarly, the ADA's mandate that employers provide reasonable accommodations to qualified individuals with disabilities to enable them to succeed in the workforce also reflects the idea that the way that things are "normally" done is not the only way to accomplish a business's ultimate objectives. The "normal" way of doing things often arbitrarily precludes persons with disabilities from working when they are otherwise capable of doing so. Moreover, the ADA's prohibition against discrimination on the basis of disability and stereotypes about disabilities and physical and mental impairments signals that our usual assumptions have for too long erected barriers to employment and civil participation that are as real and as palpable as physical impediments.¹³⁷

The ADA's command that the physical environment, public services, public accommodations, and employers must adapt to the needs of persons with disabilities (rather than persons with disabilities adapting to how services are provided) marks an important break from the approach federal law had historically taken to provide persons with disabilities access to services and jobs.

¹³⁵ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 179-80.

¹³⁶ SILVERS ET AL., *supra* note 99, at 118.

¹³⁷ See 42 U.S.C. § 12101(a)(7) (1994) (describing how negative stereotypes and assumptions about people with disabilities amount to discrimination).

The idea that the disability is a socially constructed outcome, not an inherent condition or the inevitable result of a physical or mental impairment, animates the ADA. This idea underlies its requirement that we change the usual ways of doing things so that we do not unnecessarily exclude persons with disabilities. Critically, the ADA contains no rehabilitation provisions that try to ameliorate the physical or mental condition of a person with disabilities. The ADA's approach is often referred to as "functional" because it concentrates on improving the ways persons with disabilities *function* in the workplace, in public places, at home, and as citizens, in order to integrate them into society and ensure them equal opportunity to pursue their talents.

The ADA's approach is also a social one. It recognizes the ways that society and social practices create disability and focuses on changing those assumptions and practices. It changes our "usual" way of doing things. The ADA also prohibits employers from using hiring and promotion criteria that unnecessarily bar qualified persons with disabilities.¹³⁸ The ADA also bars employers from making stereotypical assumptions about people's abilities.¹³⁹ These prohibitions underscore the fact that society's usual ways arbitrarily and needlessly exclude persons with disabilities from productive work. Isolation, dependency, limited opportunities and poverty are not inherent conditions of disability. It is, moreover, a matter of civil rights that the physical environment changes to adapt to the needs of individuals who have limitations on how they move about, receive and communicate information, and go about their daily activities. "Mere" cost—benefit analysis cannot justify building only for the "average" consumer if persons with disabilities will be excluded.

The ADA's functional and social approaches stand in stark contrast to federal disability policies of the past.¹⁴⁰ Policies such as the veterans' rehabilitation acts after World Wars I and II up

¹³⁸ *Id.*

¹³⁹ *Id.* § 12112(a); *id.* § 12101(a)(7) (stating that individuals with disabilities are a minority that suffers from stereotypic assumptions and that such discrimination is unlawful).

¹⁴⁰ ALBRECHT, *supra* note 115, at 94-95 ("The Americans with Disabilities Act . . . set[s] a new precedent by legally establishing the rights of persons with disabilities. This act . . . [is] designed to integrate [persons with disabilities] into the mainstream of society.").

through the Rehabilitation Act of 1973 focused on changing, fixing, or training the disabled person to help him overcome his disability and adapt to the ways of "normal" society.¹⁴¹ Rehabilitation formed the backbone of American disability policies¹⁴² up until the ADA's passage.¹⁴³ Rehabilitation views disability as a problem arising from injury and illness that is specific to the individual and that results from the inherent limitations imposed by a person's medical condition.¹⁴⁴ Under this view, persons with disabilities are naturally and inherently less able, abnormal, deviant, and need medical treatment, cures, special training, and protection.¹⁴⁵ Federal

¹⁴¹ See MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT* 53-55 (1990) (describing aim of rehabilitation as restoring impaired person to normal functioning); see also EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED* 169-70 (1987) (stating that disabled veterans' programs focused on generous rehabilitation efforts); Robert Funk, *Disability Rights: From Caste to Class in the Context of Civil Rights*, in *IMAGES*, *supra* note 95, at 1, 16 (discussing Rehabilitation Act of 1973's decree to develop vocational, rehabilitative, and independent living programs); 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, 1383 (1993) (arguing that focus of Rehabilitation Act of 1973 was to "restore" or "cure" persons with impairments and disabilities); LIACHOWITZ, *supra* note 117, at 19, 31 (explaining how early 20th Century American disability policy focused on converting disabled soldiers into "useful civilians").

¹⁴² See ALBRECHT, *supra* note 115, at 28 (contending that understanding history of American disability policy requires understanding rehabilitation); LIACHOWITZ, *supra* note 117, at 31-34 (describing vocational rehabilitation as primary policy method for dealing with disabled veterans after WWI and WWII and enabling them to be economically productive); *id.* at 37-40 (explaining that vocational rehabilitation programs for civilian work force shared same premise).

¹⁴³ See ALBRECHT, *supra* note 115, at 105-09 (describing American disability policy prior to ADA as essentially rehabilitative); Funk, *supra* note 141, at 10-14, 16 (describing American social policy from 1920-1960 and continuing with Rehabilitation Act of 1973 as focusing largely on rehabilitation).

¹⁴⁴ See ALBRECHT, *supra* note 115, at 83-84, 128 (describing rehabilitation as based on medicalized notion of disability that sees pathology or illness causing impairments that lead to disability); LIACHOWITZ, *supra* note 117, at 55-56, 108 (arguing that disability policy prior to ADA saw disability as personal defect inherent to individual and generally ignored social and environmental factors that contributed to disability); Hahn, *supra* note 97, at 181-82, 184 (describing medical model and noting that rehabilitation focuses on improving individual not changing surrounding environment). For example, to receive "disability benefits" under the Social Security Disability Insurance program or the Supplemental Security Income programs, a person "must have a medically determinable physical or mental impairment which, when modified by demographic factors, renders him/her unable to engage in any 'substantial gainful activity' (SGA) defined as work." 42 U.S.C. § 223(d)(1)(A), (d)(2)(A) (emphasis added) (quoted in Cheryl Rogers, *The Employment Dilemma for Disabled Persons*, in *IMAGES*, *supra* note 95, at 117, 121).

¹⁴⁵ See ALBRECHT, *supra* note 115, at 24-25 (explaining that under rehabilitation model "ideally 'handicaps' are treated with direct medical care interventions, preventative

rehabilitation programs targeted the "special" or "different" needs of handicapped individuals with the hope that, through rehabilitation or medical intervention, a handicapped or crippled person would learn to "adapt" to the normal world and to be a "productive" member of society.¹⁴⁶ That the "normal" world could adapt to the needs of a "handicapped person" was never considered.¹⁴⁷

Disability policies traditionally reflected this attitude and approach to the problem of disability, utilizing the "medical" or "pathology" model of disability.¹⁴⁸ Consistent with the idea that handicaps resulted from illness or medical conditions, rehabilitation professionals thought of handicapped persons as patients.¹⁴⁹ Rehabilitation was something *done to* a handicapped person by professionals who knew better than the handicapped person what could be done for him.¹⁵⁰ The individual being rehabili

rehabilitation, and restorative rehabilitation"); OLIVER, *supra* note 141, at 4 (describing how medical model of disability focuses on "abnormality" in human functioning and inability to perform "normal" human activities); Funk, *supra* note 141, at 7 ("Historically, the inferior economic and social status of disabled people has been viewed as the inevitable consequence of the physical and mental differences imposed by disability."); *id.* at 9, 12-14 (noting that society has viewed persons with disabilities as "unhealthy, defective and deviant, requir[ing] special institutions, services, care and attention . . . to survive"); Hahn, *supra* note 97, at 181-82 (explaining disability under medical model is "defect or disability . . . located within the individual" and focusing on "the etiology or causes of organic conditions").

¹⁴⁶ LIACHOWITZ, *supra* note 117, at 20, 77-79, 82-83, 107-08; Funk, *supra* note 141, at 8 (stating that focus of rehabilitation programs was "to create a nearly normal person").

¹⁴⁷ See Hahn, *supra* note 97, at 186 (explaining that rehabilitation model considered "surrounding environment . . . fixed and unmutable . . . beyond the legitimate purview of investigation"); LIACHOWITZ, *supra* note 117, at 11-12 (arguing that prior to ADA "physically abnormal persons [were] permitted to enter the social mainstream *on the terms* of the able bodied majority . . . [with] efforts that focus[ed] on adjusting persons . . . into existing social structures") (emphasis added).

¹⁴⁸ LIACHOWITZ, *supra* note 117, at 11-12, 108-11 (arguing that vocational rehabilitation laws of 20th Century have consistently defined disability in terms of individual medical impairment); ALBRECHT, *supra* note 115, at 23-24, 120-21; OLIVER, *supra* note 141, at 53-55 (describing rehabilitation as firmly entrenched in medical model of disability).

¹⁴⁹ LIACHOWITZ, *supra* note 117, at 108 (explaining that "medical focus resulted in disability being seen as a personal attribute[] and a disabled person being seen as a patient"); BERKOWITZ, *supra* note 141, at 171 (discussing how rehabilitation advocates urged that rehabilitation demanded specialized professionals with training similar to doctors); *id.* (describing how rehabilitation leads to dependence on medical professionals and rehabilitation counselors).

¹⁵⁰ See OLIVER, *supra* note 141, at 5 (explaining that medical model focuses on treating and curing impairments, not improving "patient's quality of life," and also views "disabled people as passive objects of intervention, treatment, and rehabilitation"); BERKOWITZ, *supra* note 141, at 157, 170-72, 176, 180, 188. Berkowitz explains that in the 1970s members of the

tated did not design the rehabilitation program or determine when it ended. Medical and rehabilitation professionals and experts controlled rehabilitation by determining how it would proceed, who was eligible for it, whether someone was impaired enough to qualify for rehabilitation services, whether someone was so impaired that rehabilitation would be futile, and when rehabilitation was complete or had achieved its maximum effect.¹⁵¹ If a person could only be partially rehabilitated, government and charitable programs placed handicapped persons in sheltered workshops, which gave people who could not work in a "regular" environment extra supervision and help and allowed them to work with people of their "own kind."¹⁵² People with disabilities largely remained segregated and isolated from "normal" society because rehabilitation tried to change or make a person with a disability "better," but ignored the myriad limitations the world placed in their paths. With little effort to alter the surrounding environment, complete rehabilitation was too often impossible.¹⁵³

The Architectural Barriers Act of 1968¹⁵⁴ and the Rehabilitation Act of 1973¹⁵⁵ took the first steps away from a wholly medical or pathological approach to disability policy and moved toward a functional approach, which sought to integrate persons with disabilities into mainstream American life.¹⁵⁶ Some aspects of the

disability community began to object to their lack of input into the rehabilitation process and its goals. Rehabilitation programs focused on "success" in terms of job placement, not on improving the lives of persons with disabilities. Moreover, rehabilitation agencies exercised an enormous amount of control, selecting only those persons judged to have the right kind of "mentality and temperament" to be successfully rehabilitated and placed in a job. Those "labeled 'infeasible' [were] denied services." *Id.* at 157.

¹⁵¹ See ALBRECHT, *supra* note 115, at 83-87, 121-24, 128 (illustrating how medical professionals exercise control over process of rehabilitation itself).

¹⁵² See LIACHOWITZ, *supra* note 117, at 81-82 (explaining that segregated work environment is premised on assumption that segregation is better for disabled persons).

¹⁵³ *Cf.* Rogers, *supra* note 144, at 124-25 (noting that vocational rehabilitation programs have been largely unsuccessful, have "over promised what they can do," and have often accepted only those applicants with very best chance of getting job).

¹⁵⁴ Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151-4157 (1994)).

¹⁵⁵ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (1994)).

¹⁵⁶ See Hahn, *supra* note 97, at 182 (discussing laws and regulations adopted in 1970s that led to new approach to disability that stressed interplay between individual and social and physical environment).

Rehabilitation Act also embodied the notion that integration was a civil right to which persons with disabilities were entitled.¹⁵⁷ The Rehabilitation Act required "recipients of federal funds to make their programs and services accessible" to the handicapped "by eliminating physical barriers and providing adaptive equipment and aides."¹⁵⁸ Educational institutions, for example, had to provide sign-language interpreters for deaf persons and books on tape or in Braille for blind persons.

On the whole, however, the Rehabilitation Act treated these accommodations "as group-differentiated entitlements or social services" for deaf and blind persons, rather than as part of a general right of equality and accessibility for persons with handicaps.¹⁵⁹ The Act's focus on *special* programs for the "handicapped" also undermined its goal of integrating handicapped persons into "mainstream" society by setting the "handicapped" apart as different and in need of *special* services.¹⁶⁰ The Rehabilitation Act's scope was also quite limited. Only recipients of federal funds were within its reach, and public transportation systems were not required to provide equal access to persons with disabilities. To gain access to the vast majority of public places, a person with a disability had to change himself and his condition to accommodate the environment.

¹⁵⁷ H.R. REP. NO. 101-485, pt. 3, at 25-26 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 465-66.

¹⁵⁸ 29 U.S.C. § 794.

¹⁵⁹ SILVERS ET AL., *supra* note 99, at 119; cf. BERKOWITZ, *supra* note 141, at 167-70 (discussing fragmentation in rehabilitation services was caused by desire to promote rehabilitation of persons with popular disabilities or those persons deemed particularly worthy of assistance, diluting support for more general rehabilitation services). Silvers notes that the Rehabilitation Act's approach of providing "special" services to handicapped persons correlated with a large increase in the number of students on university campuses claiming handicapped status. SILVERS ET AL., *supra* note 99, at 119.

¹⁶⁰ Cf. SILVERS ET AL., *supra* note 99, at 119; Funk, *supra* note 141, at 24 ("The myriad of disability-specific programs and policies, the segregation of disabled people, . . . and [not being able] to socially interact and participate has resulted in a politically powerless and diffuse class of people. . . . This class has accepted the . . . incorrect judgment of social inferiority."). Earlier efforts at rehabilitation were often designed to benefit veterans who had been injured serving their country in war. The provision of such special benefits were justified by the idea that we owed a special duty to handicapped veterans because of their sacrifices for our country. LIACHOWITZ, *supra* note 117, at 19, 24, 32-33, 36; see also BERKOWITZ, *supra* note 141, at 170 (explaining that disabled veterans have received "[s]pecial privileges" not accorded to civilians and that "veterans" are entitled to more generous benefits").

Most public places remained inaccessible to persons with disabilities.¹⁶¹

The Rehabilitation Act's main emphasis on rehabilitation continued to reflect the "medical" approach of earlier disability policies. The Act focused "on the individual to be repaired rather than [focusing on] on the environment to be reformed"¹⁶² and on restoring handicapped persons to "normal functioning."¹⁶³ In essence, rehabilitation is based on the notion that something is wrong with a handicapped person, and that everyone would be better off if that deficit or abnormality were fixed. The vocational rehabilitation sections of the Rehabilitation Act of 1973 were explicitly entrenched in the medical model of disability.¹⁶⁴ To be eligible for rehabilitation services, an individual had to demonstrate that she "possesses an infirmity that must be cured before employment can take place."¹⁶⁵ Only individuals with "a physical or mental

¹⁶¹ SILVERS ET AL., *supra* note 99, at 118-19.

¹⁶² *Id.* at 119; *see also* BERKOWITZ, *supra* note 141, at 167-68, 187-88 (arguing that rehabilitation is geared toward enabling persons with disabilities to "pass as able-bodied citizens").

¹⁶³ SILVERS ET AL., *supra* note 99, at 118-19; Funk, *supra* note 141, at 1, 16 ("The Rehabilitation Act of 1973 was passed . . . to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living."); Drimmer, *supra* note 141, at 1347-48.

¹⁶⁴ *See* Drimmer, *supra* note 141, at 1383 (arguing that by "using 'rehabilitation' as the prominent word in the title, Congress indicated that the goal of the Act was still to restore an injured worker to health, or to 'cure' an individual's problem"); *cf.* 119 CONG. REC. S5881-82 (daily ed. Feb. 28, 1973) (statement of Sen. Cranston) (describing how Rehabilitation Act of 1973 allocates money for rehabilitation of persons with specific medical conditions and also allocates money for medical treatments as well as rehabilitation); *id.* at S5900 (statement of Sen. Byrd) (explaining Rehabilitation Act's emphasis on ameliorating handicaps by changing or alleviating individual's limitations: "this legislation places greater emphasis on research and training of personnel to work with the handicapped on the development of innovative rehabilitation techniques and devices to both ameliorate the effects of being handicapped and to help make the handicapped more employable"); *id.* (statement of Sen. Byrd) (locating cause of handicap in individual, not in surrounding environment, by observing that Rehabilitation Act of 1973 "will ensure that the best knowledge, technology, and scientific research can be brought to bear on the problems of the handicapped in order that their *disabilities will no longer block their potential for a productive and self-supporting life*") (emphasis added).

¹⁶⁵ Drimmer, *supra* note 141, at 1382-83; *see* H.R. CONF. REP. NO. 92-1581, at 54-55 (1972), *reprinted in* S. Hrgs. On S. 7, Comm. on Labor and Publ. Welfare 171, 172-73 (1973) (clarifying that "[i]ndividuals who are not handicapped are not eligible for services," defining handicapped as disability that "constituted or results in a substantial handicap to employment," and requiring that eligibility for rehabilitation services as "handicapped individual" be assessed every 90 days) (emphasis omitted).

disability which . . . constitutes or results in a substantial handicap to employment” and who “can reasonably be expected to benefit in terms of employability from vocational rehabilitative services” were eligible for vocational rehabilitation.¹⁶⁶

Section 504 of the Rehabilitation Act marked the first recognition of the right of persons with disabilities to participate equally in federally-funded programs. Section 504’s ban on discrimination against “otherwise qualified individual[s] with handicaps” by recipients of federal funds¹⁶⁷ signaled that inclusion and equal participation are the civil right of persons with disabilities. The EEOC regulations to the 1974 amendments to the Rehabilitation Act moved the Act even further away from a medical approach towards both a “functional” and a civil rights approach to the issue of disability.¹⁶⁸ They defined “handicap” largely as the ADA now defines “disability”: persons with impairments that substantially limit major life activities; and persons with a record of or who are regarded as having such impairments.¹⁶⁹ This definition shifted the emphasis from being solely on what is wrong with an individual to include society’s role in creating disability. People who have no medical impairment could still be “disabled” if the attitudes of others substantially limited their major life activities.¹⁷⁰

The Health, Education, and Welfare Department’s regulations also contained the precursor to the ADA’s reasonable accommodations requirement.¹⁷¹ These regulations provided that a “recipient [of federal funds] shall make reasonable accommodations to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless . . . [it] can demonstrate

¹⁶⁶ Pub. L. 93-112, § 7(6), 87 Stat. 355, 361 (codified as amended at 29 U.S.C. § 705(20)(A) (1994)).

¹⁶⁷ Pub. L. No. 93-112, § 504(a), 87 Stat. 355, 394 (codified as amended at 20 U.S.C. § 794(a) (1994)).

¹⁶⁸ Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617 (codified as amended in scattered sections of 29 U.S.C.). See BERKOWITZ, *supra* note 141, at 211-13 (stating that Office of Civil Rights in Department of Health, Education and Welfare would ensure that § 504 would be regarded as civil rights law).

¹⁶⁹ 29 C.F.R. § 1613.702(a) (1979).

¹⁷⁰ See BERKOWITZ, *supra* note 141, at 213-14 (stating that ensuring equality for persons with disabilities may require “different treatment,” that is, reasonable accommodation and modification of physical environment).

¹⁷¹ 29 C.F.R. § 1613.704(a).

that the accommodation would impose an undue hardship."¹⁷² Reasonable accommodation marks a significant departure from rehabilitation. It depends on the belief that the "usual" way of doing something may not be the only way and that a person with a disability need not change to meet an existing set of circumstances. Insisting that the *usual* way is the *only* way artificially and arbitrarily¹⁷³ bars a disabled person's employment as surely as stairs bar people in wheelchairs from a building's upper floors.

The ADA obviously goes much further than the Rehabilitation Act. The ADA's employment title applies to all employers who employ fifteen or more persons, not just recipients of federal funds.¹⁷⁴ Its public accommodations title reaches almost any business that affects commerce.¹⁷⁵ Its public transportation title covers all forms of public transportation: buses, trains, and "any other" transportation system "that [regularly] provides the general public with general or special service."¹⁷⁶ Finally, its telecommunications access title applies with few exceptions to "any common carrier engaged in interstate communication by wire or radio."¹⁷⁷

The ADA focuses on how the environment can change to accommodate persons with disabilities. The ADA says, in effect, that there is nothing about a person or his disability that is inherently bad or needs to be fixed.¹⁷⁸ The ADA, thus, embraces the functional and civil rights approaches to disability, mandating that nearly all public places and services, including places of public accommodation, government buildings, modes of public transportation, and radio and telephone services,¹⁷⁹ must be accessible to persons with disabilities. It rejects the "medical" model of disability in that none of its provisions address rehabilitation. Admittedly, some aspects

¹⁷² *Id.*

¹⁷³ BERKOWITZ, *supra* note 141, at 215-18.

¹⁷⁴ 42 U.S.C. § 12111(5)(A) (1994).

¹⁷⁵ *See generally id.* § 12181(7) (listing private entities considered as public accommodations).

¹⁷⁶ *See id.* § 12141(2) (broadly defining public transportation systems run by public entities); *id.* § 12181(10) (defining scope of private and public transportation systems, excepting only aircraft); *id.* § 12184 (mandating antidiscrimination in provision of public transportation services).

¹⁷⁷ 47 U.S.C. § 225(a)(1) (1994).

¹⁷⁸ SILVERS ET AL., *supra* note 99, at 120.

¹⁷⁹ 42 U.S.C. § 12102(2).

of the "medical" model persist. Disabilities are still defined as possible results of "physical or mental impairments."¹⁸⁰ Importantly, however, the ADA sees disability as only a *possible* result. Not everyone with physical or mental impairments is disabled; only those whose functioning is limited in some substantial way. Furthermore, a person does not actually have to be physically or mentally impaired to *be* disabled under the ADA. The definition of disability as "having a record of" or "being regarded as" having a physical or mental impairment demonstrates that the actions and attitudes of others can create disability where there is no substantially limiting impairment.

The ADA also jettisons the Rehabilitation Act's assumption that accommodation is a "special right" designed to advantage persons to whom accommodations are made. Accommodation is a civil right. "[A]ccommodation refashions an existing practice or site to *eliminate bias* against" persons with a particular disability.¹⁸¹ All employers who employ more than 15 employees, not just recipients of federal funds, are required to make reasonable accommodations.¹⁸² In keeping with other civil rights statutes, the ADA does not require employers to lower performance expectations. Only persons with a disability who are otherwise qualified for a job—that is, able to perform the essential job functions—are entitled to reasonable accommodation.

III. WHO HAS A DISABILITY? THE ISSUE OF CORRECTIVE MEASURES

An ADA plaintiff faces an enormous hurdle that neither a Title VII plaintiff nor an ADEA plaintiff has: proving that the ADA covers her. The ADA only protects "qualified individual[s] with a disability from discrimination."¹⁸³ That standard raises two main questions. First, what does it mean to be a "qualified individual"

¹⁸⁰ *Id.*

¹⁸¹ SILVERS ET AL., *supra* note 99, at 132 (emphasis added).

¹⁸² 42 U.S.C. § 12111(2) & (5)(A) (defining "employer" as "covered entity"); *id.* § 12112(a) (prohibiting "covered entity" from engaging in discrimination against qualified individual with disability).

¹⁸³ 42 U.S.C. § 12112(a).

under the ADA? Second, who are persons with disabilities? The Supreme Court's decisions in *Sutton* and *Murphy* address the latter question.

As discussed earlier, the ADA defines disability as one of three things: (1) having "a physical or mental impairment that substantially limits one or more of the major life activities"; (2) having "a record of such an impairment"; or (3) "being regarded as having such an impairment."¹⁸⁴ Specifically, *Sutton* addresses the question of what it means for a person to have a disability under the first and third prongs. With regard to the first prong, *Sutton* holds that the whether someone has a disability depends on an assessment of her limitations, taking into account any corrective measures she uses.¹⁸⁵

This Part examines the implications of that holding. Part IV will turn to *Sutton*'s other holding on what it means to "regard" someone "as" disabled. I argue that "disability" should be interpreted to mean something different under the first and third prongs in order to best fulfill the ADA's goals and purposes.

A. WHY ISN'T EVERYONE PROTECTED AGAINST DISCRIMINATION BASED ON DISABILITY? WHY THE ADA IS SO DIFFERENT FROM TITLE VII

Discrimination itself is not necessarily illegal or even a bad thing. People discriminate all the time without arousing concern. Law schools discriminate in favor of people who have published articles and against those who have not when hiring and granting tenure. Law professors discriminate in favor of exam answers that spot all the issues and against those that do not. Employers often discriminate in favor of people who seem quick and bright over those who seem slower. Some police departments have started doing the opposite: discriminating in favor of people of average intelligence because very intelligent people find police work boring and quit.¹⁸⁶ Employers discriminate against people who appear churlish and intemperate and in favor of those who seem friendly and easygoing.

¹⁸⁴ *Id.* § 12102(2).

¹⁸⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

¹⁸⁶ Mike Allen, *Help Wanted Invoking the Not-Too-High-IQ Test*, N.Y. TIMES, Sept. 19, 1999, § 4, at 3.

The law prohibits discrimination in employment against certain individuals based on some prohibited characteristics. We are all familiar with the prohibited characteristics—race, color, sex, pregnancy, religion, national origin, age, and, since the passage of the ADA, disability. We prohibit discrimination on these bases for a variety of reasons. We have concluded that race, color, religion, national origin, and sex are irrelevant to assessing how an employee will perform in the workplace.¹⁸⁷ We also believe people should be evaluated on their own individual qualities and abilities, not on predictions of their potential gleaned from their perceived or actual group affiliations.¹⁸⁸

Age discrimination is treated somewhat differently. Employers are only prohibited from taking an individual's age into account if she is over forty. The problem of age discrimination is thought to arise from negative stereotypes about growing older. Moreover, discrimination based on factors that correlate strongly with age, for example, length of service, seniority, or salary level, are legal under federal law so long as the employer actually distinguishes between persons on that basis and is not simply camouflaging intentional age discrimination.¹⁸⁹ Courts scrutinize much more closely discrimination based on factors that correlate strongly with race, national origin, or sex. Practices that and which disproportionately screen out persons based on those categories are examined to ensure that

¹⁸⁷ Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 603, 608 (1993). I say we have concluded that they are irrelevant because it is not self-evident that being a member of one or more of these groups is always irrelevant to employment decisions. Rational statistical discrimination based on group membership likely provides employers with additional information about the prospects for employees of different genders, races, and national origins. For example, it may be in the aggregate more expensive to hire women in their mid- to late-twenties than it is to hire women in their fifties or men at any age because young women are more likely to leave the workforce for periods of time due to pregnancy, child birth, and maternity leave. The informational value of rational statistical discrimination for any one particular applicant is likely much lower. For example, not every woman will leave the workforce, and the statistical probability cannot tell you who will and who will not; some women who do leave the workforce periodically will still be more productive workers than some of those who remain.

¹⁸⁸ See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (holding that under Title VII employer could not discriminate against women with young children on assumption that they would be less productive workers).

¹⁸⁹ *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); cf. *Ellis v. United Air Lines, Inc.*, 73 F.3d 999 (10th Cir. 1996) (holding that ADEA does not permit disparate impact suits).

the factors actually relate to the job duties and the employer's business.¹⁹⁰

Disability discrimination poses some unique issues. First we cannot simply conclude that disability is irrelevant to one's job qualifications. Some disabilities overlap with the ability to do job tasks. Second, determining who has a disability is often hard. All of us have a range of abilities and inabilities, but not all of us are "disabled." Compounding the difficulty, no bright line demarcates above-average ability from average ability, below-average ability, or from disability to perform a task.

The ADA protects only a select group of individuals from employment discrimination based on disability, in contrast to Title VII's protection of all individuals from race and sex discrimination. The ADA only protects "qualified individual[s] with a disability."¹⁹¹ This is far narrower than Title VII in two ways. First, not everyone is protected from discrimination on the basis of disability, only persons with a disability. Second, only *qualified* individuals with disabilities are protected from discrimination by employers. The ADA defines "qualified" as being able to do the essential parts of the job, although a person is considered "qualified" even if she needs "a reasonable accommodation" to accomplish those tasks.¹⁹²

Courts have agreed that a plaintiff under the ADA must prove three things to establish that he has a disability under the first prong of the ADA's definition of disability.¹⁹³ First, he must prove he has a physical or mental impairment, broadly defined by EEOC regulations on the ADA as "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting" one of the systems of the body.¹⁹⁴ Second, the impairment must affect his

¹⁹⁰ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

¹⁹¹ *Id.* § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

¹⁹² *Id.* § 12111(8).

¹⁹³ See *Bragdon v. Abbott*, 524 U.S. 624, 632-33 (holding that plaintiff must prove she has physical or mental impairment); *id.* at 637-36 (holding that impairment must affect major life activity); *id.* at 639 (holding that plaintiff must prove "physical [or mental] impairment was a substantial limit on the major life activity").

¹⁹⁴ 29 C.F.R. § 1630.2(h)(1) (1999).

ability to perform a "major life activity," which is also defined broadly: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹⁹⁵ And third, the limitations must be "substantial."¹⁹⁶ The regulations define substantial as, among other things, an *inability* to perform a task an "average person in the general population can perform," or being "*significantly restricted* as to the condition, manner, or duration" of performing such an activity when compared to an average person.¹⁹⁷

The definition of "physical or mental impairment" is so capacious that there is rarely any question whether someone has an impairment. Whether an impairment "substantially limits" any major life activities, however, has proven to be fertile ground for controversy and litigation. Thanks to medical progress, many people who have physical or mental impairments can use some drug or device that either ameliorates or eliminates the effects of their impairment. Sometimes, however, these treatments have side-effects or require vigilance on the part of an individual to take his medicine on a precise schedule. If drugs, other treatments, or corrective devices reduce the day-to-day effect of a person's impairment, should courts take that fact into account when evaluating whether his "impairment . . . substantially limits one or more of [his] major life activities"?¹⁹⁸ If side effects occur, should courts take those into account? And if treatment *could* reduce the effects of his impairment, should a court take into account those potential effects?

I argue in Part III.C. that the answer to these questions most consonant with the ADA's overall purpose and approach to disability is that corrective measures' effects must be taken into account when assessing disability, if the person claiming to have a disability uses them. Admittedly, this approach means that some persons who have serious physical or mental impairments will not have a disability under the ADA and will not be entitled to reasonable accommodations if medication (or other corrective measures)

¹⁹⁵ *Id.* § 1630.2(i).

¹⁹⁶ 42 U.S.C. § 12102(2)(A) (defining disability as impairment that "substantially limits" major life activities).

¹⁹⁷ 29 C.F.R. § 1630.26(j) (emphasis added).

¹⁹⁸ 42 U.S.C. § 12102(2)(A).

effectively controls the effects of the impairment. I argue that the ADA should not be interpreted to entitle persons with correctable impairments to reasonable accommodations. A more appropriate remedy for people with correctable impairments who need job accommodations to maintain their health (for example, someone with diabetes who needs extra breaks to inject insulin or someone recovering from cancer who needs occasional time off for treatment) would be to expand the Family and Medical Leave Act.¹⁹⁹

First, however, it is important to explore some of the approaches to the issue of corrective measures taken by the EEOC, various circuit courts of appeals, and the Supreme Court on the way to answering what it means to be an individual with "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."²⁰⁰

B. EVALUATING VARIOUS RESPONSES TO THE QUESTION OF MITIGATING MEASURES

1. *The EEOC Interpretive Guidelines' Approach: Disregard Mitigating or Corrective Measures.* The EEOC issued "Interpretive Guidance"²⁰¹ (the Guidelines) in conjunction with its regulations on disability discrimination "to ensure that qualified individuals with disabilities understand their rights . . . and [to] encourage compliance by covered entities."²⁰² Unlike regulations, interpretive guidelines are *not* promulgated according to formal notice and comment procedures.²⁰³ Rather, they represent the EEOC's gloss on the statute and regulations. The EEOC also uses the standards and analysis set out in the interpretive guidelines to resolve charges of employment discrimination.²⁰⁴ In part because they are not issued

¹⁹⁹ Currently, the Family and Medical Leave Act permits workers in companies with fifty or more employees to take up to twelve weeks of unpaid leave per year for serious medical conditions, but it does not provide leave for people with less serious conditions. 29 U.S.C. § 2612(a) (1994).

²⁰⁰ *Id.*

²⁰¹ 29 C.F.R. app. § 1630 (1999).

²⁰² *Id.*

²⁰³ *Washington v. HCA Health Servs., Inc.*, 152 F.3d 464, 469-70 (5th Cir. 1998), *vacated on other grounds*, 527 U.S. 1032 (1999).

²⁰⁴ 29 C.F.R. app. § 1630.

through notice and comment procedures,²⁰⁵ courts generally have not given interpretive guidelines the same level of deference as regulations.²⁰⁶

The EEOC Guidelines explain "physical or mental impairment[s] that substantially limit[] a major life activity" by separately defining "impairment," "major life activities" and "substantially limits."²⁰⁷ The EEOC's regulations define physical or mental impairments as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.²⁰⁸

The Guidelines emphasize that impairments described by the regulations are primarily *medical* conditions that "result [from] a physiological disorder."²⁰⁹ They contrast medical impairments with below-normal abilities (such as the inability to read with fluency), which may result from lack of education or "cultural" disadvantages. The Guidelines also distinguish impairments from physical characteristics like height, weight and strength that are within the "normal range and . . . are not the result of physiological disorder[s]."²¹⁰ Thus, someone who is 4'11" tall because his parents and grandparents were short would not have an impairment, while

²⁰⁵ *Washington*, 152 F.3d at 469-70.

²⁰⁶ See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 n.6 (1986) ("EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law.").

²⁰⁷ 29 C.F.R. § 1630.2(h)-(j).

²⁰⁸ *Id.* § 1630.2(h)(1)-(2).

²⁰⁹ *Id.* app. § 1630.2(h).

²¹⁰ *Id.*

someone who is 4'6" tall because he inherited dwarfism from his parents probably has an impairment. Or, taking an example from the Guidelines, someone who cannot read because he was never taught to read does not have an impairment, while someone who reads poorly because of dyslexia does have an impairment.²¹¹

Consistent with this focus on medical conditions, the Guidelines provide that whether a person has an impairment must be "determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."²¹² For example, even if a person's epilepsy is well under control because he takes medication, he still has an impairment under the Guidelines.²¹³ *Sutton* follows the EEOC's definition of physical and mental impairments.²¹⁴ The Court and the EEOC diverge, however, over how to determine whether impairments result in a disability.²¹⁵

In elaborating on the Regulations' definition of major life activities, the Guidelines adopt a more functional approach. They define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."²¹⁶ According to the Guidelines, this list "is not exhaustive," but merely illustrative of "those basic activities that the *average* person in the general population can perform with little or no difficulty."²¹⁷ The Guidelines' use of the term "average" rather than "normal" is notable. Focusing on the "average" person's abilities, not the "normal" person's, avoids the implication that a person who accomplishes a task differently is "abnormal." Defining disability in terms of the range of activities performed by average members of the population is arguably a more functional, less medical, concept of disability. It relies on an assessment of a person's ability to function in day-to-day activities. It does not require the conclusion that something is "wrong" with someone.

²¹¹ *Id.* app. § 1630.2(j).

²¹² *Id.* app. § 1630.2(h).

²¹³ *Id.*

²¹⁴ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478 (1999).

²¹⁵ *Id.* at 482.

²¹⁶ 29 C.F.R. § 1630.2(i).

²¹⁷ *Id.* app. § 1630.2(i) (emphasis added).

The Guidelines emphasize that having an impairment is not the same as being a person with a disability. The “effects of [the] impairment on the life of the individual” must be scrutinized to determine whether the limits on major life activities imposed by an impairment are “substantial” enough to rise to the level of a disability.²¹⁸ Many impairments simply do not impose sufficient restraints on “an individual’s life to the degree that they constitute disabling impairments.”²¹⁹ Impairments that can be disabling are not invariably so: “[W]hether an individual has a disability is not necessarily based on the name or diagnosis of the impairment.”²²⁰ What matters is how an impairment actually affects the life of an individual. “Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.”²²¹ How a particular individual with an impairment functions is the key to determining whether a person has a disability. The name of the impairment and how it *usually* affects people is irrelevant.

When assessing how an impairment limits a person’s major life activities, the Guidelines provide that “whether an individual is substantially limited in a major life activity must be made on a case by case basis, *without regard to mitigating measures* such as medicines, or assistive or prosthetic devices.”²²² It is at this point—determining what actual limitations are imposed by an impairment—that the Guidelines shift from using a functional approach in assessing disability to more of a *medical* approach. Under the Guidelines, the actual day-to-day functioning of an individual who uses medication or some correction is beside the

²¹⁸ *Id.* app. § 1630.2(j) (emphasis added).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* The Guidelines notes that some impairments, “such as HIV infection, are inherently substantially limiting,” *id.*, a conclusion which the Supreme Court comes very close to adopting in *Bragdon v. Abbott*, 524 U.S. 624 (1998). Considering that the plaintiff in *Bragdon* had not expressed an interest in having children, the Court’s conclusion that the plaintiff was substantially limited in the major life activity of reproduction would likely obtain for any person infected with HIV. *Id.* at 637-39.

²²² 29 C.F.R. app. § 1630.2(j) (emphasis added). *But see* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (providing that corrective measures must be taken into account).

point. The inquiry is, rather, what would the *general* effects of this impairment be were there no medication and no way to compensate for or mitigate its effects? This inquiry centers on what the effects of an untreated impairment are generally or hypothetically, not on the practical effects an impairment actually imposes on a particular individual.

Under the Guidelines, whether the *Sutton* plaintiffs were disabled would have been a straightforward question: *Without* their glasses or contact lenses, what could they do? Could they see well enough without glasses to go about their daily business? What could they not do without their glasses? Could they read? Watch T.V.? Drive? Grocery shop? Cook for themselves? What tasks would they be dependent on others to do for them? Answering these questions would have been fairly straightforward by testing their vision without glasses. Do they meet the minimum vision requirements to operate a car? Can they read a book without glasses? Recognize labels? Faces on a T.V. screen? This inquiry is very odd. The *Sutton* plaintiffs were able to do all of these things because they *did* wear glasses.

Interestingly, in another vision case before the Court, *Albertsons, Inc. v. Kirkingburg*,²²³ it would have been difficult to assess whether Mr. Kirkingburg's loss of an eye rendered him disabled under the Guidelines. The "corrective measures" Mr. Kirkingburg relied on were provided by his brain, which adjusted for the lack of depth perception caused by his loss of an eye by unconsciously translating visual cues into a sensation of depth.²²⁴ There were few circumstances where Mr. Kirkingburg was truly unable to "sense" depth of space and the distance of objects. He also unconsciously compensated for his loss of peripheral vision on one side by turning his head more frequently.²²⁵ If Mr. Kirkingburg's "corrective measure" was the unconscious working of his brain, how would a court go about disregarding it? The only option would be to conclude that, because humans require two eyes to sense depth and to see peripherally and Mr. Kirkingburg has only one, he must be substantially limited in

²²³ 527 U.S. 555 (1999).

²²⁴ *Id.* at 565.

²²⁵ *Id.*

his ability to perceive depth and to see objects to his side. Thus, he is substantially limited in the major life activity of seeing. The only problem with that conclusion is that it was not true in Mr. Kirkingburg's case.

If the Guidelines took a *functional* approach to disability, whether someone uses medication or corrective devices to ameliorate the effects of her impairment *would* be pertinent to assessing how her impairment affects her day-to-day life, her day-to-day *functioning*. It is common sense to analyze the question of disability in such a way. Is there a functional difference between the life of a person who takes Zoloft or Prozac²²⁶ to combat chronic depression and is restored to feeling as good as (or better than) the "average" person²²⁷ and a person who does not have depression at all? Both probably feel anxious sometimes (though anxiety may be more upsetting to the person on Zoloft because she may fear her illness is recurring).²²⁸ Both probably feel deliriously happy sometimes. The person who takes Zoloft must remember to take her medicine, may occasionally feel nauseated,²²⁹ and may have a somewhat lower sex drive²³⁰ than the person who does not take Zoloft. These, however, may be the only differences.²³¹

²²⁶ See PETER D. KRAMER, LISTENING TO PROZAC 62-63, 106, 328 n.63 (1993) (explaining that Zoloft and Prozac are both drugs classified as SSRIs (selective serotonin reuptake inhibitors) and are designed to combat depression).

²²⁷ See *id.* at xv, xvii (describing that author had seen in his psychiatry practice "patient after patient" who had come to him seeking treatment for depression become "better than well" and that his observations had been confirmed by many other clinicians); *id.* at 11 (describing Prozac as effective in treating atypical depression and obsessive compulsion disorder, as "especially effective in [treating] minor depression," and as having broader ability to stabilize mood by targeting serotonin); *id.* at 125-27 (explaining that Prozac is "particularly effective for mild chronic and recurrent depression" and thus may guard against kindled, more severe disorder or depression).

²²⁸ Cf. *id.* at 82-84 (explaining that when people with anxiety disorders, which are closely related to depression, are cured of spontaneous anxiety attacks, they often experience severe anticipatory anxiety, which stems from fear of spontaneous attacks recurring, though this anticipatory anxiety may fade over time).

²²⁹ *Id.* at 181 (describing Prozac's occasional side-effects of nausea, loss of appetite, and insomnia, but explaining that generally "Prozac . . . works . . . well and has [] few side-effects").

²³⁰ *Id.* at x, 316 n.x, 366-67 n.265 (describing sexual difficulties experienced by some persons who take Prozac).

²³¹ See *id.* at 11 (explaining that Prozac had "few immediate side effects" and that people on "Prozac do not feel drugged up or medicated").

Let us take a different example—the one at issue in *Sutton*. How does the life of a person with completely correctable 20-200 vision (using contact lenses or glasses) differ from the life of a person with 20-20 vision? The person who uses lenses cannot see when she first wakes up and has to fumble for her glasses. She has to keep a spare pair of glasses on hand. She has to carry re-wetting drops to moisten her contacts. She has to wipe her lenses off when they get fogged up from walking out of the cold into a warm room. Interestingly, in both examples, any *functional* differences between a person without an impairment and a person with an impairment only emerge when we consider the effect of the corrective measures. Individual reactions to medicines or corrective measures, which certainly affect how a person conducts her daily life, come into play only when a person's disability is assessed with reference to the measures she uses to combat her impairment.

2. *Circuit Court Approaches Prior to Sutton*. The Supreme Court's *Sutton* decision resolved division among the circuits as to the definition of disability. The circuits had taken an array of positions on the issue of how to assess whether someone is disabled. The First, Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits followed the EEOC's Guidelines and held that mitigating and corrective measures must be disregarded when determining whether an individual was actually disabled.²³² Only two circuits—the Tenth, which ruled on *Sutton* on appeal,²³³ and the Sixth²³⁴—had taken the position that the Supreme Court would espouse in *Sutton*: that corrective and mitigating measures must be taken into account when assessing whether a person has a disability.²³⁵ The Fifth Circuit split the difference and held that whether an individual's use of corrective measures should be taken into

²³² *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854 (1st Cir. 1998); *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2d Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997); *Baert v. Euclid Bev., Ltd.*, 149 F.3d 626 (7th Cir. 1997); *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996); *Harris v. H & W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996).

²³³ *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997).

²³⁴ *Gilday v. Mecosta Co.*, 124 F.3d 760 (6th Cir. 1997).

²³⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

account depends on the character of the disability and the effectiveness of the particular corrective measure.²³⁶

a. *The Fifth Circuit's Hybrid Approach.* The Fifth Circuit, in *Washington v. HCA Health Services*,²³⁷ charted a middle course, holding that if a mitigating or corrective measure completely corrected an individual's impairment, then a court should evaluate the plaintiff's limitations with regard to corrective measures.²³⁸ If a corrective or mitigating measure merely lessened the symptoms of the impairment without fully correcting it, then courts should evaluate whether the individual's impairment substantially limited her in a major life activity without regard to corrective measures.²³⁹ The Fifth Circuit seemed motivated by the idea that the ADA's purpose was to level the playing field for people who live with more severe physical or mental limitations than an average person does.²⁴⁰ An average person copes with back pain and occasional episodes of throwing his back out; an average person suffers injuries or illnesses that incapacitate him for a short period of time or require significant medical intervention such as medicine or surgery to correct. In the main, however, these medical interventions are successful. Even if an individual is temporarily incapacitated, the treatment restores him to health. The average person, however, does not cope with an incurable mental or physical condition with symptoms that can only be lessened, and perhaps lessened only intermittently.

Concluding that the EEOC Guidelines deserved some deference, the Fifth Circuit determined that individuals with impairments that are "serious in common parlance," and that "require that the individual use mitigating measures on a frequent basis, that is, he must put on his prosthesis every morning or take his medication with some continuing regularity," should be evaluated without regard to mitigating measures.²⁴¹ In other words, mitigating

²³⁶ *Washington v. HCA Health Servs., Inc.*, 152 F.3d 464, 471 (5th Cir. 1998), *vacated on other grounds*, 527 U.S. 1032 (1999).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 470.

measures that were employed "continuous[ly]" and on a "recurring" basis were to be disregarded when assessing a person's disability.²⁴² Examples the court gave of such impairments were those mentioned in the legislative history: "diabetes, epilepsy, . . . hearing impairments," and the like.²⁴³ In contrast, mitigating measures that essentially correct or permanently ameliorate impairments should be taken into consideration when determining whether an individual is disabled. For example, "[i]f an individual has a permanent correction . . . such as an artificial joint or a pin or a transplanted organ, that individual must be evaluated in his mitigated state and cannot claim that he is disabled because he would be 'substantially limited in a major life activity' if he had not had his hip joint replaced."²⁴⁴

Like the EEOC Guidelines, the Fifth Circuit's approach in *Washington* reflects a medical approach to the issue of disability, focusing on the kind of impairment or illness a person has.²⁴⁵ Not everyone who has diabetes or epilepsy faces limitations on how they conduct their lives, even if they have to take daily medication or monitor their diets vigilantly. Most problematically, the Fifth Circuit's standard does not help resolve difficult cases. What does it mean that a mitigating measure essentially corrects or permanently ameliorates an impairment? Do glasses permanently ameliorate an impairment even though they have to be put on every morning? What distinguishes a "serious" impairment, which might or might not be assessed with regard to corrective measures, from a minor impairment, which, regardless of corrective measures, would not count as a disability? If by "serious" the Fifth Circuit meant that there should be a list of conditions drawn up that constitute "serious" impairments, it would seem an inflexible and wholly medicalized standard.²⁴⁶ If the seriousness of an impairment

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 471.

²⁴⁵ *See id.* at 470 ("We hold that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines . . . will be considered in their unmitigated state.")

²⁴⁶ For example, if new treatments emerge, how will the list of *per se* disabilities be altered, and who will be charged with monitoring new developments in treating physical and mental impairments? *Per se* approaches to defining disability similarly rely on a medical

has to be assessed on a case by case basis, the Fifth Circuit's standard is question begging.

b. Some Dissension From Courts Deferring to the EEOC Guidelines. One court that adopted the Guidelines' approach to corrective measures only did so out of deference to the EEOC. In *Smith v. Horton Industries*,²⁴⁷ the district court explicitly stated that in the absence of the EEOC Interpretive Guidelines, it would have evaluated the plaintiff's disability with regard to any corrective measures he employed.²⁴⁸ "Were this court writing on a clean slate, the Court would adopt the rationale of the Tenth Circuit in *Sutton*."²⁴⁹ The failings the court identified in the EEOC's approach are instructive:

By way of personal example, I cannot read at all, hunt successfully or play tennis successfully without the use of eye wear. It would seem unfair, if you will, to conclude that uncorrected vision due to the aging process would translate to a disability within the meaning of the ADA. That seems, however, to be the import of [ignoring corrective measures].²⁵⁰

It *does* seem odd that people who can completely, or nearly so, control or correct their impairments with medication or corrective devices and have no practical limits on how they conduct their lives should be considered to have a disability along with persons who, despite assistive devices like wheelchairs, still remain significantly

approach and suffer from problems of inflexibility. See, e.g., *Lanctot*, *supra* note 42, at 338 ("[T]he case-by-case approach to the determination of disability should be abandoned for impairments that are inherently substantially limiting."). Both appear inconsistent with the ADA's functional approach. Congress expressly rejected a *per se* approach. "It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future." S.REP.NO. 101-116, at 22 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 120.

²⁴⁷ 17 F. Supp. 2d 1094 (D.S.D. 1998).

²⁴⁸ *Id.* at 1099.

²⁴⁹ *Id.* (internal quotation marks omitted).

²⁵⁰ *Id.*

hampered in their daily life activities.²⁵¹ It is important to remember that the ADA imposes *affirmative obligations* on employers to reasonably accommodate disabilities.²⁵² It does not require employers simply to ignore a person's disability, as Title VII requires employers to disregard race, sex, religion and national origin. An employer's failure or refusal to provide reasonable accommodations to a person with a disability is illegal under the ADA, as is making an employment decision that takes into account a person's need for a reasonable accommodation.²⁵³ The ADA prohibits employers from considering the cost of reasonable accommodations in all employment decisions, unless an accommodation amounts to an undue burden.²⁵⁴ The employer shoulders the burden of proving that an accommodation imposes such a burden.²⁵⁵

3. *Equity Perplexities: Why Should People with Correctable Impairments Be Entitled to Reasonable Accommodations?* If corrective measures enable an individual with an impairment to live life in a manner similar to a person without an impairment, why should the impaired individual be entitled under the ADA to reasonable accommodations from his employer? Why should a person with a correctable impairment be entitled to more time off or to a flexible schedule for medical care, while an individual without an impairment who needs some time off because of the health needs of her children, or because of plain old misfortune, is not?²⁵⁶ We might argue that a person who takes medication or who uses meditation as a corrective measure may need breaks during the day to take medication or to meditate. Without a workplace accommodation to take such breaks, the impairment might worsen dramati-

²⁵¹ See Mark Kelman, *Market Discrimination and Groups*, (Stanford Law School, Public Law and Legal Theory Working Paper Series, Paper No. 8, 2000) 11, 37-38, 68-72 (visited Nov. 11, 2000) <http://papers.ssrn.com/paper.taf?abstract_id=231752> (arguing that reasonable accommodation is best viewed as claim to in-kind redistribution of wealth in form of social integration and can only be justified for persons who without accommodation will be excluded or segregated from workplace or social realm).

²⁵² 42 U.S.C. §§ 12111(a), 12112(b)(5) (1994).

²⁵³ *Id.* § 12112(b)(5).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Cf.* Kelman, *supra* note 251, at 72 (noting that disabled persons and nondisabled persons who could benefit from accommodations are in morally equivalent, blameless positions).

cally. A person who is not able to inject insulin, for example, might lapse into a coma. Such serious consequences seem to make a compelling case for requiring that reasonable accommodations be granted to persons with such impairments. *Sutton's* rule would nonetheless leave such people without a claim to reasonable accommodations.

This outcome is perhaps not as inequitable as it may first seem. Federal law does not entitle a new employee leave from work if her pregnancy requires bed rest—no matter how dire the consequences—if her employer does not grant leave for temporary disabilities more generally.²⁵⁷ For impairments that can be mitigated and that have consequences short of death or grave illness, we may reasonably question whether there is a compelling reason to require reasonable accommodations for an individual whose impairment will flare up if she does not take work-breaks to take her medication, when the law would require no accommodations for someone who breaks her arm or comes down with mononucleosis.²⁵⁸ I will return to this question in greater detail in Part III.C.4 in connection with my discussion of the Court's *Sutton* opinion.²⁵⁹

C. COULD THE SUPREME COURT HAVE GOTTEN SUTTON RIGHT? SHOULD CORRECTIVE MEASURES BE TAKEN INTO ACCOUNT?

In *Sutton*, the Supreme Court held that corrective and mitigating measures must be taken into account when determining whether a person has a disability and is therefore protected by the ADA.²⁶⁰

²⁵⁷ See 42 U.S.C. § 2000e(k) (stating that pregnant women are to be treated same "as other persons not so affected [by pregnancy] but similar in their ability or inability to work"); *Troupe v. May Dep't Stores*, 20 F.3d 734, 738 (7th Cir. 1994) (finding that employer may fire employee for pregnancy-related absences "unless the employer overlooks the comparable absences of nonpregnant employees"); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611(2), 2612(a)(1)(D) (1994) (extending protections to employees employed by employer for over twelve months).

²⁵⁸ The temporary nature of a broken arm and of mononucleosis would preclude either of them from being an impairment that substantially limits a major life activity. See 29 C.F.R. § 1630.2(j)(2) (1999) (explaining that temporary impairments do not substantially limit major life activities); *id.* app. § 1630.2(j) (1999) (same).

²⁵⁹ See *infra* notes 357-360 and accompanying text.

²⁶⁰ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999).

Sutton involved two twin sisters, Karen Sutton and Kimberly Hinton, who applied and were rejected for positions as pilots with United Air Lines because their uncorrected vision was worse than 20-100. Without glasses, both of them had 20-200 vision in one eye and 20-400 in the other. With glasses, both had 20-20 vision or better in both eyes. Without glasses, the plaintiffs "effectively [could not] see to conduct numerous activities such as driving a vehicle, watching television, or shopping in public stores."²⁶¹ With glasses, they "function[ed] identically to individuals without a similar impairment."²⁶²

Under the ADA's definitions, whether a person is "disabled" depends on whether he (1) has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," (2) has "a record of such an impairment," or (3) "is regarded as having such an impairment."²⁶³ The *Sutton* plaintiffs alleged both that they had an impairment that substantially limited one or more major life activities and that they were regarded as having such an impairment.²⁶⁴ Each side agreed that the *Sutton* plaintiffs' myopia constituted an impairment for purposes of the ADA, because myopia is a "physiological disorder, or condition" that affects one of the systems of the body.²⁶⁵ The question was whether this impairment substantially limited any of their major life activities.

The Court relied almost entirely on the ADA's text for its conclusion that courts must take into account any corrective measures used by the plaintiff in evaluating whether the plaintiff has a disability. First, the Court noted that the phrase "substantially limits" one or more "major life activities" is phrased in the "present indicative verb form," indicating that a person must *currently* be substantially limited rather than "potentially or hypothetically" so.²⁶⁶ A person whose impairment is corrected, the Court reasoned, is not actually limited from engaging in any

²⁶¹ *Id.* at 475.

²⁶² *Id.*

²⁶³ 42 U.S.C. § 12102(2) (1994).

²⁶⁴ *Sutton*, 527 U.S. at 475.

²⁶⁵ 29 C.F.R. § 1630.2(h)(1) (1999).

²⁶⁶ *Sutton*, 527 U.S. at 482.

activities.²⁶⁷ Second, the ADA provides that disabilities be evaluated “with respect to *an individual*”; “[t]he name or diagnosis of the impairment” is not conclusive of disability.²⁶⁸ Courts must focus instead on “the effect of that impairment on the life of the individual.”²⁶⁹ The Court read the language “with respect to an individual” to require an inquiry into the effect that an impairment actually has on the particular plaintiff.²⁷⁰ If a particular person’s impairment can be corrected or mitigated, then the effect the impairment has on the person’s life is altered (presumably for the better, though a medication or treatment may have side effects). Side effects of corrective treatment, the Court held, should be considered another reason for evaluating disability in light of corrective measures.²⁷¹ Third, the Court argued that the ADA’s findings demonstrated that Congress had not intended the ADA to protect all persons whose uncorrected impairments would substantially limit them in some major life activity.²⁷² The Court noted that the ADA’s findings stated that forty-three million Americans had physical or mental disabilities, whereas the number of Americans with correctable impairments is closer to 160 million.²⁷³

1. *Squaring Sutton with the House and Senate Committee Reports on the ADA.* *Sutton* has been roundly criticized for its formal textual analysis; its repudiation of the EEOC’s interpretive guidelines on this issue; its disregard of legislative history that suggests Congress wanted individuals’ disabilities to be evaluated without reference to corrective measures; and its seemingly ironic concern for the *individual*, while limiting the ADA’s protection and entitlement to reasonable accommodations to an extremely narrow class of Americans.²⁷⁴

²⁶⁷ *Id.* at 483.

²⁶⁸ *Id.* (emphasis added).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 484.

²⁷² *Id.*

²⁷³ *Id.* at 484-85.

²⁷⁴ Professor Chai Feldblum, who helped draft the ADA, contended that *Sutton* and its companion cases left “the ADA . . . with a huge gaping hole right at its heart.” Robin Toner & Leslie Kaufman, *Ruling Upsets Advocates for the Disabled*, N.Y. TIMES, June 24, 1999, at A24. Professor Feldblum argued that *Sutton* creates “the absurd result of a person being disabled enough to be fired from a job but not disabled enough to challenge the firing.” David

The Court's reliance on formal, textual arguments, largely divorced from arguments based on the policies or purposes of the ADA, seems to have been driven largely by the Court's desire to duck the merits of the EEOC's interpretive guidelines and to avoid deciding whether the Court owed interpretive agency guidelines less deference than it owed agency regulations promulgated through a formal notice and comment process.²⁷⁵ To avoid these questions, the Court was forced to hold that the statutory language of the ADA was clear and unambiguous on the issue of corrective measures and that the EEOC's interpretation was unreasonable in light of the ADA's "clear" text.²⁷⁶ Notably, nowhere does the ADA's text specifically address the issue of corrective measures. A law, such as the ADA, that is filled with vague, contextual terms like "disability," "substantially limited in one or more of the major life activities," "reasonable accommodation," and "undue hardship," is peculiarly ill-suited to "the rule of law is a law of rules"²⁷⁷ school of statutory interpretation.

a. A Functional, Civil Rights Approach. There is more to the Court's opinion in *Sutton* than a simple continuation of crabbed employment discrimination jurisprudence and a prudential dodge of a sticky administrative law question. Arguably, *Sutton* correctly decides the issue of corrective measures. The ADA's text and

G. Savage, *High Court Reins in Disability Law's Scope*, L.A. TIMES, June 23, 1999, at A1. See also, e.g., Feldblum, *supra* note 78, at 153-54 (arguing that Court's formalistic analysis had little connection to Congress's purposes for enacting ADA); Parmet, *supra* note 78, at 80-81 21 (criticizing textualists approach taken in *Sutton*, which ignored inherent ambiguity of text upon which Court was relying as well as clear legislative history contrary to Court's conclusions); Chemerinsky, *supra* note 42, at 88-89; *The Supreme Court, 1999 Term-Leading Cases*, 113 HARV. L. REV. 200, 337-41 (1999); Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 87-103 (1999); Colgate, *supra* note 42, at 143.

²⁷⁵ *Sutton*, 527 U.S. at 477-80.

²⁷⁶ *Id.*; see also *Chevron USA v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) (holding that regulations are entitled to deference if statute is ambiguous and regulations are reasonable interpretation of statutory language); *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218 (1994) (finding FCC regulation to be unreasonable interpretation of word "modify" in 47 U.S.C. § 203(b)(2) (1994)).

²⁷⁷ Cf. Antonin Scalia, *The Rule of Law as Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("[U]ncertainty has been regarded as incompatible with the Rule of Law" and arguing that certainty afforded by rules should be preferred to individualized but uncertain justice afforded by standards).

purpose strongly support that whether a person is actually, functionally disabled (that is, has a physical or mental impairment that substantially limits a major life activity) is most properly evaluated with regard to corrective measures. Two reasons support this conclusion. First, an analysis of the ADA's text, its legislative history and its purposes reveal that the ADA's primary purpose is to integrate people into the work world who have long been shut out by job and workplace designs that only took into account the needs and abilities of able-bodied people and by negative employer attitudes. Second, the ADA fundamentally views disability as a *functional* problem and a *civil rights* problem, not as a medical problem. This approach is exemplified by the fact that the ADA does not try to cure, fix, or rehabilitate persons with disabilities; it takes them as they are.

Taking corrective measures into account when determining whether someone actually has a disability—and thus may need a reasonable accommodation—makes sense in light of these goals. Reasonable accommodations can easily be justified for people with disabilities that actually limit their functioning in day-to-day life. For such persons, reasonable accommodations mean the difference between being employed and being unemployed, being productive and being a drain on society, living independently and being dependent on others to manage daily living, actively participating in the social, political, and economic life of America, and living in relative isolation. The lack of reasonable accommodations likely does not prevent persons with largely correctable conditions (correctable high blood pressure, myopia, treatable heart disease, and the like) from being employed or participating in average American life. Tellingly, the *Sutton* plaintiffs and Mr. Murphy had little trouble finding alternative employment, and all asserted that their “correction” allowed them to live “normal” lives.²⁷⁸

It is especially difficult to justify reasonable accommodations for people with largely correctable impairments when, for example, we do not require employers to reasonably accommodate a woman's breast feeding schedule or parents' need to take their children to

²⁷⁸ *Sutton*, 527 U.S. at 475-76; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 518-20 (1999).

doctor appointments.²⁷⁹ Moreover, legally entitling people with largely correctable impairments to reasonable accommodations stands in tension with the fact that we do not require employers to employ the merely untalented or unintelligent, much less bear the cost of their inabilities and limitations. Mandating that employers reasonably accommodate persons with largely correctable impairments may create serious inequities among the treatment of persons with similar limitations.²⁸⁰

b. But What About the ADA's Legislative History? Justice Stevens's dissent rebukes the Court for entirely ignoring the ADA's legislative history that supports disregarding corrective measures.²⁸¹ The Court is indeed guilty on this point. The Court's reasons for ignoring the ADA's legislative history appear to be largely formalistic. Under the Court's increasingly textual approach to statutory interpretation, resort to legislative history is rarely permissible.²⁸² Given the influence of Justice Scalia's "ordinary meaning of the text" approach, the Court rarely finds a text ambiguous, at least when Justice Scalia is in the majority. Having held that the text of the statute was clear and unambiguous, the Court could justify avoiding the legislative history entirely.²⁸³

²⁷⁹ Cf. Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2156 (1994) (arguing that failure to accommodate pregnancy and demands of parenthood means that women predictably experience "permanent or lengthy early . . . departures from the work force, which contribute significantly to job-market segregation and the wage gap between women and men").

²⁸⁰ That persons with largely correctable impairments should not be entitled to reasonable accommodations under the ADA does not mean that the ADA should not protect them from discrimination. As I will argue in Part IV, discriminatory attitudes and stereotypical assumptions may impose insurmountable barriers to employment. The ADA's antidiscrimination provisions should be applied far more broadly than its reasonable accommodations provisions.

²⁸¹ *Sutton*, 527 U.S. at 495-512.

²⁸² See, e.g., *West Va. Univ. Hosps., Inc., v. Casey*, 499 U.S. 83, 100-02 (1991) (holding that Congress's intent to include expert witness fees within fee shifting scheme of 42 U.S.C. § 1988 was irrelevant in light of Court's role to construe ambiguous terms "to contain that permissible meaning which fits most logically and comfortably into the body of . . . law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind . . . but because it is our role to make sense rather than nonsense out of [law].") (citation omitted); cf. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring) (criticizing opinion for making use of legislative history beyond narrow task of ensuring that Congress had not meant bizarre anomaly in Rule 609 of Federal Rules of Evidence).

²⁸³ *Sutton*, 527 U.S. at 482.

The dissent argues that the ADA's text is vague and never addresses the issue of corrective measures, thus authorizing even textualists to peek at the legislative history.²⁸⁴ And, indeed, nowhere does the ADA specifically address whether corrective measures should be taken into account or disregarded. The Court had to lean heavily on the grammatical structure of the text (the fact that "an impairment that substantially limits one or more major life activities" is in the present indicative tense) and on the ADA's emphasis that a particular *individual's* limitations should be gauged before the ADA's text could be interpreted to address the corrective measures issue.²⁸⁵ The legislative history, on the dissent's account, would have quickly put this issue to bed because it expresses Congress's intent that a person's disability should be assessed without regard to any corrective measures.²⁸⁶

The legislative history, however, does not unequivocally support ignoring corrective measures, despite Justice Stevens's portrayal. The House Education and Labor Committee Report (the House Report) does state that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."²⁸⁷ But what "mitigating measures" means with reference to reasonable accommodations and auxiliary aids is unclear.²⁸⁸ "Auxiliary aids" and "reasonable accommodation" are defined by the ADA as things that an employer might provide a person with a disability to enable her to perform some essential aspect of the job, such as providing a person with a severe hearing impairment with a sign interpreter, providing a blind person with a reader or with text in tape version, or modifying work equipment for persons with mobility impairments.²⁸⁹ Reasonable accommodations and auxiliary aids, however,

²⁸⁴ *Id.* at 499 (Stevens, J., dissenting).

²⁸⁵ *Id.* at 483.

²⁸⁶ *Id.* at 499-501 (Stevens, J., dissenting).

²⁸⁷ H.R. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 325.

²⁸⁸ *But cf. Feldblum, supra* note 78, at 154 (contending that Congress carefully deliberated about issue of corrective measures and determined they should not be taken into account in determining existence of disability).

²⁸⁹ See 42 U.S.C. § 12102(1) (1994) (defining "auxiliary aids"); *id.* § 12111(9) (defining "reasonable accommodation").

are not "corrective measures." Corrective measures are something that an individual uses on his own initiative.²⁹⁰ It is possible that the House Report was referring to things an employer might provide that would "mitigate" the effect of someone's disability. For example, a reasonable accommodation, such as a higher desk and wider doorways, might give a person confined to a wheelchair as much mobility as someone who can walk; or providing a blind person with an auxiliary aid, such as a reader or electronic reading device, might allow a blind person to absorb textual material just as well as a sighted person. If all the House Report meant was that such accommodations and aids should not be considered when assessing the extent of a person's impairment, it would have been a very trivial point, hardly worth the time and effort of including it in a committee report. Even if a person in a wheelchair could easily get around a particular office, or if a blind person with the aid of a reader could easily absorb printed text in the workplace, such accommodations and aids are rarely provided in the other areas of their lives. As a result, people who use wheelchairs generally have mobility problems, and, without readers, blind persons cannot read printed text.

The House Report seems to mean something else by "mitigating measures," not "reasonable accommodations" and "auxiliary aids." The House Report continues:

For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of

²⁹⁰ 29 C.F.R. § 1630.2(o) (1999) (enumerating possible reasonable accommodations as modifications to application procedures, work environment, or benefits for persons with disabilities); *Id.* app. § 1630.2(o) (explaining that reasonable accommodation includes accommodations to ensure equal opportunity in application process and to enable person to perform essential job functions, but does not require employer to provide personal assistive devices, aids or services).

disability, even if the effects of the impairment are controlled by medication.²⁹¹

These examples are curious in light of the House Report's reference to "auxiliary aids" and "reasonable accommodations." Neither hearing aids nor medication is a reasonable accommodation that an employer might provide. Both are medical devices, corrective measures taken by an individual himself, to limit the effects of his impairment. And while a hearing aid might be an "auxiliary aid," medication to control epilepsy is not.

What unites all of these kinds of "mitigating measures" is that none of them actually correct the underlying condition or restore the person to the equivalent functioning of someone with no impairment; each merely lessens an impairment's effects. At most, then, the House Report suggests that for only partially correctable impairments, such as hearing loss and epilepsy, mitigating measures should be ignored. With regard to fully correctable impairments, such as myopia, the House Report is silent.

The Senate Report from the Committee on Labor and Human Resources is quite different from the House Report. Like the House Report quoted above, the Senate Report,²⁹² which was written before the House Report, states that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."²⁹³ Up to this point, the Senate and House Reports use exactly the same language.

But then the House and Senate Reports diverge. The Senate Report emphasizes that the ADA must define disability broadly so as to prohibit discrimination against individuals who are "regarded as" disabled by others, even if a "medical condition[]" is "under

²⁹¹ H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 325.

²⁹² S. REP. NO. 101-116, at 23 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 121; *see also* H.R. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 325.

²⁹³ S. REP. NO. 101-116, at 23, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 121.

control, and . . . do[es] not currently limit [an individual's] major life activities."²⁹⁴ The Senate Report states:

By amending the definition of "handicapped individual" to include not only those who are actually physically impaired but also those who are *regarded as impaired* and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.²⁹⁵

In particular, the Senate Report singles out "individuals with *controlled* diabetes or epilepsy" as examples of individuals with medical conditions that are *not* substantially limiting, but which make persons with epilepsy and diabetes targets of unjustified discrimination and negative stereotyping.²⁹⁶

These conflicts between the House and Senate Reports on the issue of mitigating and corrective measures suggest that Congress did not fully resolve how corrective measures fit into an assessment of a person's limitations and that no unified congressional intent ever coalesced on the corrective measures issue. The House Report leans toward the EEOC's position of disregarding corrective measures when assessing disability. The House Report, however, was written *after* the Senate passed the ADA. It is, therefore, difficult to impute knowledge and agreement with its contents to the Senate, especially in light of the Senate Report's comment that a person with a controlled impairment would not *have* a "substantially limiting impairment." The Senate Report would not have left persons with "controlled" or "mitigated" impairments out in the cold; instead, the Senate Report presumes that people with such impair-

²⁹⁴ *Id.* at 24, reprinted in 1 Legislative History, *supra* note 100, at 122.

²⁹⁵ *Id.* at 24 (quoting *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)) (emphasis added), reprinted in 1 Legislative History, *supra* note 100, at 122.

²⁹⁶ *Id.* (emphasis added).

ments would be protected from discrimination based on their impairments by the ADA's "regarded as" prong.

On balance, these reports suggest that at least some members of the House thought that disability should be assessed without regard to corrective measures, and also that at least some members of the Senate thought that: (1) taking mitigating measures into account was sometimes appropriate in evaluating a person's limitations; and (2) some people who can control their impairments with medication do not have a substantially limiting impairment.

Even if one reads these committee reports as endorsing the EEOC's position on corrective measures, this next section explains that such an approach is at odds with other aspects of the legislative history. The ADA's overall functional and civil rights approach to disability indicates that corrective measures should be taken into account when assessing the limitations imposed by physical and mental impairments. The ADA's conception of disability recognizes that physical and mental impairments do not inevitably cause disability. Instead, disabilities result from the intersection of a person's impairment with, among other things, the design of the surrounding environment and buildings, the form in which information is communicated (whether written, spoken, or in Braille), the extent to which job duties are fixed or malleable, and by exaggerated, negative assumptions about the limitations created by a disability.

A functional, social view of disability recommends taking stock of a person's existing limitations, not extrapolating what those limitations might be in the abstract. If medication or a corrective device like eyeglasses would largely ameliorate the palpable effects of an impairment on a person's daily life, the functional approach advocates the conclusion that the person is not "disabled." The ADA does not give a leg up to a person whose medication or glasses enable them to participate in American life as well or nearly as well as the average person.

Finally, I argue in Part III.C.5 that requiring employers to grant reasonable accommodations to persons with largely correctable impairments creates serious anomalies in the law's treatment of similarly situated individuals. Assessing disability with respect to corrective measures minimizes these anomalies.

2. *Squaring Sutton with the ADA's Functional, Civil Rights Approach.* Taking corrective measures into account when assessing an impairment's effect on an individual's major life activities fits nicely within the ADA's overall tenor and approach. The House and Senate Reports consistently refer to the ADA's *functional approach* to disability. Both the Senate and House reports emphasize that "[a] physical or mental impairment does not constitute a disability under the first prong of the definition . . . unless its severity . . . results in a 'substantial limitation of one or more major life activities.' A 'major life activity' means *functions* such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities."²⁹⁷

Our social practices, in the form of an inhospitable physical environment and negative attitudes and stereotypes, compound an impairment's disabling effects. "Fear of mistreatment and discrimination, and the existence of architectural, transportation, and communication barriers, are critical reasons why individuals with disabilities do not participate [in American public life] to the same extent as nondisabled people."²⁹⁸

The ADA's purpose section also embodies this functional, social approach, noting that impairments do not cause disability so much as do inhospitable physical environments, condescending and unaccommodating attitudes, and negative stereotypes.²⁹⁹ Disability—the *inability* to perform a particular task or set of tasks—is described in the purpose section as a *situational, contingent* condition, not an inherent condition arising inevitably from a physical or mental impairment. That is why the ADA concentrates

²⁹⁷ H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 325 (emphasis added); S. REP. NO. 101-116, at 22 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 120 (emphasis added).

²⁹⁸ H.R. REP. NO. 101-485, pt. 2, at 42 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 315. *See also* S. REP. NO. 101-116, at 78 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 176 (explaining that "telecommunications relay services" means telephone transmission services that allow individual who has hearing impairment or speech impairment to engage in communication by wire or radio with hearing individual in manner that is *functionally equivalent* to *ability* of individual who does not have hearing impairment or speech impairment to communicate using voice communication services by wire or radio).

²⁹⁹ 42 U.S.C. § 12101(a)(7)-(9) (1994).

on changing and restructuring the configuration of things around us, like buildings, services, public transportation, offices, and jobs, so that a person can work and participate in American life regardless of his disability.

This understanding of disability suggests that an individual's abilities and limitations should be evaluated in his usual condition. If an individual usually takes medication to control an impairment, and, as a result, is not substantially limited in his day-to-day life either by the impairment or the medication, the functional approach would require taking stock of his limitations in light of the corrective measures the individual uses.

A functional, social approach to disability draws a sharp line between disability and illness.³⁰⁰ That someone has an illness or medical impairment, such as many of the conditions enumerated in the EEOC regulations on physical and mental impairments, does not mean he has a "disability." Conversely, that someone has a "disability" does not imply that he is ill or has a medical impairment. Professor Anita Silvers explains that a functional approach draws such a sharp distinction for the following reasons.³⁰¹ Focusing on functional disabilities rather than on medical impairments or illnesses trains attention on an individual's particular needs.³⁰² Focusing on disability avoids the judgment that there is something "inherently wrong" with a person who has a disability.³⁰³ By contrast, the conclusion that someone is ill or has a medical impairment leads almost inevitably to the presumption that the illness should be cured.³⁰⁴

³⁰⁰ SILVERS ET AL., *supra* note 99, at 76-79.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*; see *id.* at 76-79 (explaining that determining that person has disability does not necessitate conclusion that person is ill or suffering or that her limitations are "inherently bad"). "Pain, suffering and incapacitation are bad things that should be avoided if possible." *Id.* at 60 (quoting JEROME BIRKENBACH, PHYSICAL DISABILITY AND SOCIAL POLICY 91-92 (1993)). "Given our conviction that science and technology can always meet the challenge posed by a threat to human life and health, people with disabilities—especially those who are chronically ill or dying—come to represent the failure of biomedicines' mastery over the human body. . . . [One "all too familiar way" to hide these failures and our incomplete mastery] "is to attribute the failure to the victim and to blame, fear and eventually physically isolate the victim." *Id.*

Focusing on the limitations imposed by our social practices does not necessarily lead to the conclusion that someone's "disability" should be "fixed." Rather, if someone is unable to walk and is thus unable to manage sidewalks with curbs and stairs in her wheelchair, we may conclude that we should create curb cuts and ramps, not that a person should be rehabilitated or surgically enabled to walk. A functional, social approach avoids judging the inherent worth of the "lives of people with disabilities."³⁰⁵ It is an essential aspect of this approach to disability that disabilities and persons with disabilities are not judged as "bad" or "abnormal" or "deficient."³⁰⁶

Professor Silvers summarizes the ADA's approach well:

The ADA is propelled by the theory that [the] social isolation [of persons with disabilities] will be diminished, and their social equality furthered, by a different kind of protection from that advised by the medical model of disability—namely, by protecting them against external obstructions of their physical and social access rather than from their internal flaws and failings. The ADA thus marks a significant evolution of the status of citizens with disabilities by advancing them beyond confinement to a class subject(ed) to special treatment and by joining them with other minorities as classes explicitly designated to command equal treatment.³⁰⁷

Ironically, the view that a person's disability should be assessed without regard to corrective or mitigating measures represents a step back toward the medical model of disability.³⁰⁸ It requires determining what effects a disease or impairment usually has, not

³⁰⁵ *Id.* at 95.

³⁰⁶ *Id.* at 72. For example, many deaf persons, if given the opportunity to have a cochlear implant, would choose to remain deaf because of their connections to the deaf community and their feelings about the cultural richness of sign language. *Id.*

³⁰⁷ *Id.* at 120. Though Professor Silvers advocates a functional and civil rights approach to interpreting the ADA, she does not address the issue of *who* is disabled and whether that question should be answered with or without regard to corrective measures.

³⁰⁸ *See id.* at 59-74 (explaining rationale for medical model of disability).

what actual limitations the individual in question experiences. It shifts the inquiry to the illness. What the individual experiences becomes secondary, as does the manner in which the world compounds her limitations, and how her limitations might be accommodated or lessened. Admittedly, the ADA's rejection of the medical model and embrace of the functional and social model is not complete. It does define disability as a result of a "physical or mental impairment,"³⁰⁹ and the EEOC regulations define impairments in terms of medical disorders.³¹⁰ Yet, in most respects the ADA surely strides toward a functional approach. We should not take its occasional nods to the medical model as an invitation to remake the ADA on a medical model of disability.

Sutton's approach to evaluating whether a person has a disability is more consistent with a social, functional approach than the Guidelines are. Additionally, *Sutton's* approach makes a fair amount of sense. If medication or other corrective devices largely blunt the effects of a person's impairment, is she really functionally disabled in any meaningful sense? Can we really say that either of the *Sutton* plaintiffs was functionally disabled? (Whether others may still see them as "disabled" is a separate question. It is possible to be thought of as "disabled" without being disabled, and one may need protection against discriminatory stereotypes and animus about an impairment. Part IV addresses that question.) If a person's condition is largely controlled she probably is not disabled in the sense of needing reasonable accommodations to enable her to work or to participate in social and political life.³¹¹

Finally, some commentators have argued that the Supreme Court's insistence that courts evaluate each particular plaintiff's limitations undercuts the ADA's effectiveness and grants courts far too much discretion on the issue of whether someone has a disability. Professor Lanctot, for example, has argued that an individualized approach has made it much easier for defendants to argue that

³⁰⁹ 42 U.S.C. § 12102(2) (1994).

³¹⁰ 29 C.F.R. § 1630.2(g)-(h) (1999).

³¹¹ On the other hand, if a person is seriously limited in her ability to work or to accomplish other daily activities without a reasonable accommodation, we would probably conclude that her condition is not really controlled by medication or other mitigating measures.

a particular ADA plaintiff's impairment does not actually impose any substantial limitations on any life activities.³¹² On the other hand, a medical or per se approach that defines certain conditions as disabilities implies that there is something inherently wrong with someone who is per se disabled.³¹³ The ADA decidedly rejects that idea.

3. *Congress Intended to Entitle a Smaller Class of People to Reasonable Accommodations than the EEOC Guidelines Did.* We can imagine a law that protects all individuals from discrimination based on disability, whether or not they are disabled or have physical or mental impairments. In fact, the ADA took that form when it was originally introduced by the 100th Congress in 1988.³¹⁴ Echoing Section 703(a) of Title VII, this initial draft bill of the ADA forbade discrimination against any person on the basis of handicap in employment, housing, public accommodations, public transportation, and discrimination by government agencies and telecommunication and broadcast services.³¹⁵ Additionally, this initial draft defined handicap very broadly, far more broadly than the final ADA. The draft defined the phrase "on the basis of handicap" to mean "because of a physical or mental impairment, a perceived impairment, or record of impairment."³¹⁶ The definition of "physical or mental impairment" in the initial draft would have codified the Rehabilitation Act regulations on impairment which broadly define impairments in terms of physiological or mental disorders, anatomi-

³¹² Catherine J. Lanctot, *Ad Hoc Decisionmaking and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 336-40 (1997).

³¹³ SILVERS ET AL., *supra* note 99, at 67.

³¹⁴ See H.R. 4498, 100th Cong. § 2(b)(2) (1988) (declaring its purpose "to provide a prohibition of discrimination against persons with disabilities parallel in scope of coverage with that afforded to persons on the basis of race, sex, national origin, and religion"); see also *id.* § 4(a)(1-6) (1988) (declaring that discrimination on basis of handicap will be prohibited in employment practices, sale or rental of housing, public accommodations, transportation, broadcast and telecommunications, and practices of state and local governments).

³¹⁵ Compare, H.R. 4498, 100th Cong. §§ 2(b)(2), 3 (1-4), 4(a)(1) (1988) (making discrimination against any "person" on "basis of handicap" illegal), with 42 U.S.C. 2000e-2(a)(1) (1994) (making discrimination by employer against "any individual" on basis of race, color, national origin, religion, or sex illegal).

³¹⁶ H.R. 4498 § 3(1).

cal losses that affect major systems of the body or mental capabilities, and cosmetic disfigurements.³¹⁷

This initial draft's definition of disability and scope of coverage differ in two major ways from the final version of the ADA. First, the initial draft was much broader in its scope and offered broader protections than the ADA does. It would have applied to all persons,³¹⁸ not just "qualified individual[s] with a disability."³¹⁹ It would have protected all persons from discrimination on the basis of handicap,³²⁰ not just individuals with a disability who are discriminated against because of their disability.³²¹ The definitions of handicap and of discrimination on the basis of handicap were also defined extremely broadly, far more broadly than the final version of the ADA. The initial draft defined "[o]n the basis of handicap" as "because of a physical or mental impairment, perceived impairment, or record of impairment."³²² Under the initial draft, impairments did not have to substantially limit a major life activity to be a handicap.

By defining the group of protected persons so broadly, the initial draft of the ADA effectively characterized a far wider range of activities as illegal discrimination on the basis of handicap than the ADA ultimately does. Under the initial draft, employers would have been required to provide reasonable accommodations to persons who had "a physical or mental impairment," even if those persons were not limited in a major life activity.³²³ For example, an employer would have been required to allow someone who had a relatively minor impairment to have a flexible schedule to accommodate his doctors appointments. Covered entities would also have been prohibited from providing persons with impairments with services or jobs that were "different or separate" than ones offered to

³¹⁷ *Id.* § 3(2).

³¹⁸ *Id.* § 4(a) (stating that "no person shall be subjected to discrimination on the basis of handicap . . .") (emphasis added).

³¹⁹ 42 U.S.C. § 12112(a) (stating that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . .").

³²⁰ H.R. 4498 § 4(a) (stating that "no person shall be subjected to discrimination on the basis of handicap . . .") (emphasis added).

³²¹ 42 U.S.C. § 12112(a).

³²² H.R. 4498 § 3(1).

³²³ *See id.* (requiring reasonable accommodations).

unimpaired persons.³²⁴ The failure to do so was discrimination because of handicap. In the final version of the ADA that became law, however, only persons with substantially limiting impairments are entitled to be provided with services in the same manner as nondisabled persons.³²⁵ For example, a store probably has to reconfigure its layout to permit persons in wheelchairs to pass through aisles.

Second, the initial draft of the ADA defined "handicap" in medical, not functional, terms. Everyone with a physical or mental impairment was handicapped,³²⁶ and discrimination because of a "physical or mental impairment" was prohibited under the initial draft.³²⁷ It paid no regard to the effect an impairment actually had on the manner in which a person conducted her daily activities. The initial draft's definition treats handicaps as an inevitable consequence of some "disorder," some anatomical "loss," or some deviation from good health.³²⁸

No one ever expected the initial draft of the ADA to become law. The ADA's sponsors and the disability community knew it would need substantial revision before it could win congressional approval. The initial draft of the ADA was introduced simply to begin the process of educating Congress, the executive branch, and the public about the pressing problem of discrimination against persons with disabilities and to put disability discrimination on the national agenda.³²⁹ Given that it was introduced at the end of the 100th Congress and at the close of President Reagan's presidency, the initial draft had no chance of becoming law. It did, however, put disability discrimination on the national political agenda. Then-Vice-President Bush promised in his acceptance speech at the Republican Convention that as President, he would make ending discrimination against people with disabilities his top priority.³³⁰

³²⁴ *Id.* § 5(a)(1)(A)(iv).

³²⁵ 42 U.S.C. § 12102(2)(A) (defining "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities . . .").

³²⁶ H.R. 4498 § 3(1).

³²⁷ *Id.* § 3(2).

³²⁸ *Id.*

³²⁹ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 71, 75, 82, 86.

³³⁰ *Id.* at 84.

The ADA was not immediately reintroduced when the 101st Congress commenced in 1989. Senator Lowell Weicker, who had been the ADA's primary Senate sponsor, lost his seat in the 1988 election, so the ADA needed a new sponsor.³³¹ Senator Tom Harkin took up the baton as primary sponsor, but as a first-term senator, he realized he would need the support and help of a more senior senator to push the ADA through the Senate.³³² Senator Kennedy was a natural choice because Kennedy saw disability essentially as a "civil rights issue," due to the influence of one of his staff members.³³³ Both Senator Kennedy and Senator Harkin were deeply committed to securing broad antidiscrimination protection for persons with disabilities. Both had close family members who had disabilities.³³⁴

Senators Harkin and Kennedy concluded that in its initial draft form, the ADA "was too ambitious and stood little chance for passage."³³⁵ It would need to be completely rewritten.³³⁶ Securing protection from discrimination for persons with disabilities required getting the ADA through Congress and obtaining the President's signature. Achieving passage by the Senate and the House would require the business community's support, not just the disability community's, as well as broad bipartisan support in the Senate, House, and Bush Administration.³³⁷ The ADA therefore had to be introduced in the 101st Congress in a form in which it could be passed. Senators Harkin and Kennedy feared that if it were to be tagged "extreme," it would never recover.³³⁸ They decided to hold discussions with members of the business community, the Bush Administration, and House and Senate leaders to figure out what "a form that could be passed" actually entailed.³³⁹ They wanted to

³³¹ *Id.* at 95-96.

³³² *Id.* at 96.

³³³ *Id.* at 97.

³³⁴ See *supra* text accompanying notes 16-25.

³³⁵ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 97.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

"reach important compromises before they even introduced the bill."³⁴⁰

These meetings convinced Senators Kennedy and Harkin that "modesty and parity" had to be the ADA's guiding lights.³⁴¹ They decided that the ADA should be built on previous civil rights legislation so that it appeared to be a moderate, inevitable evolution of past policies, specifically, the Rehabilitation Act.³⁴² To that end, the May 1989 draft of the ADA jettisoned the initial draft's extremely broad definition of handicap, and instead modeled its definition of "disability" on the Rehabilitation Act's definition of "handicap," a definition that had been part of federal policy for over fifteen years.³⁴³ The May 1989 draft also dropped the initial draft's definition of "reasonable accommodation" and incorporated the Rehabilitation Act Amendments' definition.³⁴⁴ The Rehabilitation Act's definition of reasonable accommodation was somewhat narrower than the initial draft's and did not include "modifying [job] standards [and] criteria" as reasonable accommodations.³⁴⁵

Crucially, the definition of disability was significantly narrowed in the May 9, 1989 draft to mirror the definition of "handicap" in the Rehabilitation Act regulations.³⁴⁶ This narrower definition carried through to the version of the ADA that ultimately became law. Getting the ADA through Congress depended on significantly

³⁴⁰ *Id.*

³⁴¹ *Id.* at 98.

³⁴² *Id.* Professor Feldblum explains the change in the definition of disability similarly, noting that "the political disability rights advocates found [the 1988 draft] to be unrealistic and infeasible to pass in Congress," Feldblum, *supra* note 78, at 127, in part because the 1988 draft had "consistently created greater burdens on employers, businesses, and the government than had existed under Section 504" of the Rehabilitation Act. Thus, the May 1989 bill "used the Section 504 regulations as its guide, and diverged from those regulations in only a few, select circumstances." *Id.*

³⁴³ See S. 933, 100th Cong. § 3(2) (1989) (changing initial draft's definition of "disability").

³⁴⁴ *Id.*

³⁴⁵ Compare *id.*, with H.R. 4498, 100th Cong. § 3(5) (1988) (highlighting differences in definition of "reasonable accommodation" between initial draft of ADA and Rehabilitation Act).

³⁴⁶ See Feldblum, *supra* note 78, at 128 (explaining desire to base ADA's definition of disability on Rehabilitation Act's: "[I]t seemed smarter to use a definition of disability that had fifteen years of experience behind it, rather than to attempt to convince Congress to adopt a new, untested definition.").

narrowing that definition. In its history of the ADA, the National Council on Disabilities explains,

One of the most contested aspects of the ADA was the definition of disability People asked: Who would be protected by the ADA? It was a difficult question because one cannot readily identify disability with the same precision that one can identify, for example, race and gender. It would also be impractical to name, in a statute, each and every type of disability. This would be cumbersome, if not impossible, and require constant adjustment for future, unknown impairments. The challenge, therefore, was to find a definition that was at once inclusive enough to cover diverse disabilities, but not so universal that anyone could claim protection by the ADA. Under the original bill, S. 2345, a disability was defined as "a physical or mental impairment, perceived impairment, or a record of impairment." This definition was similar to the . . . definition implemented under Section 504 [of the Rehabilitation Act], except that [the definition in the initial draft of the ADA] did not limit the first prong to impairments that "substantially limit" major life activities. This meant that anyone with "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss" or "any mental or psychological disorder" was covered. Senate staff members Osolinik and Silverstein instead used the Section 504 standard and restricted the first prong to "a physical or mental impairment that *substantially limits* one or more of the major life activities"—such as seeing, walking, self-care, and learning.³⁴⁷

³⁴⁷ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 99-100.

The definition of persons with disabilities was limited to persons who had impairments that imposed substantial limitations on their daily lives.³⁴⁸

Notice that the concern that drove this narrower definition of disability was that the class of persons defined as disabled under the *first* prong (persons who actually have impairments) had to be a lot narrower than in the initial draft. That is, the class of persons *entitled to reasonable accommodations* had to be narrow because the business community would not countenance being forced to grant reasonable accommodations to everyone who had a physical or mental impairment. Because of the way the definition of "disability" is structured, how the definition of the class of persons who actually have a disability is defined may affect who is protected from arbitrary discrimination under the second and third prongs of the definition—the "record of such an impairment" and the "regarded as having such an impairment" prongs.³⁴⁹ Interestingly, narrowing the scope of the "record of" and "regarded as" prongs did not seem to be on anyone's agenda. Indeed, no one seemed to pay much attention to the effect that changing the first prong of the definition would have on the "record of" and "regarded as" prongs of the disability definition.

The ADA as passed was broader than the initial draft in one very important respect. The final ADA applied to a larger number of public accommodations and to more kinds of public accommodations. The initial draft cribbed the Civil Rights Act of 1964's definition of public accommodations—hotels, motels, restaurants, bus and train stations. The final version of the ADA, however, applied to "virtually every privately-operated establishment that was used by the general public and affected commerce."³⁵⁰ The ADA needed to apply to such a wide range of public establishments because many more different kinds of public establishments and services were

³⁴⁸ See S. 933, 100th Cong. § 3(2) (1989) (defining disability as impairment "that substantially limits one or more of the major life activities of [an] individual."). *But cf.* Feldblum, *supra* note 78, at 129 (noting that decision to adopt Rehabilitation Act regulations' definition was "not a . . . decision to narrow the class of covered individuals from the wide-ranging group of individuals who had been covered under Section 504 of the Rehabilitation Act.").

³⁴⁹ 42 U.S.C. §§ 12102(2)(B) and (C) (1994).

³⁵⁰ NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 102.

inaccessible to persons with disabilities than had been inaccessible to African Americans. “[A]s the Civil Rights Act [of 1964] addressed the universe where race discrimination was an issue, [so] the ADA covered the broader universe where disability discrimination was relevant.”³⁵¹ Segregation and isolation of persons with disabilities had to end, and that required ensuring that the whole range of public accommodations was made accessible, including “places of lodging, office buildings, parks, recreation facilities, theaters, retail stores, medical facilities, and restaurants.”³⁵² Independence for and the integration of persons with disabilities had to be assured.

The evolution of the ADA, from its initial draft with an extremely broad definition of “handicap” and wide range of prohibited activities to its much narrower final form, tells us three important things about the ADA’s purpose as it bears on the issue of corrective measures. First, the ADA in its initial form would have covered everyone with a physical or mental impairment, however severe and whether or not it was correctable or corrected. Congress rejected this definition of “disability” in favor of a much narrower one that focused on the *effects* of a physical or mental impairment and that required those effects to be substantial. Second, the ADA initially defined “handicap” in medical terms.³⁵³ Congress rejected that conception of disability and adopted a *functional* and *social* definition of disability.³⁵⁴ Finally, Congress substantially expanded the number and types of public accommodations that would be prohibited from discriminating against and required to accommodate persons with disabilities.

Taken together, these three major changes in the ADA suggest that Congress narrowed the ADA’s protected class while assuring substantial protection and expanded opportunities to persons with serious limitations on their major life activities.³⁵⁵ A narrower definition of disability allowed Congress to apply the ADA to a

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* at 99-100.

³⁵⁴ *Id.*

³⁵⁵ *See id.* at 100 (explaining that protection of civil rights and guarantee of equal opportunity for persons with disabilities required reasonable accommodations as well as protection from disparate treatment).

broader range of businesses, accommodations, and activities, and required those entities to do more to accommodate such persons. Persons who live with substantial, uncorrectable limitations on their ability to engage in major life activities are the persons who are deprived of their civil right to full participation in American life, unless the law requires reasonable accommodations. Persons with largely correctable impairments, like the *Sutton* plaintiffs, Mr. Kirkingburg, and Mr. Murphy, do not need reasonable accommodations to participate fully in our society; in reality, the limitations on their activities are few.³⁵⁶ Only persons whose disabilities impose substantial limitations on their major life activities should be entitled to reasonable accommodations.

In light of the ADA's drafting history and the purpose that emerges from it, the most sensible way to determine who is substantially limited in the conduct of major life activities is to take into account whatever corrective measures a person actually uses when assessing the extent and severity of her limitations. Courts should evaluate a person's life in terms of how it is actually lived. Conversely, the palliative effect of a corrective measure on an impairment should be ignored if a person does not actually use a corrective measure, though one may be available. Regardless of a person's reasons for not using corrective measures, if she lives her life without them, her "uncorrected" state is the state relevant to the ADA. The ADA's functional approach demands this conclusion.

4. *Does Sutton Create a Catch-22?* We might still object that *Sutton* unfairly puts plaintiffs in a double-bind, forcing them into the impossible situation of arguing that they are disabled enough to be substantially limited in a major life activity, but not so disabled that they cannot satisfactorily perform at work.³⁵⁷ Is this a legitimate reading? Recall that to be covered by the ADA, plaintiffs must show that they are "otherwise qualified" (that is, able to

³⁵⁶ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488-89 (1999) (stating that plaintiffs' poor vision without glasses imposed no limitations on their life activities); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 525 (1999) (stating that hypertension did not limit life activities); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 565-67 (1999) (stating that blindness in one eye did not prevent plaintiff from doing most things).

³⁵⁷ David G. Savage, *High Court Reigns in Disability Law's Scope*, L.A. TIMES, June 23, 1999, at A1 (quoting Chai Feldblum).

perform the essential functions of a job, with or without reasonable accommodation) in addition to proving that they have a disability. If a person's corrective measures are taken into account, many have argued that only persons with the most severe disabilities would actually "have" a disability. Persons with severe disabilities cannot possibly establish that they are "otherwise qualified" to do a job.

Arlene Mayerson of the Disability Rights Education and Defense Fund has argued that the ADA's definition of who has a disability should encompass a wide range of disabilities, not simply the most severe. She points out, and rightly so, that the ADA is not built on the "model of disability where [a person is] supposed to be so unable [to work] that [she] get[s] some kind of government dole."³⁵⁸ Ms. Mayerson contends, "[i]t's . . . completely contrary" to the idea that persons with disabilities are independent and able to work "that if someone takes something that mitigates the disability effects of their impairment, which enables them to participate [better], that they're then cut out of protection under the [ADA]."³⁵⁹ She argues that surely it is perverse that "those who manage [] to correct and cope with their disabilities would lose protection against discrimination because of it."³⁶⁰

The force of the Catch-22 stems largely from the fact that many plaintiffs, including each of the plaintiffs before the Supreme Court, have argued that they have a disability because they have an impairment that substantially limits them in the major life activity of *work*. If work is the sole major life activity a person's impairment limits, *Sutton* certainly makes it more difficult to argue simultaneously that the person has a "disability" and that the person is nonetheless "otherwise qualified" to do the job. That problem is only compounded when a plaintiff argues, as the *Sutton* plaintiffs and Mr. Kirkingburg did, that their impairment only limits the ability to perform a particular job, such as a global airline pilot or a commercial truck mechanic.

³⁵⁸ Robin Toner & Leslie Kaufman, *The Supreme Court: Employment; Ruling Upsets Advocates for the Disabled*, N.Y. TIMES, June 24, 1999, at A24.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

People who argue that their impairment substantially limits them in some major life activity other than work, however, may not face any Catch-22. There is nothing inconsistent, for example, with arguing that an impairment substantially limits a person's mobility and that she can perform the essential functions of a job with reasonable accommodation (such as a first-floor office with wide doorways to accommodate a wheelchair), or that someone is substantially limited in the major life activity of seeing, but that with the reasonable accommodation of a reader, dictaphone, and typist, she can perform the essential job functions of an attorney.

5. *Persisting Equity Perplexities.* If courts take corrective measures into account when assessing whether someone *has* a disability, certainly fewer persons will be entitled to reasonable workplace accommodations. (People with impairments, defined broadly, should still be protected from "regarded as" discrimination, though, as I argue in Part IV).³⁶¹ Endorsing the Court's approach in *Sutton* means accepting that some people with some impairments that the legislative history specifically refers to as "disabilities" will not be entitled to reasonable accommodations if they use corrective measures that largely control their condition.³⁶² For example, under *Sutton* a person with diabetes kept in check by diet and a daily insulin injection may not be able to establish that she experiences major limitations on how she conducts her life. Her diabetes alone would not entitle her to any reasonable accommodations, such as extra breaks to inject insulin or to eat a snack. Similarly, a person with bipolar controlled by lithium and weekly visits to a psychiatrist might not be entitled under the ADA to a flexible work schedule to accommodate her weekly appointments. People with largely controllable conditions that require regular doctors' visits or frequent medical treatments will have to negotiate accommodations with their employers without the protections of the ADA.

The conclusion that the ADA leaves such persons without an entitlement to reasonable accommodations may seem unduly harsh and unfair. After all, such individuals have good and valid reasons

³⁶¹ See *infra* text accompanying notes 420-474.

³⁶² See H.R. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 325 (describing epilepsy and diabetes as disabilities).

for needing accommodation; the maintenance of their health depends upon it. Moreover, a person generally cannot control whether she has a potentially disabling condition. Such persons are usually morally blameless for their conditions. That a result is relatively harsh, though, does not necessarily mean that it is unfair.

Indeed, gauging who has a disability without regard to corrective measures itself creates some nagging questions about equal treatment of like cases that may be ameliorated if we assess disability with respect to corrective measures. For many people with impairments that are well under control, day-to-day life may be similar to that led by persons without such impairments. A person who needs more frequent breaks to take medication or needs regular time-off for doctors' appointments is in much the same position as a breast-feeding mother who needs to take regular breaks to use a breast pump, a parent with young children who have frequent colds and ear infections, a parent who needs to stay home with a child because the child's sitter has fallen ill, and a woman who is suffering from acute morning sickness. It is surprisingly hard to justify providing accommodations to people to attend to their own largely controllable medical conditions but not providing accommodations to breast-feeding mothers, parents whose children have frequent doctors' appointments, or women with morning sickness. Under the current state of federal law, such persons are not legally entitled to work accommodations.³⁶³

We cannot simply say that persons with correctable impairments deserve reasonable accommodations and parents do not because disability is outside of one's control and parenthood is within one's control. In the main, that conclusion is certainly true—people don't choose to become disabled, while many people choose to become parents. But some people become disabled as a result of engaging in very risky behavior, and other disabilities (say for example, heart

³⁶³ See, e.g., *Troupe v. May Dept. Stores*, 20 F.3d 734, 738 (7th Cir. 1994) (employer may fire employee for pregnancy-related absences "unless the employer overlooks the comparable absences of nonpregnant employees"); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2612(a)(1)(C) and (D) (1999) (requiring that leave be for "serious health condition[s]"); *id.* § 2612(b)(1) and (2) (providing that employee does not have legal entitlement to intermittent leave or reduced schedule unless intermittent leave is foreseeable and for planned medical treatment).

disease, age-related mobility impairments, and adult-onset diabetes) could have been avoided with better diet, calcium supplements, and more exercise. On the other side of the equation, many people become parents because their very reliable method of birth control fails. In the same way, the idea that persons with disabilities are morally blameless for their condition does not justify accommodations for persons with correctable impairments but not for people who need similar job accommodations for other reasons.³⁶⁴

We may ask further, why it is that the ADA mandates that employers pay persons with disabilities in accord with their gross productivity, not their net productivity, by absorbing the cost of reasonable accommodations. Can we square paying a blind attorney who requires the services of a reader the same salary as nondisabled associates? Can we square paying the blind attorney's reader at a rate less than half the attorney's because the reader lacks the attorney's intellectual firepower?³⁶⁵ Surely both the blind attorney and the reader are equally morally blameless (and morally worthy), and neither controlled how innately talented he would be. Professors Kelman and Lester query, "How . . . can it be considered less moral for a less 'productive' *group* to be paid less than a more productive *group* unless it is equally immoral to pay less productive individuals within a particular group less than more productive ones within the same group?"³⁶⁶

In response, we can counter that the attorney's civil rights and his inclusion in the work world depend on his being able to demand reasonable accommodations and on the legal requirement that the employer ignore the cost of the accommodation when making decisions regarding his employment. Without the reasonable accommodation of a reader, the attorney might not be able to work

³⁶⁴ Cf. Kelman, *supra* note 251, at 72 (noting that disabled persons and nondisabled persons who could benefit from accommodations are in morally equivalent, blameless positions).

³⁶⁵ Professors Kelman and Lester pose this hypothetical to demonstrate the tensions between the liberal-centrist view that employers should not be allowed to engage in rational statistical discrimination (for example, paying a blind attorney less because it has to provide him with a reader) and the conservative view that smarter people are more deserving than less intelligent persons. MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 207 (1997).

³⁶⁶ *Id.* at 211.

at all.³⁶⁷ He would be forced into dependency on his family or on the state and denied both the self-respect and the respect from others earned by working and being a productive member of society.³⁶⁸ Requiring an employer to pay a blind attorney for his gross rather than net productivity is therefore justified because, without that accommodation, the attorney would be condemned to a life of dependency and isolation. Providing the accommodation means the difference between a person who enjoys and exercises civil rights and one who is deprived of civil rights. It transforms a dependant person into a productive, full citizen, integrated into the mainstream of American society.³⁶⁹

Is the reader similarly entitled to be paid as much as the blind attorney, though he lacks the attorney's intellect or training? I think the answer is no. Requiring an employer to pay a less-intensely intelligent individual as much as a more intelligent person would certainly increase the income of the less intelligent person, but that may be all it accomplishes. It does not make the difference between dependency and independence, being productive and being a drain on society, between being able to control one's own life and relying on the charity of others. Many not-so-bright people are employed in all kinds of jobs, even as attorneys!³⁷⁰ We can justify requiring employers to grant reasonable accommodations to persons with disabilities because it means the difference between being segregated from the mainstream of American life, socially isolated and dependent, and being a productive, contributing member of the mainstream of American life and an independent person.

These sorts of perplexities also crop up if the ADA mandates reasonable accommodations for persons with largely correctable

³⁶⁷ See Kelman, *supra* note 251, at 11, 37-38, 68-72 (arguing that reasonable accommodation is best viewed as claim to in-kind redistribution of wealth and that people who do not face social exclusion or segregation have weak claims to reasonable accommodations).

³⁶⁸ See *supra* text accompanying notes 114, 120-93 (discussing importance of work to identity and citizenship in America).

³⁶⁹ "Listening to the voices of people with disabilities in their own words . . . we . . . observe[] that, foremost, they desire a public sphere that embraces their presence. For them equality means taking their places as competent contributors to well-ordered cooperative social and cultural transactions. For them, justice must offer, first, the visibility of full participatory citizenship, not a spotlight that targets them as needing more than others do." SILVERS ET AL., *supra* note 99, at 145.

³⁷⁰ I'll resist the urge to drop a "see, e.g.," cite.

impairments that impose few limits on their day-to-day lives. It is very difficult to justify requiring employers to pay net-less-productive persons with correctable disabilities the same as unimpaired persons who do the same job, without taking a position that also demands that employers pay untalented or less bright persons the same as more innately bright or talented persons.

Justice Ginsburg explained this point in a slightly different way in her concurrence in *Sutton*:

[P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination. In short, in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a "discrete and insular minority."³⁷¹

The legal right to reasonable accommodation is only fairly granted if it is provided to persons who actually have some sort of actual limitation on their major life activities that is substantially uncorrectable. Otherwise, no principled distinction justifies requiring a reasonable accommodation for a correctable or treatable impairment, but not for the other situations discussed above: parental needs and temporary medical conditions. In all of these cases, an individual is not necessarily at fault for her condition. Nor does the person with the impairment, the person with a temporary medical condition, or the person who has children with perpetual earaches live her life in a way substantially different from the average person.

Expanding the reach of the Family and Medical Leave Act (FMLA) may provide a more natural solution for people with controllable medical conditions that need regular attention. Currently, the FMLA requires employers to allow an individual to take time off intermittently to seek medical treatment for her own "serious health condition" or that of a spouse, child, or parent, and

³⁷¹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999).

it prohibits employers from discriminating against employees who take leaves.³⁷² Only individuals who have worked for an employer for over a year are entitled to such leaves,³⁷³ and total time off may not exceed twelve weeks of work during any given calendar year.³⁷⁴ As it stands now, the FMLA does not require an employer to accommodate an employee's need to take more frequent breaks or work a flexible schedule, which controlling a medical condition may necessitate.³⁷⁵ Nor does it require an employer to reasonably accommodate a woman who has severe morning sickness,³⁷⁶ parents whose child care falls through on a given day, or parents who need to take their children to the doctor's office for run-of-the-mill runny noses and ear infections.

Expanding the FMLA to require employers to allow workers a certain number of personal hours per year to be used for doctors appointments or breaks to take medication might be one solution to this very real problem. Requiring employers to permit flexible schedules for persons who need breaks to take medication, go to see a doctor or a mental health provider, or to take children to the doctor might be another solution, if such flexibility could be reasonably accommodated without undue hardship to the employer. Accommodations of this sort might take the form of permitting a person to take an extra fifteen minute break if the time was made up at the beginning or end of the day; or to take a couple of hours off to go to an appointment if the time was made up within the work week or banked in advance. There will be some work situations where such accommodations might not be reasonable. For example,

³⁷² 29 U.S.C. § 2612(a) (1999).

³⁷³ *Id.* § 2611(2)(A).

³⁷⁴ *Id.* § 2612(a)(1). The scope of the FMLA's application is limited to employers with fifty or more employees and to employees who work more than 1,250 hours per year. *Id.* §§ 2611(A)(ii), 2611(B)(ii). This limit on the FMLA's application means that more than half of the workers in the United States are not protected by its provisions. Issacharoff & Rosenblum, *supra* note 279, at 2190.

³⁷⁵ See *id.* § 2612(a)(1)(D) (providing leave for "serious medical conditions"); 29 C.F.R. § 825.114 (1999) (defining "serious health condition" as one that requires hospitalization or period of incapacitation exceeding three days and excluding ordinary conditions such as flu, ulcers, and upset stomach).

³⁷⁶ See D'Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1442 n.164 (1996) (explaining that FMLA has been interpreted to cover women with morning sickness so severe that woman was forced to take leave).

people who work on assembly lines may not be able to take more frequent breaks without throwing off the entire assembly line. As we become a more service-oriented economy and less a manufacturing economy, the need for scheduling flexibility should become increasingly possible to accommodate.

6. *Conclusion and Implications.* The Court seems to have come to the right conclusion in *Sutton* on the issue of corrective measures but for the wrong reasons. Though the Court's formal, textual arguments weakly favor the conclusion in *Sutton*, the real support for the Court's position comes from the ADA's purpose, gleaned from a reading of all of its provisions, of ensuring that persons who are limited in their ability to live independently, work, and participate fully in American society are guaranteed the right and the means to do so. The legislative history and the evolution of the ADA from its initial to final version back up this interpretation of the ADA's purpose. That purpose, in turn, counsels that the ADA's requirement of reasonable accommodations be limited to people who actually have substantial limitations on major life activities. Additionally, the ADA's functional approach to disability implies that the effect an individual's impairment has on her life be evaluated in terms of how she actually lives her life. If she uses corrective measures, whether they be glasses or Prozac, and they ameliorate her functional limitations, the measures should be taken into account.

I may have been too quick in my conclusion that persons with correctable physical or mental impairments are similarly situated to parents, temporarily injured workers, and pregnant women. There is a difference between a person with a physical or mental impairment and a person with a broken arm or a person with perpetually sick young children. Often people who have physical or mental impairments that can be corrected or treated are stereotyped by employers because of their impairments, even though the impairment does not actually set them apart from the "average" person. If employers consistently rely on stereotypes about physical and mental impairments in making hiring decisions, those stereotypes could prevent a person with a corrected, or largely corrected, impairment from finding work at all. A person with a broken arm or mononucleosis fired for poor attendance or forced to resign

because she needs frequent breaks may be temporarily out of a job until her condition improves. Her arm will heal eventually and she will get over mononucleosis. She may be temporarily derailed, but when her impairment heals, nothing stands in the way of her finding another job. Even the fact that she lost a job because of illness probably would not reflect poorly on her.

By contrast, a person who has a permanent impairment or condition that is controlled by medication must live with that condition until a cure is found—perhaps his whole life. If one employer fires him from a job because of stereotypes associated with his impairment, his next employer (if he manages to find work) may believe the same stereotypes or have the same negative attitudes about his condition.

The solution to that problem, however, is not to shoehorn a person who in reality has few limitations into the first prong of the definition of disability. Rather, a more natural fit is the third prong: being “regarded as” having such an impairment. Under that prong, a person is protected from discrimination on the basis of stereotypes and animus about disabilities, but is not entitled to reasonable accommodations. I argue in Part IV that a relatively broad definition of “regarded as” meets the ADA’s goal of protecting individuals with impairments from irrational discrimination, while still leaving employers a fairly free hand to hire and promote individuals they consider best qualified for the job.

IV. WHEN IS SOMEONE REGARDED AS DISABLED?

Sutton and *Murphy* decided when a person is “regarded as” disabled³⁷⁷ and thus covered under the third prong of the ADA’s definition of disability.³⁷⁸ *Sutton* holds that to be “regarded as” disabled, an employer must believe that a person has an impairment

³⁷⁷ Recall that the ADA prohibits employers from “discriminat[ing] against a qualified individual with a disability because of the disability of such individual.” 42 U.S.C. § 12112(a) (1994).

³⁷⁸ The statute defines “disability” as follows: The term “disability” means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. *Id.* § 12102(2).

that substantially limits a major life activity.³⁷⁹ This conclusion tracks the Court's definition of what it means to *have* a disability (to be substantially limited in a major life activity, even with corrective measures).³⁸⁰ While textually defensible, the Court's interpretation of what it means to be "regarded as" disabled completely defeats the ADA's purpose. The text permits, but does not compel, this conclusion.

The problem with the Court's essentially unitary approach to defining "disability" is that each of the three parts of the definition describes quite different classes of persons—some who actually are substantially limited in major life activities (those who *have* a disability), and others who are not actually so limited (those with a "record of" disability or "regarded as" disabled). The ADA protects each of these groups of people for different reasons. We would, therefore, expect that it would protect each group in different ways. The ADA requires employers to grant reasonable accommodations to people who actually have substantially limiting impairments,³⁸¹ but who are nevertheless qualified for a job, to integrate them into mainstream society.

In contrast, persons "regarded as" disabled, as well as many with a "record of" a disability,³⁸² do not need or seek reasonable accommodations.³⁸³ Rather, much like race and sex discrimination under Title VII, persons "regarded as" disabled and with a "record of" disability seek protection from *disparate treatment* based on their perceived or past conditions. The ADA covers such persons because employers all too often rely on generalizations or inaccurate stereotypes about perceived or past impairments.³⁸⁴ Attitudes and

³⁷⁹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492-93 (1999). The Court's decision implies that to have "a record" of a disability, one must have had a substantially limiting impairment in the past.

³⁸⁰ *Id.* at 482.

³⁸¹ 42 U.S.C. § 12102(2)(A).

³⁸² That is, those persons with a record of a disability that with corrective or mitigating measures, imposes no current, significant limitations on a major life activity.

³⁸³ See Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171 (1999) (pointing out similar distinction between "having" disability and "being regarded as having" disability and suggesting protection from discrimination means different things for each of these groups).

³⁸⁴ See 42 U.S.C. § 12102(a)(7) (finding that individuals with disabilities are discrete and insular minority subject to purposeful unequal treatment because of "stereotypic assumptions

fears create barriers to employment as real and insurmountable as physical barriers.³⁸⁵ Recognizing that fact, the ADA forbids employers from using stereotypes and generalizations about physical or mental impairments.³⁸⁶ It compels employers to evaluate an individual's actual abilities and qualifications or to assess realistically the danger a person might pose to others.

In light of these goals, the "regarded as" and "record of" prongs should be interpreted broadly. To be protected from disparate treatment discrimination under the "regarded as" or "record of" prongs, it should suffice that an employer holds and acts on the basis of stereotypes or generalizations about the abilities (or dangers) of a person with an actual or perceived physical or mental impairment, or with a record of a physical or mental impairment. Whether a person has a physical or mental impairment should be determined in accordance with the EEOC's regulations on the matter.³⁸⁷

This construction would prohibit employers from making employment decisions based on: (1) stereotypes about how a person's perceived or past impairment affects job performance; (2) the employer's feelings of animus towards persons with such impairments; or (3) on tests or criteria that on their face exclude persons on the basis of physical or mental impairments and that are not justified as job-related and consistent with business necessity. The ADA's goals would be best fulfilled if "disability" were defined more broadly in the "regarded as" and "record of" context than it is defined in the actual disability prong.³⁸⁸

not truly indicative of . . . individual ability"); *see also supra* notes 105-109 and accompanying text.

³⁸⁵ *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987) (construing "regarded as" prong as being designed to address "society's accumulated myths and fears about disability and disease," which "are as handicapping as are the physical limitations that flow from actual impairment").

³⁸⁶ *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489-90 (1999) (explaining that ADA recognizes that stereotypes and fears are as handicapping as physical barriers).

³⁸⁷ *See* 29 C.F.R. § 1630.2(h) (1999) (providing definitions of physical and mental impairments and examples of impairments).

³⁸⁸ *See Kelman, supra* note 251, at 90-91 (arguing that interpretation of ADA should protect "almost any party who either has, or is perceived as having, atypical 'medical' traits to make claims against simple discrimination" even if we interpret entitlement to accommodation narrowly).

Importantly, defining disability more broadly in the “regarded as” and “record of” contexts would not significantly curtail an employer’s ability to hire the “best” qualified person for the position. Employers would still be able to set high standards and use many physical and mental qualification tests as well as other job requirements.

The next section argues that the Court’s narrower construction of “regarded as” disabled falls far short of the ADA’s aims.

A. THE COURT’S NARROW INTERPRETATION OF WHAT IT MEANS TO REGARD SOMEONE AS DISABLED

Unfortunately, the ADA does not clearly define what it means to be “regard as” disabled. The question of who is protected (who is disabled as a result of the attitudes of others) easily conflates with the question whether an employer has acted unlawfully (did the employer act because it “regarded” a person “as” disabled). Often the conclusion that an employer regards someone as disabled also seems to demonstrate that the employer discriminated on the basis of disability. The scope of the protected class and the question whether discrimination on the basis of disability occurred are distinct issues, however. *Sutton* and *Murphy* address only the first question, *who* is “regarded as” disabled under the ADA,³⁸⁹ not what acts constitute discrimination.

Moreover, the phrase “regarded as” implies that *someone* is “regarding.” In turn, it seems that one’s membership in the protected class appears to depend on an employer’s subjective state of mind: Did the employer consider this person to be disabled or treat him as though he were disabled? Reading through the “disability” definition, the words “such an impairment” in the “record of” and “regarded as” subsections refer us back to the kinds of impairments specified in the first subsection—that is, “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”³⁸⁹ Whether someone has “a record of” a disability would therefore seem to depend on whether someone has had “a physical or mental impairment” that had in the past “substantially limited one or more of [his] major life activities,”

³⁸⁹ 29 C.F.R. § 1630.2(g) (1999).

but does not now do so. Whether someone is “regarded as having” a disability would similarly seem to depend on whether someone mistakenly views him as having “a physical or mental impairment that substantially limits one or more of [his] major life activities.”³⁹⁰ To find out whether an employer violated the ADA, we would plug the definition of “regarded as” (or “record of”) into the ADA’s general prohibition of discrimination against “qualified individuals with a disability.”

We arrive at a curious conclusion, however, if we plug this definition of “regarded as” into the ADA’s prohibition section. We would conclude that the ADA prohibits employers from “discriminat[ing] against a qualified individual [whom the employer regards as having an impairment that substantially limits one or more of his major life activities] because [the employer regards this] individual [as having an impairment that substantially limits one or more of his major life activities].”³⁹¹ Read literally, a person is protected from discrimination based on perceived impairments *only if* an employer thinks the impairment (imagined or real) substantially limits a major life activity (whether it does or not). In other words, the ADA’s prohibition on disparate treatment against those “regarded as” disabled turns entirely on an employer’s subjective belief: whether the employer actually thinks that a perceived impairment imposes substantial limitations on a major life activity.

This is the tack the Court took in both *Sutton*³⁹² and *Murphy*.³⁹³ In *Sutton*, the Court held that a person is “regarded as” disabled if an employer *mistakenly believes* one of two things: *first*, that an individual has an impairment that substantially limits a major life activity, when she has no such impairment³⁹⁴ (for example, an employer believes a rumor that an employee is infected with HIV

³⁹⁰ The language “major life activities of such individual” seems to require that courts examine what the major life activities of a person actually are, and that some major life activities could vary from person to person. Thus, someone who is a master carpenter and has no other job skills *might* be substantially limited in the major life activity of working if he injures his back and cannot lift things heavier than fifteen pounds. See 29 C.F.R. § 1630.2(j) (describing types of impairments which substantially limit major life activities).

³⁹¹ 42 U.S.C. § 12112(a) (1994); § 12102(2)(A), (C) (1994).

³⁹² 527 U.S. 471, 489 (1999).

³⁹³ 527 U.S. 516, 523-25 (1999).

³⁹⁴ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

when she is not); or, *second*, that someone's actual impairment substantially limits a major life activity, when in fact its effects are not so severe³⁹⁵ (for example, an employer refuses to hire a person who wears a hearing aid because the employer erroneously believes that he cannot hear well enough to communicate effectively with others).

On this reading of the statute, United easily won its motion to dismiss on whether it "regarded" the *Sutton* plaintiffs as substantially limited in a major life activity. According to the *Sutton* plaintiffs' allegations, United had only viewed them to be disqualified from flying United's large commercial passenger jets.³⁹⁶ They did not allege that United regarded them as generally unfit for work or even generally unfit to fly planes.³⁹⁷ Regarding someone as incapable of flying large passenger jets is not the same as regarding someone as disabled, because flying big passenger jets is not a major life activity, even for pilots.³⁹⁸ A pilot with the *Sutton* plaintiffs' eyesight can still fly for regional or cargo airlines.³⁹⁹ The EEOC's Interpretive Guidance backed up the Court on this point: "[A]n individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working."⁴⁰⁰

This literal reading made *Murphy v. United Parcel Service, Inc.*⁴⁰¹ a simple case, too. UPS did not "regard" Mr. Murphy as "disabled" when it dismissed him from his position as a mechanic for commercial vehicles because his blood pressure exceeded Department of Transportation limits. UPS only "regarded" him as unfit for jobs that required *driving* commercial vehicles. UPS claimed it consid-

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 477, 490.

³⁹⁷ *Id.* at 490-91, 493 (holding that allegation that United considered plaintiffs unfit to do one specialized type of job does not suffice to allege that defendant regarded plaintiff as disabled under ADA).

³⁹⁸ *Id.* at 493.

³⁹⁹ *Id.* at 493.

⁴⁰⁰ 29 C.F.R. § 1630.2(j) (1999).

⁴⁰¹ 527 U.S. 516 (1999).

ered him perfectly capable of *fixing* commercial vehicles, and Mr. Murphy alleged nothing to the contrary.⁴⁰²

Much recommends the particular results the Court reached in both of these cases. The *Sutton* plaintiffs and Mr. Murphy functioned well in mainstream American life. The *Sutton* sisters were *not* compelling ADA plaintiffs because their myopia probably never caused them any real trouble or limited their opportunities before United rejected their pilot applications. They were certainly not members of the “discrete and insular” minority described in the ADA’s purpose section.⁴⁰³ Not many negative stereotypes attach to nearsightedness in everyday life. Nor was Mr. Murphy’s argument very sympathetic—that UPS “regarded” him as disabled because it required him to comply with DOT regulations. People with hypertension are not a discrete and insular minority, and few stereotypes attach to hypertension.⁴⁰⁴ That Mr. Murphy found a new job fixing commercial vehicles just three weeks after UPS fired him undermined his claim further.⁴⁰⁵

At least on the surface, both employers seemed to rely on verifiable facts rather than stereotypes. The *Sutton* plaintiffs did not dispute that without glasses they could not see well enough to fly. Mr. Murphy conceded his high blood pressure prevented him

⁴⁰² See *Murphy*, 527 U.S. 516, 517 (stating that petitioner “has put forward no evidence that he is regarded as unable to perform any mechanic job that does not . . . require DOT certification . . . [and UPS presented] uncontroverted evidence that he [petitioner] could perform a number of mechanic jobs” such as diesel mechanic and customer mechanic).

⁴⁰³ Justice Ginsburg put it eloquently in her concurrence:

[The ADA covers persons] subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, . . . [P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination. In short, in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a discrete and insular minority.

527 U.S. at 494 (Ginsburg, J., concurring) (citations and internal quotation marks omitted).

⁴⁰⁴ During oral argument in *Murphy*, Justice Scalia jokingly observed that “there must be many hypertense people among the politically powerful.” Transcript of oral argument, *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 471 (1999), available in 1999 U.S. TRANS. LEXIS 39, *12 (April 27, 1999).

⁴⁰⁵ *Murphy*, 527 U.S. at 524; *Murphy v. UPS*, 946 F. Supp. 872, 876 (D. Kan. 1996); transcript of oral argument, *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 471 (1999), available in 1999 U.S. TRANS. LEXIS 39, *38 (April 27, 1999).

from complying with formal DOT regulations. What the plaintiffs did dispute was whether United and UPS could legally rely on these facts to conclude these plaintiffs were unfit for the jobs they sought—flying large passenger jets and driving commercial vehicles.

Arguably, too, the plaintiffs' arguments that United and UPS "regarded" them "as" disabled would lead to absurd results in other cases. Unfortunately, the *Sutton* plaintiffs argued that United regarded them as substantially limited from working rather than that United regarded them as substantially limited in seeing.⁴⁰⁶ In effect, the *Sutton* plaintiffs argued that United's enforcement of its minimum uncorrected vision standard said "we don't think people with worse than 20-100 vision are good enough to fly passenger jets." That, they argued, was tantamount to regarding them as substantially limited in the major life activity of work. Taken to extremes, this argument could support challenges to all sorts of performance criteria and job requirements: those who do not meet set criteria are deemed to be "unfit" to work for the employer.

It comes as no surprise that the Court rejected the plaintiffs' argument. Once the Court held that only those "regarded as substantially limited in a major life activity" were "regarded as" disabled, it could not find that United or UPS "regarded" the *Sutton* plaintiffs or Mr. Murphy "as" disabled without creating an absurd and circular standard. If the Court agreed that United "regarded" the *Sutton* plaintiffs as disabled because they failed their uncorrected vision test, it would then follow that any time an employer turned down someone who did not meet its minimum job requirements, the employer "regarded" that person "as" disabled.⁴⁰⁷

⁴⁰⁶ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). Murphy's argument was essentially the same as the one that the *Sutton* plaintiffs made, except that he emphasized that his medication only lowered his high blood pressure, rather than correcting it completely as glasses or contact lenses do for people with myopia. See Transcript of oral argument, *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 471 (1999), available in 1999 TRANS. LEXIS 39, *3-6, *13-14 (April 27, 1999).

⁴⁰⁷ The Tenth Circuit emphasized this point when it dismissed the plaintiffs' claims in *Sutton*. As that court held, if an employer "regarded" an individual as disabled merely by considering her unfit for a single, particular job, "anyone who failed to obtain a single job" because of a "single" job requirement "would become a 'disabled' individual because the employer would thus be regarding the applicant's failure as substantially limit[ing] . . . the major life activity of working." *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 905 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999).

That conclusion cannot be right. Lots of requirements and tests accurately gauge a person's physical or mental abilities. Employment decisions based on such tests are not necessarily based on myths and stereotypes.⁴⁰⁸ Furthermore, the text of the ADA, the EEOC regulations, and the legislative history allow employers to prefer people with some physical characteristics to others, strongly suggesting that the use of physical and mental requirements and tests are not always tantamount to regarding someone as disabled.⁴⁰⁹ Finally, if applying physical standards amounted to "regarding" those who didn't measure up as disabled, employers would have to justify every physical qualification standard as "job-related for the position in question and . . . consistent with business necessity."⁴¹⁰ Besides being extremely costly for employers, requiring such justification is at odds with the Act's text.⁴¹¹

The Court's narrow interpretation of "regarded as" certainly ensures that an employee does not have a cause of action whenever an employer makes a job decision based on a physical or mental characteristic. The Court's decision also leaves employers a relatively free hand to rely on physical or mental tests in employment decisions. These concerns were central to the Court's analysis and conclusions.⁴¹² The Court explained in *Sutton*:

⁴⁰⁸ This point may be too obvious to merit an example, but I will err on the side of comprehensiveness. For example, a police department is not relying on a stereotype when it hires someone as an officer who can shoot a pistol accurately, or a moving company when it uses a strength test to determine whether someone can do the heavy lifting involved in moving furniture. See *infra* text accompanying notes 481-507.

⁴⁰⁹ See 42 U.S.C. § 12112(b)(7) (1994) (stating qualification standards are permissible if there is no disparate impact on individuals with disabilities); cf. 29 C.F.R. § 1630.2(c) (1999) (defining qualification standards as "the personal and professional attributes including the skill, expertise, educational, physical, medical, safety, and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired."); H.R. REP. NO. 101-485, pt. 3, at 31-32 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 471-72 (stating that employers may disqualify person with disability who cannot perform essential job functions with or without reasonable accommodations).

⁴¹⁰ 42 U.S.C. § 12112(b)(6).

⁴¹¹ See 42 U.S.C. § 12112(b)(7) (requiring employers to justify as job-related those requirements, tests, and standards that have disparate impact on persons with disabilities and implying that some job requirements, tests, and standards need not be so justified).

⁴¹² See Transcript of oral argument, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), available in 1999 U.S. TRANS LEXIS 20, *24-25 (April 28, 1999) (revealing central concerns of Court). Many of the Court's questions explored whether a finding that United "regarded"

By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others.⁴¹³

As far as this goes, the Court is on very firm ground. No one has ever argued that the American Ballet Theater has to hire dancers who cannot follow the beat, the Metropolitan Opera tenors with tin ears, or the 49ers sluggish wide receivers.

There are many reasons having nothing to do with the "regarded as" definition why no one seriously argues tone-deaf tenors can successfully sue under the ADA. First, being tone deaf, lacking rhythm, or running more slowly than Jerry Rice are not even physical or mental impairments, much less disabilities; they are just differences in talent or different levels of normal ability.⁴¹⁴ Employers may freely prefer people with varying degrees of talent or ability.⁴¹⁵ Additionally, none of those in the parade of horrors

the *Sutton* plaintiffs as disabled would mean that any time an employer thought a person's physical qualities rendered that person less than ideal for the job, the employer "regarded" that person as disabled.

Justice Scalia spun the following hypothetical at oral argument to illustrate his concern. If a major league "ball club manager" who "play[s] the odds" "has a perfectly good outfielder whom . . . he could have played instead of Ted Williams, but he chooses Ted Williams," who has 20/10 vision, "and rejects the other fellow because he only has 20/30 [vision], does that mean he's treating the other . . . fellow as disabled?" Justice Scalia answered his own question, "[T]hat's ridiculous." The manager's preference for Ted Williams does not mean that he thinks the other player is a bad ball player, much less disabled. The manager merely prefers ball players with extraordinary eyesight. *Id.* (The author learned from counsel who participated in oral argument that it was Justice Scalia who posed this hypothetical.) (E-mail on file with author.)

⁴¹³ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999).

⁴¹⁴ See 29 C.F.R. § 1630.2(h) (defining physical and mental impairments); *Id.* app. § 1630.2(h) (distinguishing impairments from other kinds of physical characteristics).

⁴¹⁵ See H.R. REP. NO. 101-485, pt. 2, at 51 (1990), *reprinted in* 1 LEGISLATIVE HISTORY,

would be able to establish that they were “otherwise qualified” to perform the job in question—that is, to perform the essential functions of the job. Plaintiffs have the burden to establish this point, and an employer’s description of essential aspects of a job receives a fair amount of deference.⁴¹⁶

For United and UPS to win motions to dismiss, the Court had to conclude that the plaintiffs were not “regarded as” disabled. The Court could not easily resolve as a matter of law whether the *Sutton* plaintiffs and Mr. Murphy were “otherwise qualified” for their jobs. Nor could the Court easily dispose of their cases in a manner befitting the tone-deaf tenor because the plaintiffs each had physical impairments. In deciding the “regarded as” issue, the Court started from two uncontroversial premises: (1) “the ADA allows employers to prefer some physical attributes over others and to establish physical criteria”;⁴¹⁷ and (2) “an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one’s height, build, or singing voice—are preferable to others.”⁴¹⁸

From these premises, the Court reached the startling conclusion that an employer “is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.”⁴¹⁹ That is, employers are free to prefer persons who have no impairments over people who have physical or mental impairments that do not substantially limit major life activities. With that conclusion, the Court dismissed the *Sutton* plaintiffs’ and Mr. Murphy’s claims. And with that, the Court

supra note 100, at 324 (stating that “the term ‘physical or mental impairment’ does not include simple physical characteristics, such as blue eyes or black hair. . . . [or] environmental, cultural, and economic disadvantages”); S. REP. NO. 101-116, at 22 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 120 (same).

⁴¹⁶ Too often the specter of the tone-deaf tenor and his friend the blind bus driver drive courts’ understanding of the ADA. The understandable impulse is to conclude quickly that such persons cannot bring claims under the ADA. Whether someone can bring a claim under the ADA is too often equated with the question of whether someone falls under the definition of disability. Coverage under the ADA demands more than being “disabled.” One must also be otherwise qualified for the job in question. See 42 U.S.C. § 12112(a) (1994) (“No covered entity shall discriminate against a qualified individual with a disability . . .”).

⁴¹⁷ *Sutton*, 527 U.S. at 490.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 490-91.

proved that hard cases make for bad law. Just how bad is the subject of the next section.

B. AS INTERPRETED BY THE COURT, THE CLASS OF PERSONS PROTECTED UNDER THE ADA'S "REGARDED AS" PRONG IS VANISHINGLY SMALL

The Court's twin conclusions—that (1) only persons subjectively and mistakenly believed by employers to have substantially limiting impairments are "regarded as" disabled, and (2) that employers may freely discriminate against persons with physical and mental impairments that are not substantially limiting—do avert absurd results on the employer's side. Yet the Court averts such absurdity at a high cost. It annuls the ADA's mandate that employers base employment decisions on people's actual abilities, not imagined inabilities.⁴²⁰

The ADA's structure and purpose indicate that the Court's textually defensible delineation of "regarded as" is actually quite wrong. Recall that the ADA gives three definitions of disability. Courts generally interpret statutes to give effect to each provision. Courts generally assume each was included for a reason, regardless of Congress's subjective intent.⁴²¹ Each definition of disability, thus, presumably creates a distinct class of persons, with each definition contributing something different to the ADA's scope of protection than the other definitions.

The Court's reading, however, essentially renders the "regarded as" prong superfluous, at best, a vestigial category. How so? Surely we can drum up hypotheticals in which an employer subjectively and mistakenly believes an employee has a substantially limiting impairment and fires her because of that belief. An employer could, for example, fire an employee based on a rumor that the employee has AIDS, when she does not. The employer could be said to have "regarded" that employee "as" substantially limited in a major life

⁴²⁰ 42 U.S.C. § 12101(a)(7); see Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERK. J. EMP. & LAB. L., 476, 515 ("If one interprets the ADA's definition of disability narrowly, as courts have thus far done, conditions which result in impairments only because of the attitudes of others remain uncovered. This is not what the Act's drafters intended.").

⁴²¹ See *Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986) (explaining presumption that every word and phrase in statute adds something to statutory command).

activity and consequently to have fired her.⁴²² But the false-rumor scenario is somewhat far-fetched; so far-fetched, in fact, that it is hard to imagine that it was the “mischief” that impelled Congress to prohibit discrimination against persons “regarded as” disabled. Indeed, the committee reports never mention the false rumor scenario as a problem needing Congress’s attention.⁴²³ The “regarded as” definition of disability must address something besides false rumors.

Here lies the flaw in the Court’s definition of “regarded as”: Few besides the victims of false rumors come within it. Those who do constitute a vanishingly small class of people, and, oddly, a class of people largely determined by the *arguments* an employer’s attorney makes during the course of ADA litigation, not by the employer’s actions or discriminatory attitudes.⁴²⁴ If an employer did regard an applicant as substantially limited in a major life activity, few employers would ever admit to such a perception, and no employer would ever have to. An employer could always explain that he thought the applicant’s (imaginary or real) impairment limited her in some relatively minor fashion, but not that it limited her *substantially*.

Additionally, even an honest employer could justify a decision by explaining that it “regards” someone as unfit for its *particular* position. That was the tack United and UPS took. Their explanation had great intuitive appeal and the advantage of likely being the truth. No employer evaluates an applicant’s fitness to do some other employer’s work.⁴²⁵ Employers evaluate applicants for a *particular* job that needs to be filled, not the requirements for some other, hypothetical job. (At most, an employer keeps an eye on

⁴²² *Bragdon v. Abbott*, 524 U.S. 624 (1998).

⁴²³ The “false rumor of HIV infection” scenario was mentioned only in the dissenting views from the House Report of the Committee on Energy and Commerce. A few conservative members of that committee raised the specter that the “regarded as” prong could be a masquerade for back-door protection for gays. These members worried that an employer could not, for example, discriminate against all gay men on the belief that they might have AIDS. H.R. REP. NO. 101-485, pt. 4, at 80-83 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 614-16.

⁴²⁴ *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 200, 337, 347 (1999).

⁴²⁵ *Id.*

someone's potential for advancement.) One thing the Court and the EEOC can agree on is that regarding someone as unfit for one kind of job does not amount to "regarding" him as "substantially limited in the major life activity of working."⁴²⁶ Given this very practical fact, an employer could invariably avoid the Court's definition of "regarded as," even if it was motivated by stereotypes and fears about physical or mental impairments.

Sutton and *Murphy* will permit only a tiny number of plaintiffs to claim that they were "regarded as" disabled, leaving in place most attitudinal barriers to employment. A few striking examples of plaintiffs who fall outside the Court's definition illustrate this point. Phyllis Ellison⁴²⁷ could not establish that her employer "regarded" her as disabled when she was downsized while she was undergoing cancer treatment. Though Ms. Ellison's supervisor made several insulting remarks about her cancer, the Fifth Circuit held she was not covered under the ADA. Her supervisor, had, for example, joked that in a power outage, employees could find their way out of the building by following a "glow[ing]" Ellison. He also observed that Ellison might as well have a mastectomy because her figure was not worth saving. And he pointedly mentioned that "Phyllis has cancer" during a meeting about cutbacks with the department head. There is little doubt that Ellison's supervisor discriminated against her because of her cancer. His statements showed that he considered her cancer to be relevant to her retention and that he held persons with cancer in low regard. Yet the Fifth Circuit held that Ms. Ellison did not prove her supervisor "regarded" her as disabled because none of the comments demonstrated that he perceived her to be substantially limited in any major life activities.

⁴²⁶ 29 C.F.R. § 1630.2(j)(3)(i) (1999). *But see* Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 598-609 (1997) (arguing that "single job" exception has been broadened without sufficient justification from its roots in *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980)).

⁴²⁷ *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996). Though *Ellison* precedes *Sutton* and *Murphy*, the Fifth Circuit analyzed the "regarded as" issue in the same way the Court did in those cases. Compare *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999) ("An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."), with *Ellison*, 85 F.3d at 192 (holding that central issue for "regarded as" is whether employer "regarded her cancer as a substantial limitation on her ability to work").

Ellison is not an exceptional case. There are countless troubling examples of discrimination based on inaccurate, negative stereotypes about physical and mental impairments that are perfectly legal under the Court's construction of "regarded as." Judge Posner provides us with a graphic example in *Christian v. St. Anthony Medical Center, Inc.*⁴²⁸

Suppose that the plaintiff had a skin disease that was unsightly . . . but neither the disease itself nor the treatment for it would interfere with her work. And suppose her employer fired her nevertheless, . . . because he was revolted by her disfigured appearance . . . [H]e would not be guilty of disability discrimination. . . . It would be otherwise if he believed that the plaintiff's skin disease was disabling, even if it was not; for the [ADA] protects persons who are not disabled from being discriminated against on the basis of the false beliefs of their employers.⁴²⁹

Judge Posner's conclusion is indisputable under *Sutton*. The ADA only "protects people who are discriminated against by their employer (the only form of disability discrimination at issue in this case) either because they are in fact disabled or because their employer mistakenly believes them to be disabled."⁴³⁰

Discrimination based on negative, inaccurate stereotypes about physical and mental impairments will flourish freely under *Sutton*. An employer can legally discriminate freely against a person who wears a hearing aid, based on negative, inaccurate stereotypes.⁴³¹

⁴²⁸ 117 F.3d 1051 (7th Cir. 1997).

⁴²⁹ *Id.* at 1053 (citations omitted) (predating *Sutton* but applying same "regarded as" standard).

⁴³⁰ *Id.*

⁴³¹ At oral argument, Justice Breyer asked United's counsel whether the "regarded as" prong would have extremely limited application if it applied only when an employer regarded an individual as substantially limited in a major life activity, and merely regarding an individual as unfit to work for it in a particular position does not amount to regarding someone as so limited. As an example, Justice Breyer inquired about a deaf person who wore a hearing aid and who would appear not to be covered under the ADA. With a corrective measure, the individual's hearing loss would not be substantially limiting. But if that individual is "met with [a] totally irrational . . . reaction on the part of some other employer"

A law firm can legally refuse to hire an associate with mild depression (or major depression, for that matter, if it is well-controlled by antidepressants) because it believes that depressed people in general cannot handle the stress of a busy, high-profile law practice. *Sutton* would permit this refusal even if nothing besides the bare fact of the associate's having depression prompted the firm's concerns. Not being able to handle the stress of a busy, prestigious law firm is not a substantial limitation on a major life activity. Indeed, *Sutton* would leave such a person utterly out in the cold. If she takes medication that controls her depression, she cannot argue that she has a disability because she is not *actually* limited in *any* major life activities.⁴³²

A police department can also lawfully force a police officer who takes antidepressants to submit to extra medical examinations as well as intensive supervision and monitoring.⁴³³ *Sutton* permits such action even if (indeed, *especially* if) the police officer has no symptoms of psychological problems and experiences no side-effects from his medication.⁴³⁴ Being concerned that someone might be more prone to behavior not befitting a police officer is not the same as "regarding" him as substantially limited in a major life activity.⁴³⁵ In fact, under *Sutton*, the police officer would have an especially weak case if the police department only subjected him to more intensive monitoring. If it retains him, there is no evidence that the department regards him as unfit to be a police officer.

and fired due to his hearing aid, Justice Breyer expressed concerns that the individual still would not be covered by the ADA "because the employer just regarded [him] as not good enough to work here, but perfectly good enough to work somewhere else." Transcript of oral argument, *Sutton v. United Air Lines*, 527 U.S. 471 (1999), available in 1999 U.S. TRANS. LEXIS 20, *40 (April 28, 1999); see also, transcript of oral argument, *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), available in 1999 U.S. TRANS. LEXIS 39, *43 (including similar colloquy regarding asthmatics).

⁴³² Even if a person with mild depression takes no medication, courts are reluctant to conclude that depression substantially limits a major life activity. See, e.g., *Greer v. Emerson Elec. Co.*, 185 F.3d 917, 921 (8th Cir. 1999) (depression not substantially limiting enough to constitute disability); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305-06 (10th Cir. 1999) (same); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (same). But see *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998) (upholding jury verdict finding depression was disability).

⁴³³ *Kroka v. City of Chicago*, 203 F.3d 507, 514 (7th Cir. 2000).

⁴³⁴ *Id.*

⁴³⁵ *Id.*

An employer can also legally refuse to hire an applicant for a shipping and receiving position because of the applicant's high blood pressure, which the employer erroneously believes prevents the applicant from safely lifting items heavier than fifty pounds. Such a person is completely unprotected by *Sutton*. The ability to lift more than fifty pounds is *not* a major life activity, and believing someone cannot lift fifty pounds is not regarding that person as disabled. If the applicant's high blood pressure imposes no actual restraints on how he lives his life, he does not "have" a disability. An employer may also legally refuse to hire people with cosmetic facial disfigurements because the employer and his other employees would feel uncomfortable around people with disfigurements.⁴³⁶ Again, the Court's construction of "regarded as" insulates the employer from liability. The employer does not believe such a person to be incapable of working or actually limited in ability. The employer would simply prefer that people with disfigurements work elsewhere. According to the Court's logic, because disfigurements impose no actual limitations on a person's major life activities, the ADA affords no protection.

These are troubling conclusions. In each of these examples, an employer has irrationally discriminated against an individual because of animus or negative, inaccurate stereotypes about physical or mental impairments. In each of these cases, an individual's limitations are created by the assumptions and attitudes of others. Despite the ADA's clear directive against the use of "stereotypic assumptions not truly indicative of . . . individual ability,"⁴³⁷ the ADA's mandate to remove attitudinal barriers,⁴³⁸ and pellucid legislative history indicating that precisely those kinds of attitudes are what the "regarded as" prong is after,⁴³⁹ the rules of

⁴³⁶ See *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1053 (7th Cir. 1997) (observing that feeling uncomfortable around or revolted by someone with disfigurement not tantamount to "regarding as" disabled).

⁴³⁷ 42 U.S.C. §12101(a)(7) (1994).

⁴³⁸ *Id.* § 12101(b)(1).

⁴³⁹ See S. REP. NO. 101-116, at 24 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 122 (referring to discrimination against "burn victims" because of their appearance as kind of discrimination prohibited under "regarded as" definition of disability); accord H.R. REP. NO. 101-485, pt. 3, at 30 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 470.

Sutton and *Murphy* shield employers who rely on stereotypes or act out of discomfort. The Court's interpretation gives no protection to persons "with stigmatic conditions that are viewed as *physical impairments* but do not in fact result in a substantial limitation of a major life activity."⁴⁴⁰

This failure reveals a substantial flaw in the Court's "regarded as" interpretation. Prohibiting employers from making decisions based on stereotypes, biases, and misperceptions about physical and mental impairments was the impetus behind the ADA generally⁴⁴¹ and behind the inclusion of the "regarded as" prong particularly.⁴⁴² The elimination of stereotypes lies at the heart of the Act.⁴⁴³ The Supreme Court's own disability precedents put this goal front and center.⁴⁴⁴

Nevertheless, the ADA should not be interpreted to keep employers from having high standards, or to fuel unnecessary litigation by forcing every employer to justify its high standards as "job-related for the position in question and . . . consistent with business necessity."⁴⁴⁵ Crafting a definition of "regarded as" that avoids, on the one hand, the Scylla of undue interference with employers' legitimate business objectives and, on the other, the Charybdis of allowing employers to run roughshod over persons with

⁴⁴⁰ S. REP. NO. 101-116, at 24 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 122 (emphasis added). *Accord* H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 470. The Reports also contain examples of conduct prohibited by the ADA: "Similarly, if an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual . . . that person would be covered under the third ['regarded as'] prong" of the definition of disability. S. REP. NO. 101-116, at 24 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 122. "Such [a stigmatic, but non-limiting] impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Id.*

⁴⁴¹ 42 U.S.C. § 12101(a)(7); S. REP. NO. 101-116, at 6, 7, 9, 21 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 104-05, 107, 119; *accord* H.R. REP. NO. 101-485, pt. 2, at 53 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 470 (containing similar language).

⁴⁴² S. REP. NO. 101-116, at 23-24 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 121-22.

⁴⁴³ 42 U.S.C. § 12101(a)(7).

⁴⁴⁴ *See* *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 279 (1987) (stating that Congress's purpose was to "combat the effects of erroneous but . . . prevalent perceptions about the handicapped . . .").

⁴⁴⁵ 42 U.S.C. § 12112(6).

impairments because of overbroad or inaccurate stereotypes is no small task.⁴⁴⁶ It is not an impossible one, however. The next section maps the middle position between the Court's crabbed definition of "regarded as," which allows almost no one under the ADA's protective umbrella, and a definition that would let anyone in the whole, wide world seek shelter any time someone was rejected for a job.

C. REGARDING A MIDDLE POSITION

The House and Senate committee reports provide a number of examples that illustrate what Congress intended being "regarded as" disabled to mean and that explain the kinds of discrimination Congress intended to prohibit. The Senate Report explains that the "regarded as" language includes:

an individual who has a physical or mental impairment that does not substantially limit major life activities, but that is treated by a covered entity as constituting such a limitation, [as well as] an individual who has a physical or mental impairment that substantially limits major activities only as a result of the attitudes of others toward such impairment or has no physical or mental impairment but is treated by a covered entity as having such an impairment.⁴⁴⁷

Congress drew its conception of "regarded as" largely from the Rehabilitation Act regulations on the same subject. Unsurprisingly, the EEOC's regulations on the ADA's "regarded as" prong mirror the earlier Rehabilitation Act regulations.⁴⁴⁸

⁴⁴⁶ See generally Risa M. Mish, "Regarded as Disabled" Claims Under the ADA: Safety Net or Catch All?, 1 U. PA. J. LAB. & EMP. L. 159 (1998) (noting unduly broad case law interpretation of "regarded as").

⁴⁴⁷ S. REP. NO. 101-116, at 23 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 121; accord H.R. REP. NO. 101-485, pt. 3, at 29 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 469.

⁴⁴⁸ The EEOC regulations provide that the "regarded as" definition includes a person who:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting

A quote from the Supreme Court decision, *School Board of Nassau County v. Arline* (a Rehabilitation Act case), sums up the purpose of protecting those "regarded as" disabled from discrimination: "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."⁴⁴⁹ The ADA is, in other words, "as concerned about the effect . . . an impairment [has] on others as it [is] about its effect on the individual."⁴⁵⁰ Protecting those "regarded as having such an impairment" means prohibiting employment discrimination against people with physical or mental impairments based on negative, inaccurate "presumptions, stereotypes and myths" about how physical and mental impairments affect "job performance, safety, insurance costs, absenteeism, and acceptance by co-workers . . . [and not based on] the [individual's] ability to perform the essential functions of a job."⁴⁵¹ The House Report for the Committee on the Judiciary emphasized that this list of "attitudinal barriers" is "not exhaustive." This list illustrates (but does not limit) the kind of attitudes Congress intended to prohibit "within the meaning of 'regarded as.'"⁴⁵²

These general injunctions against stereotypes and attitudinal barriers pose more questions than they answer. Are all employment decisions based on a person's impairment prohibited? Does the ADA prohibit only employment decisions based on inaccurate assessments of the effect an impairment has on someone's ability to perform some task, or does the ADA make decisions based on accurate assessments off-limits, too? Are employment decisions

such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has [no physical or mental] impairment[] . . . but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l) (1999). Compare *id.*, with 29 C.F.R. § 1613.702(e) (1979).

⁴⁴⁹ 480 U.S. 273, 284 (1987).

⁴⁵⁰ S. REP. NO. 101-116, at 23 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 121.

⁴⁵¹ *Id.* at 9-10.

⁴⁵² H.R. REP. NO. 101-485, pt. 3, at 30 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 470.

based on inaccurate or stereotypical perceptions about all physical and mental impairments illegal, or only those about substantially limiting ones?

1. *The Legislative History Favors a Broader Conception of the Class Protected by the "Regarded as" Definition of Disability.* To begin, what kinds of perceived impairments are covered under the "regarded as" prong and how serious must they be perceived to be? The EEOC Regulations and the House and Senate committee reports suggest that the employer's subjective perception of the seriousness of an impairment is less important than *the effect* that perception has. The Regulations' first example of what it means to "regard" someone as disabled is: "an individual who has a physical or mental impairment that does not substantially limit major life activities, but that is *treated* by a covered entity as constituting such a limitation."⁴⁵³ Notice that the regulations say "*treated as*" not "*perceived as*."⁴⁵⁴ The use of the phrase "treated as" suggests that whether someone is regarded as disabled depends on what attitudes an employer's actions evince, not the employer's subjective perceptions. That is, the message an employer's actions communicate should be the focus of any "regarded as" inquiry.

The House and Senate Reports also suggest that an employer does not have to perceive an individual as substantially limited in a major life activity for someone to be "regarded as" disabled. Instead, the committee reports suggest that perceiving someone to have an impairment that disqualifies him from the job may be enough. The reports state that "[i]t is not necessary for [an employer] to articulate" a concern about an applicant's productivity, cost, or safety.⁴⁵⁵ The House Report amplifies this point:

⁴⁵³ 29 C.F.R. § 1630.2(1) (1999); accord S. REP. NO. 101-116, at 23 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 121 (emphasis added); see also H.R. REP. NO. 101-485, pt. 3, at 29 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 469 (containing similar language).

⁴⁵⁴ S. REP. NO. 101-116, at 23 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 121 (emphasis added); see also H.R. REP. NO. 101-485, pt. 3, at 29 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 469 (containing similar language).

⁴⁵⁵ H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 470.

[I]f a person is disqualified on the basis of an *actual or perceived physical or mental condition*, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the 'regarded as' test.⁴⁵⁶

The House Report's choice of language is significant. Its choice of the phrase "perceived physical or mental *condition*," not "perceived physical or mental *disability*," suggests that the employer does not have to believe that a perceived impairment amounts to a substantially limiting impairment. It suffices if an employer wrongly perceives that an individual's physical or mental *condition* will interfere with an individual's ability to do the job.

The inquiry into whether an individual is "regarded as" disabled thus can be framed this way: Does an employer treat an individual as though an impairment prevents that person from functioning as an "average" person would? The Regulations' second and third examples of who is "regarded as" support this construction: a person who "[h]as a physical or mental impairment that substantially limits major life activities only *as a result of the attitudes* of others toward such impairment;" or who "[h]as [no physical or mental] impairment[] . . . but is treated by a covered entity *as having* a substantially limiting impairment."⁴⁵⁷ Again, the focus remains on how an employer *treats* an individual, not what the employer's subjective perceptions are.

At this level of abstraction, however, it is difficult to tell how these definitions of "regarded as" will play out in particular cases. The Senate Report does discuss how the ADA is designed to protect persons with some specific impairments. Let us turn to these examples now to see whether they can help us draw some conclusions about what it means to be "regarded as" disabled.

2. *The ADA Outlaws Employment Decisions Based on Negative Reactions to Physical or Mental Impairments.* First, the Senate Report says that the "regarded as" prong would protect someone

⁴⁵⁶ *Id.* at 30-31 (emphasis added).

⁴⁵⁷ 29 C.F.R. § 1630.2(l)(2)-(3) (1999) (emphasis added).

with cerebral palsy who is refused entry to a restaurant "because of [her] physical appearance."⁴⁵⁸ In some ways this is a surprising example of the "regarded as" prong. Someone with cerebral palsy would probably *have* a disability and would need no recourse to the "regarded as" prong. Its inclusion, however, highlights the point that a person need not be "regarded as" substantially limited in a major life activity to be "regarded as" disabled under the ADA. *Appearance* is not a major life *activity*. Nor does regarding someone as unfit to eat at a restaurant amount to "regarding" someone as substantially limited in the major life activity of appearing in public. A restaurant owner who refuses to serve someone with cerebral palsy likely does not believe the person is substantially limited in some activity. He may, however, be uncomfortable being around someone with a disability or worried about how his customers will react to her.

The Senate Report's next example amplifies that negative reactions to people with impairments are at the heart of the "regarded as" prong. "Similarly, if an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual . . . that person would be covered under the third prong."⁴⁵⁹ Here, too, having a negative reaction to someone with an impairment (whether it is an imagined or real impairment) does not necessarily imply that the person is regarded as substantially limited in a major life activity. Moreover, others' negative reactions may not limit an individual's ability to carry out major life activities, at least not in the strict sense the Supreme Court requires.⁴⁶⁰ Negative reactions may only limit some aspects of major life activities. An employer might fear placing someone in a position involving customer contact, but may be happy to hire that person to keep the business's books. Ridding America of negative attitudes that limit a person's opportunities without regard to ability to

⁴⁵⁸ S. REP. NO. 101-116, at 24 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* 100, at 122.

⁴⁵⁹ *Id.* (citing *School Bd. of Nassau County v. Arline*, 480 U.S. at 273, 284 (1987); *Doe v. Centinela Hospital*, 57 U.S.L.W. 2034 (C.D. Cal., June 30, 1988); *Thornhill v. Marsh*, 49 Fair Empl. Prac. Cas. (BNA) 6 (9th Cir. 1989)).

⁴⁶⁰ See *supra* text accompanying notes 392-402.

perform the actual tasks of a job forms the core purpose of the "regarded as" prong.

Furthermore, the Senate Report suggests that the "regarded as" prong of the ADA protects people with *impairments* generally, not just people with substantially limiting ones, from discrimination rooted in animus, discomfort, or lack of understanding. The Senate Report states the "regarded as" prong "is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. For example, severe burn victims often face discrimination."⁴⁶¹ Again, in this example, discrimination does not depend on the perception that someone is substantially limited in any major life activity. No one thinks a burn victim is incapable of any activity. Rather, people feel uncomfortable around people with scars. The Supreme Court's definition of "regarded as" would leave persons with physical disfigurements completely exposed to discrimination, as they are neither substantially limited in any major life activity nor regarded as being substantially limited.

We can gather from the Senate Report's examples that the "regarded as" prong protects persons with physical or mental impairments who, as a consequence of their impairments, are treated with irrational animus, or whose impairments provoke negative reactions or ill-treatment regardless of the actual limitations the impairment imposes on the individual's ability to do a job. In other words, the "regarded as" prong protects people who would be discriminated against because they have an impairment, even if they could be model employees.

3. *The ADA Prohibits Employment Decisions Based on Stereotypes About Physical and Mental Impairments.* The Senate Report emphasizes that the "regarded as" definition ensures "persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their *medical conditions*."⁴⁶² Here, too, the Senate Report speaks of "medical conditions" generally, not just substan-

⁴⁶¹ S. REP. NO. 101-116, at 24 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 122.

⁴⁶² *Id.* (emphasis added).

tially limiting ones. The Senate Report observes two particular conditions that often leave people vulnerable to discrimination: “[I]ndividuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.”⁴⁶³

Persons with diabetes and epilepsy face a somewhat different form of discrimination than that faced by someone with a physical disfigurement. Persons with epilepsy, diabetes, or some other impairment like depression or mental illness, are often assumed to be unreliable workers.⁴⁶⁴ Employers may be concerned that someone with epilepsy may suddenly become incapacitated at work, that someone with diabetes may have more health problems generally and a high absentee rate, or that a depressed person may be moody and unreliable. None of these fears or assumptions about epilepsy and diabetes amount to a perception that a person is substantially limited in a major life activity. The Fifth Circuit, for example, held that a person with epilepsy who “lost awareness” of her surroundings twice a day for two to three minutes at a time was not substantially limited in any major life activities.⁴⁶⁵ Further, the court noted that her employer, who discharged her based on her “loss of awareness,” did not regard her as so limited.⁴⁶⁶ Anticipating *Sutton*, the Fifth Circuit wrote, “Where . . . the claim is that the plaintiff was ‘regarded as’ having a substantially limiting impairment, the requirement that the perceived impairment be substantially limiting remains, and the plaintiff bears the burden of making a prima facie showing that the impairment, as the defendant perceived it, was substantially limiting.”⁴⁶⁷ The Fifth Circuit observed that the employer only perceived that her epilepsy “slightly” interfered with her ability to see, hear, and speak.⁴⁶⁸ If

⁴⁶³ *Id.*

⁴⁶⁴ *See, e.g.,* Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000) (holding not violation of ADA for police department to subject depressed police officer to special monitoring and to require he patrol only with partner); Deas v. River West, L.P., 152 F.3d 471, 474-75, 479-80 (1998) (noting employer’s concern that epilepsy would affect worker’s reliability).

⁴⁶⁵ *Deas*, 152 F.3d at 474-75, 479-80.

⁴⁶⁶ *Id.* at 479-80.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 480 n.20.

the employer perceived the impairment's effect to be so slight, why did the employer fire her?

There is no reason to treat an employer who refuses to hire someone with depression more leniently because he holds moderately negative stereotypes about depression than we would if he flatly believed that depression renders a person utterly unfit for any kind of work.⁴⁶⁹ An act of discrimination on the basis of unverified generalizations about perceived impairments has precisely the same effect as an act of discrimination on the basis of unverified generalizations about perceived disabilities: The employer refuses to hire the person because of the perceived impairment. Whether people generally perceive persons with depression as *less* fit to work or completely *unfit* to work, the result is the same—poorer employment opportunities for people perceived to be depressed.

The conclusion that individuals should be considered “regarded as” disabled under the ADA whether an employer discriminates against someone on the basis of stereotypes or generalizations about impairments or on the basis of stereotypes or generalizations about disabilities is not as radical as it first may seem. Whether someone is “regarded as” disabled is merely a threshold issue of *coverage* under the ADA. It is not an ultimate finding of employer liability. An ADA plaintiff must prove that, even with her impairment, she is qualified for the job and able to meet the employer's expectations.⁴⁷⁰ In other words, an ADA plaintiff who is discriminated against because her employer perceives her to have an impairment that disqualifies her from the job will have to prove the employer's perception wrong. Moreover, a plaintiff will also have to prove that the employer's stereotypical assumptions about her impairment actually motivated the employer's decision.

⁴⁶⁹ See also *supra* notes 419-427 and accompanying text (arguing that rule that permitted employers to discriminate against persons perceived to have non-substantially limiting physical or mental impairments would effectively enable employers to discriminate against those perceived to have substantially limiting impairments).

⁴⁷⁰ 42 U.S.C. §§ 12112(a), 12111(8) (1994) (prohibiting discrimination against “qualified individual with a disability” and defining “qualified individual with a disability” as someone “who with or without reasonable accommodation, can perform the essential functions” of job she desires and providing that deference should be given to employer's judgment “as to what functions of a job are essential”).

The ADA should be interpreted to protect an individual believed by an employer to have a physical or mental impairment (as defined by the EEOC regulations),⁴⁷¹ which the employer believes makes the person less qualified for a job⁴⁷² because of generalizations about the effects that impairment has on one's ability to perform a job.⁴⁷³ This definition of "regarded as" fits well with the ADA's overall approach to disability. It harmonizes the function of the "regarded as" prong of the disability definition with the ADA's overall purpose. Professor Silvers explains that if the ADA protects persons

whether or not one actually has "a physical or mental impairment that substantially limits one or more of the major life activities" or is "regarded as having such an impairment," . . . it offers redress against suffering the unwarranted attenuation of opportunity incurred when false and biased theorizing about people's physical or cognitive functioning stipulates falsely as to their incompetence.⁴⁷⁴

⁴⁷¹ See 29 C.F.R. § 1630.2(h) (1999) (defining physical or mental impairment).

⁴⁷² See Burgdorf, *supra* note 42, at 409, 439-55 (discussing distinction between definition of disability in first prong and definition of "regarded as" in third prong). Professor Robert Burgdorf speculates that the tendency of courts to interpret the "regarded as" prong narrowly stems from a confusion of the definition of disability in the first prong (what it means to have a disability) with the third prong's definition of "regarded as" disabled. Courts have generally ruled that a physical impairment that prevents one from doing a specialized job, but leaves one able to do many other kinds of jobs, does not mean that one has an impairment that substantially limits a major life activity. *Id.* at 449. Professor Burgdorf argues, however, that an employer's belief that an impairment renders an individual unfit for a single job should suffice to show the employer regards that person as disabled. *Id.* at 455.

⁴⁷³ Professor Mark Kelman makes a similar suggestion, arguing that:

[A]s long as an employer . . . articulates an explicit exclusionary policy—or explicitly elicits information that is arguably irrelevant for an impersonal rationalist—we should define the [ADA's] protected class quite broadly. (That is, we should protect individuals challenging such policies with little regard to the niceties of the question of whether they are members of a discernable group.) In the ADA context, one implication is that any time an employer explicitly considers any physical/medical trait, we should subject his practice to scrutiny, without regard to whether the physical trait he considers was conventionally considered a disability.

Kelman, *supra* note 251, at 44.

⁴⁷⁴ SILVERS ET AL., *supra* note 99, at 122.

That the ADA applies does not mean that such employers are automatically liable, however. Let me turn now to the question of how prohibiting discrimination based on perceived physical or mental impairments would affect an employer's prerogatives to use standardized employment criteria or tests.

D. TESTS AND JOB REQUIREMENTS UNDER THE "REGARDED AS" PRONG

Under this proposed scheme, an employer commits wrongful act of discrimination if she decides not to hire an individual based on negative stereotypes she holds about impairments or disabilities. We would inquire whether the employer perceived the applicant or employee to have a physical or mental impairment as defined by EEOC regulations.⁴⁷⁵ Then we would investigate whether the employer acted on negative beliefs or stereotypes about the perceived impairment. This inquiry fits comfortably within current disparate treatment jurisprudence.⁴⁷⁶

We have a more difficult case when an individual challenges an employer's use of tests, job requirements, or performance criteria on the grounds that the tests, requirements, or criteria themselves reflect stereotypical notions about physical or mental impairments, or on the grounds that the employer's use of such tests or criteria effectively discriminates against an individual on the basis of physical or mental impairments. Legitimate selection and promotion requirements and tests often overlap significantly with impairments and disabilities. For example, a writing test for an associate position at a litigation firm is likely relevant to whether an applicant can write motions and client letters. Yet someone with dyslexia may have trouble performing well on such tests, especially under time pressure.⁴⁷⁷ Similarly, a speed and strength test may

⁴⁷⁵ See 29 C.F.R. § 1630.2(h) (defining physical or mental impairment).

⁴⁷⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (explaining that Title VII liability turns on whether gender-based stereotypes motivated employer's decision); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993) (determining that liability under ADEA depends on whether stereotypes or animus about age motivated employer's decision).

⁴⁷⁷ See Sara Engram, *Reconciling the Letters of the Law*, BALT. SUN, Oct. 26, 1997, at 3F, available in LEXIS, News Library, Balsun File (describing challenge to bar exams because persons with dyslexia perform poorly on written, timed tests).

help to identify people most likely to make effective firefighters,⁴⁷⁸ but it would almost certainly screen out people with back and knee impairments.

The Supreme Court is right that the ADA does not require employers to justify all selection criteria and tests as job-related and consistent with business necessity.⁴⁷⁹ On the other hand, many requirements, tests, and criteria *are* based on stereotypes about impairments. It, therefore, would be odd if the ADA were read to prohibit only the use of tests and requirements that discriminated against people with substantially limiting physical and mental impairments, but not those tests that discriminated against persons with less limiting impairments. Such a conclusion would be especially strange in light of the ADA's central aim of prohibiting the use of stereotypes about impairments. Additionally, prohibiting individual acts of discrimination based on stereotypes about impairments, but allowing tests or requirements based on stereotypes, would permit employers to do indirectly the things they could not do directly.⁴⁸⁰ This next section will use the analysis developed in the previous section about stereotypes, along with the examples presented in *Sutton* and *Murphy*, to explain how courts can identify tests and requirements that are tantamount to regarding an individual as disabled. Such tests and requirements merit scrutiny under the ADA.

1. *When Is a Test Just a Test? What Kinds of Tests Amount to Regarding a Class of People as Disabled?* Employers often use standardized tests or requirements to make hiring and promotion decisions. These can include requiring a minimum score on standardized IQ tests,⁴⁸¹ passing strength and physical fitness

⁴⁷⁸ Cf., e.g., *Zamlen v. City of Cleveland*, 906 F.2d 209, 218-20 (finding test for speed, strength, and physical fitness adequately measured skills necessary to be firefighter and did not violate Title VII).

⁴⁷⁹ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490-91 (1999) (deciding that employers may establish physical criteria and make employment decisions based on physical characteristics).

⁴⁸⁰ Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (specifying that employer cannot use tests that have effect of discriminating on basis of race unless shown to be demonstrably related to job performance).

⁴⁸¹ See *Allen*, *supra* note 186, § 4, at 3 (describing police department that refused to grant police patrol job interview to applicant who scored too high on preemployment test because he would likely become bored and leave soon after city paid for training).

tests,⁴⁸² being able to type quickly, having a college degree, passing the state bar exam, or being DOT-certified to drive a commercial truck. Employers rely on these requirements for a variety of reasons. They provide convenient proxies for skills and allow employers to identify people with those skills. They also provide a quick way of screening out applicants who lack those skills. Additionally, employers may be obligated by law to require certain qualifications, such as bar membership or, in UPS's case, DOT certification. Large and small employers alike rely on such requirements or tests. Without them, employers would have to expend far greater resources to identify qualified employees.

a. Distinguishing Between Facially Neutral and Facially Discriminatory Tests and Requirements. In the race and gender discrimination context, any facially neutral employment practice or test proven to have a significant, disparate impact on members of a particular racial group or on the basis of sex must be justified by an employer as job-related and consistent with business necessity.⁴⁸³ Facially discriminatory policies are illegal under Title VII unless an employer demonstrates that sex, national origin, or religion is a "bonafide occupational qualification" for the particular job in question.⁴⁸⁴ An employer can only establish a BFOQ if the qualification the employer seeks is essential to the essence of the employer's business, and there is no real way to assure that employees possess that qualification without relying on proxies of gender,² age, or national origin.⁴⁸⁵

The ADA, too, requires that facially neutral "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" must be proven to be "job-related for

⁴⁸² See, e.g., *Zamlen*, 906 F.2d at 219-20 (rejecting disparate impact suit challenging strength, speed, and physical fitness tests brought by female applicants for firefighter positions); *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (holding height and weight requirements had disparate impact based on gender and suggesting that state use strength tests as alternative).

⁴⁸³ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

⁴⁸⁴ 42 U.S.C. § 2000e-2(e); see *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 197-99 (1991) (concluding that policy requiring women to prove they are incapable of producing children was facially discriminatory).

⁴⁸⁵ *International Union*, 499 U.S. at 197-99.

the position in question and . . . consistent with business necessity.”⁴⁸⁶ The ADA also prohibits the use of facially discriminatory policies unless the employer demonstrates that disabled persons excluded by the policy constitute a direct threat.⁴⁸⁷

In the disability context, the distinction between “facially neutral” and “facially discriminatory” policies can be elusive. Selection and promotion requirements and tests of a person’s ability to do a job often overlap significantly with impairments and disabilities. Conversely, tests for impairments often tell an employer whether someone can perform some aspect of a job. United’s minimum uncorrected vision requirement⁴⁸⁸ and UPS’s blood pressure test to determine whether a trucker could be certified by the Department of Transportation⁴⁸⁹ are examples of policies that may be difficult to characterize as facially neutral or facially discriminatory.

One way to approach this problem of characterization is to ask whether the tests and requirements at issue in *Sutton* and *Murphy* can be distinguished from discrimination based on stereotypes against persons with physical and mental impairments. UPS, for example, required its employees who drove commercial trucks to meet DOT regulations for commercial truck-drivers.⁴⁹⁰ The underlying DOT regulations, which set an upper limit on blood pressure, do appear to be based on stereotypes about high blood pressure’s effects. One common perception about high blood pressure is that it makes a person more likely to suffer heart attacks. As with all stereotypes, this generalization about high blood pressure may be untrue in any particular case. Mr. Murphy’s blood pressure may not have made *him* more likely to lose consciousness or have a heart attack, especially because he generally

⁴⁸⁶ 42 U.S.C. § 12112(b)(6).

⁴⁸⁷ See 42 U.S.C. § 12113(b) (providing that employer may require that “an individual shall not pose a direct threat to the health or safety of other individuals in the workplace”); see also *EEOC v. Exxon Corp.*, 203 F.3d 871, 874 (5th Cir. 2000) (contrasting generally applicable safety-based qualification standards from facial discrimination against persons with disabilities, and noting that latter may only be justified if individual excluded is shown to be direct threat).

⁴⁸⁸ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475-76 (1999).

⁴⁸⁹ *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 519-20 (1999).

⁴⁹⁰ *Id.* at 521-22.

kept his blood pressure under control.⁴⁹¹ Moreover, whether someone is "more likely" to have a heart attack or become unconscious is a relative matter, and our assessment of the likelihood will depend on the groups we compare. Is someone with high blood pressure more likely than the average American to have a heart attack? More likely than the average truck driver? If our concern is that someone with high blood pressure will be an unsafe driver, we are still faced with a question of comparative risk, and it may be appropriate to ask whether people with high blood pressure actually have worse safety records than the average truck driver. When an employer has not assessed comparative risk, an employer's tests or requirements may be premised on stereotypes about the sorts of physical or mental impairments that pose safety issues.

In this light, a maximum blood pressure requirement resembles the stereotypes discussed in the previous section. Employers who make decisions based on stereotypes do not assess a particular individual's reliability, absentee rate, safety record, or past work history. The employer relies instead on generalizations to predict future performance. The generalizations may themselves be false or they may be false for a particular individual. Creating tests or requirements that are based on generalizations or stereotypes about physical or mental impairments is no different from making an individual employment decision based on such stereotypes.

UPS itself, however, did not appear to rely on stereotypes. It accurately measured Mr. Murphy's blood pressure and accurately determined that he could not be certified to drive trucks by the DOT. UPS made no presumptions about Mr. Murphy's qualifications for the job. Mr. Murphy's high blood pressure did, as a matter of fact, prevent him from being certified to drive commercial trucks by the DOT.⁴⁹² Indeed, it appears that UPS escaped liability in *Murphy* largely because federal law required it to comply with DOT regulations.⁴⁹³ UPS's requirement of DOT certification could be

⁴⁹¹ See *id.* at 519-20 (explaining that, in general, Mr. Murphy functions normally with medication).

⁴⁹² *Id.*

⁴⁹³ *Id.*

characterized as a neutral requirement that its employees comply with federal law.

In a similar vein, one might argue that United's vision requirement was an ability test that was not based on stereotypes but was instead based on an accurate assessment of the *Sutton* plaintiffs' ability to fly planes. Under this view, United's minimum uncorrected vision requirement accurately determines that without glasses the *Sutton* plaintiffs cannot fly a plane. Viewed this way, United's vision requirement is similar to requiring a baseball pitcher to pitch a fastball over 95 miles per hour or a wide-receiver to run the 100-yard dash under eleven seconds. The stringency of the requirement reflects the employer's high standards, not discriminatory attitudes about physical impairments.

But United's minimum uncorrected vision requirement is not so easily brushed aside as a case of high standards. No one disputes that United accurately measured the *Sutton* plaintiffs' eyesight without glasses, and that without glasses, they cannot fly planes. The *Sutton* plaintiffs, however, never argued that they should be allowed to fly planes *without* their glasses. They argued, instead, that *with* their glasses they could fly planes. United did not dispute this fact. In fact, the plaintiffs had successfully flown planes for regional airlines.⁴⁹⁴ Moreover, United did not test them on a flight simulator, which would have tested their ability to fly, because United determined they were ineligible to work for United solely on the basis of their uncorrected vision.⁴⁹⁵

United's uncorrected vision requirement thus does not differentiate people who can fly planes from people who cannot. Rather, United's vision requirement screens out people who pose a certain safety risk of becoming incapacitated if their glasses fall off or get foggy. We still might ask whether this risk assessment is based on an impermissible stereotype or on a permissible assessment of a verifiable, measurable ability (a measurement of their ability to see without glasses). United might argue that its requirement is still akin to clocking the speed of a pitcher's fastball or a running back's

⁴⁹⁴ See *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 895 (10th Cir. 1997) (observing that *Sutton* plaintiffs were pilots for regional commuter airlines), *aff'd*, 527 U.S. 471 (1999).

⁴⁹⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475-76 (1999).

100-yard dash. The analogy to ballplayers does not withstand scrutiny.

United does not hire pilots who are especially talented at seeing in the same way that a baseball team hires talented ball-throwers. Put bluntly, United wants pilots who can fly planes carrying hundreds of passengers without flying into the side of Mount Tamalpais or landing in San Francisco Bay, thereby killing hundreds of (suddenly former-) paying customers. To determine whether a pilot is more or less likely to become an ex-pilot in one fell swoop, United measures applicants' vision. A vision test tells United that in a given set of circumstances—a pilot's glasses fall off or become foggy—a pilot will be unable to see. From that fact, United concludes that a particular individual poses too high a safety risk.

Put this way, United's vision test begins to look more like a blood pressure test for commercial truck-drivers (which is premised on the generalization that people with high blood pressure are more prone to heart attacks, and it is bad for truck drivers to have heart attacks while driving 10-ton vehicles at 65 miles per hour). United's vision test, accordingly, starts to look like a stereotype about people with a physical impairment (people with uncorrected vision worse than 20-100 make risky pilots), not a test of a pilot's ability.

United's uncorrected vision test is similar to job requirements that are based upon some condition that affects only one gender, though not every member of that class, such as the potential to become pregnant or the ability to bear children. Such requirements are considered to be "facially" discriminatory⁴⁹⁶ as a practical matter (only women have the ability to get pregnant), even though as a logical, formal matter they are not facially discriminatory (such requirements do not discriminate against all women, only against those able to become pregnant; thus they discriminate against "potentially pregnant persons" and in favor of "persons unable to become pregnant").⁴⁹⁷ In the same vein, United's vision requirement

⁴⁹⁶ *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 197-99 (1991).

⁴⁹⁷ *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 140 (1977) (holding discrimination on basis of pregnancy is not sex discrimination because it classifies people as pregnant and non-pregnant, and men fall into latter category), *rev'd*, Pregnancy Discrimination Act, 42 U.S.C.S. § 2000e(k) (1978); *Geduldig v. Aiello*, 417 U.S. 484, 489-90 (1974) (same).

can be construed as a test of one's ability to see, but as a practical matter, it only screens out people with a specific impairment: myopia.⁴⁹⁸

b. Tests and Requirements that Facially Discriminate on the Basis of Physical or Mental Impairments Are Tantamount to "Regarding" Persons with Such Impairments "as" Disabled. Whether stereotypes take the form of tests or requirements or directly motivate an individual employment decision, the ADA *should* be interpreted to prohibit employers from making employment decisions based on stereotypes and generalizations about how perceived or real, past or present, physical or mental impairments affect a person's abilities. To ascertain whether a test or requirement facially discriminates on the basis of stereotypes about a physical or mental impairment, courts should assess whether the employer is relying on some heuristic (a perceived impairment or disability) to predict future performance or if it is testing for that ability directly.

The Senate Report makes it clear that the ADA was intended to prohibit discrimination on the basis of stereotypes, even when they masquerade as tests or job requirements.⁴⁹⁹ "[E]xamples of individuals who fall within the 'regarded as' prong of the definition include people who are rejected for a particular job for which they apply" because the employer learns through a medical exam that the person has a latent condition that may become serious in the future although it causes no problems at the moment.⁵⁰⁰ The report cites the example of a person who is rejected for a job because an x-ray

⁴⁹⁸ This analysis does not raise the specter of the blind pilot or the blind bus driver. A person who was blind or vision-impaired with correction would not be able to pass a flight simulator test or a driving test; as I will explain below, such tests are properly considered neutral "ability" tests. Presumably, too, such persons could not meet Federal Aviation Administration vision regulations for flying, *see* 14 C.F.R. § 67.203(a) (2000) (requiring distant visual acuity of 20-20 with correction), or DOT requirements for driving commercial vehicles. *See* 49 C.F.R. § 391.41(10) (1999) (setting minimum distant visual acuity at 20-40 with correction); *id.* § 391.45(b)(2) (requiring commercial vehicle drivers to comply with health and safety regulations).

⁴⁹⁹ *See* S. REP. NO. 101-116, at 23 (1989), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 122 (explaining that third prong includes both those that do and those that do not have physical impairment that does not substantially limit major life activities when treated by covered entity as constituting such limitation).

⁵⁰⁰ *Id.* at 24, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 100, at 123.

reveals "a back abnormality[,] . . . notwithstanding the absence of any symptoms," and the example of people rejected for jobs "solely because they wear hearing aids," even though they "compensate substantially" for hearing loss "by using [hearing] aids, speechreading, and a variety of other strategies."⁵⁰¹ The reports emphasize that such persons need protection from discrimination under the "regarded as" prong because they often would not meet the definition of *having* a disability.⁵⁰²

Under current law, employment policies that facially discriminate against persons with disabilities (that is, substantially limiting impairments) can only be justified if an individual with a particular disability poses a direct threat to the health or safety of others in the workplace.⁵⁰³ Like the requirement of reasonable accommodation, this stringent scrutiny of facially discriminatory policies requires employers to shoulder some of the costs associated with integrating persons with substantially limiting impairments into the workplace. An employer cannot refuse to hire someone who poses *some* threat, only those who pose substantial, likely threats of harm.⁵⁰⁴

People with less limiting impairments, however, generally do not experience segregation and isolation to the same extent as persons with substantially limiting ones.⁵⁰⁵ Tests or requirements that facially discriminate against persons with non-substantially limiting impairments (such as tests for myopia or maximum high-blood pressure limits) should therefore be considered somewhat less suspect under the ADA. When an employer uses a test or a

⁵⁰¹ *Id.*

⁵⁰² *Cf.* S. REP. NO. 101-116, at 8 (1989), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 106 (explaining that persons with epilepsy and former cancer patients merit protection under the "regarded as" prong because they often are not substantially limited enough by their impairments to *have* disability).

⁵⁰³ See 42 U.S.C. § 12113(b) (1994) (providing that employer may require that individual not pose direct threat to workplace).

⁵⁰⁴ See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987) (agreeing with AMA that direct threat analysis requires reasoned assessment based on reasonable medical or scientific judgments about nature, duration, severity (potential harm to third parties), and probability of risk).

⁵⁰⁵ See *supra* notes 370-373 and accompanying text (discussing questions of equities involved in assessing whether persons not substantially limited in major life activities should be entitled to reasonable accommodations and concluding that because relatively minor impairments do not result in isolation and segregation, they should not be).

requirement that on its face discriminates against persons with physical or mental impairments, an employer should have to justify those tests or requirements as job-related and consistent with business necessity, a lesser standard than the "direct threat" test.⁵⁰⁶ Requiring employers to justify tests that facially discriminate against persons with impairments as job-related harmonizes with the notion that persons subject to individualized discrimination based on stereotypes about perceived impairments should be covered under the "regarded as" prong. In the latter case, an employer could legally refuse to hire an applicant if it had a nondiscriminatory reason for rejecting her, even if it believed negative stereotypes about an impairment it thought she had. A requirement of job-relatedness for facially discriminatory policies imposes a similar burden by forcing the employer to articulate reasons for the test or requirement grounded in the abilities actually required to perform the job.

This proposed standard would not interfere with an employer's ability to set high qualification, performance, or safety standards. It would require an employer to evaluate the actual requirements for a job as well as a person's actual ability. It could not rely on generalizations about a person's ability based on whether she has a physical or mental impairment. An employer would not be able to assume that someone with depression cannot handle a high stress job, or that a person with cancer or a history of cancer will not be a long-term employee. Furthermore, to prove an ADA violation, a plaintiff would have to prove that she was qualified for the position in question and that the stereotypes or generalization actually caused the employer to decide not to hire her.⁵⁰⁷

⁵⁰⁶ See *EEOC v. Exxon Corp.*, 203 F.3d 871, 874 (5th Cir. 2000) (explaining that job-relatedness defense was less stringent than direct threat defense).

⁵⁰⁷ See *e.g.*, *Lessard v. Osram Sylvania, Inc.*, 175 F.3d 193, 197 (1st Cir. 1999) (holding that plaintiff must establish he has disability, was nevertheless qualified for job, and that defendant discharged him because of his disability); *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 897 (10th Cir. 1997) (same), *aff'd*, 527 U.S. 471 (1999); *Roth v. Lutheran Gen'l Hosp.*, 57 F.3d 1446, 1457 & n.18 (7th Cir. 1995) (same); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1123 (10th Cir. 1995) (same); *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995) (same and collecting cases); *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) (same elements under Rehabilitation Act cases).

2. *Facially Neutral Tests and Requirements with Disparate Impact on Persons with Disabilities.*

a. *Neutral Standards and Tests Do Not Imply that People Who Do Not Meet Them Are "Regarded as" Disabled.* Having high standards is not the same as regarding someone as disabled, so long as the standards in question are facially neutral as to physical or mental impairments. The ADA's structure bears out this contention. Tests and selection criteria are specifically regulated by Section 12112(b)(3) and Section 12112(b)(6) of the ADA. Section 12112(b)(3) prohibits the use of "standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability."⁵⁰⁸ Section 12112(b)(6) prohibits "using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out [persons with disabilities] unless the standard, test or other selection criteria . . . is shown to be job-related . . . and is consistent with business necessity."⁵⁰⁹

Facially neutral tests and performance criteria that screen out persons with disabilities are a distinct issue from whether an employer "regards" an applicant as disabled, a conclusion supported by the ADA's separate regulation of tests and performance criteria. Several things follow from this conclusion. First, that an employer uses a performance standard or relies on a some ability test does not mean that it regards an individual as disabled. Second, tests that have a disparate impact based on *disability* must be justified by the employer as job-related and consistent with business necessity, or the employer is liable under the ADA. Third, employers do not have to justify as job-related and consistent with business necessity those tests and requirements that do not have a disparate impact on the basis of *disability*.

The ADA's provisions on facially neutral policies are similar to Title VII's treatment of facially neutral tests and requirements that have a disparate impact on the basis of sex or race. If a facially neutral standard, test, or requirement has a substantial disparate

⁵⁰⁸ 42 U.S.C. § 12112(b)(3)(A) (1994).

⁵⁰⁹ *Id.* § 12112(b)(6).

impact on the basis of race or sex, it must be justified by an employer as job-related and consistent with business necessity.⁵¹⁰

The example of a flight simulator test provides an example of a neutral requirement that may have disparate impact on persons with disabilities or impairments. It is facially neutral because it is not designed to determine whether a disability or an impairment prevents someone from passing the test. People with a variety of impairments and disabilities—for example, uncorrectable vision, poor hearing, and motor skill impairments—and people with a variety of skills that are not impairments—someone with worse than average eye-hand coordination or who had never taken flying lessons—will fail the test. The test is not sensitive to which of these abilities or impairments cause one to fail. Similarly, if UPS's DOT certification requirement is indifferent to the reasons why a person fails to be certified, and a person can be denied certification for a variety of reasons, UPS's requirement or standards can be characterized as facially neutral with regard to physical or mental impairments. Nothing on the face of the requirement refers to any physical or mental impairment (or strongly correlates with any impairment, as taking Lithium correlates with bipolar disorder).

A facially discriminatory policy, by contrast, would be one that required police officers who take anti-depressants to submit to extra monitoring of fitness for duty and to be accompanied on patrols by a partner. Such a requirement was at issue in *Krocka v. City of Chicago*.⁵¹¹ When Officer Krocka reported to the police department that he had depression and was taking Prozac to control it, the department insisted he participate in a special program to closely monitor his fitness for duty.⁵¹² Someone from the program checked in with him several times during a shift and accompanied him on his patrols.⁵¹³ This policy is facially discriminatory because it explicitly applies to persons who have specific mental impairments; a mental illness triggers application of the rule. It relies on a generalization about the effect suffering from depression would have

⁵¹⁰ *Id.* § 2000e-2(k)(1).

⁵¹¹ 203 F.3d 507, 512-13 (7th Cir. 2000).

⁵¹² *Id.* at 511.

⁵¹³ *Id.*

on an officer's fitness for duty,⁵¹⁴ not on the actual performance of individual police officers.⁵¹⁵ Indeed, Officer Krocka consistently had favorable performance evaluations, and the police department's evaluating physician certified that he showed no signs of psychological illness and suffered no side effects from Prozac.⁵¹⁶ As discussed above, facially discriminatory policies should constitute evidence that the employer regards persons with the triggering impairment as disabled.

But should an employer have to justify all facially neutral tests and requirements as job-related and consistent with business necessity if they have an impact on persons with physical or mental impairments? Or should employers only have to justify those tests with a disparate impact on persons with *disabilities* (substantially limiting impairments)? The structure of the ADA suggests that only tests that have a *disparate impact* on persons *with disabilities* must be so justified. The legislative history of the ADA and of the 1991 Civil Rights Act also supports this conclusion.

b. Tests with Disparate Impact on People with Disabilities Must Be Justified as Job-Related and Consistent with Business Necessity. The prohibitions against tests and requirements with disparate impact on the basis of disability appear in Section 12112(b) of the ADA.⁵¹⁷ That section also requires employers to provide reasonable accommodations to persons with disabilities, to make employment decisions without regard to the cost of a reasonable accommodation, to refrain from discriminating against persons associated with persons with disabilities,⁵¹⁸ and to administer tests to persons with disabilities in a manner that ensures that the disability does not interfere with the person's ability to succeed on

⁵¹⁴ *Id.* Though placement in the "Personnel Concerns Program" was generally "reserved for officers with disciplinary problems," the Chicago Police Department also put all officers who took psychotropic medication into the program because "they are deemed to have 'significant deviations from an officer's normal behavior' " regardless of their actual performance on the job. *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ 42 U.S.C. § 12112(b)(1)-(7) (1994).

⁵¹⁸ This prohibition would, for example, require an employer to make employment decisions without regard to the fact that an employee has a child with a disability who may require expensive medical procedures that will drive up the employer's medical insurance costs.

the test (such as providing verbal tests or tests in braille for persons with severe visual disabilities). Each of the provisions in Section 12112(b) requires an employer to do something more than refrain from discrimination based on disability.⁵¹⁹ Each provision in Section 12112(b) imposes an affirmative duty to accommodate the needs of people with disabilities by providing reasonable accommodations, by altering the administration of tests, and by affirmatively proving the validity and job relatedness of tests and requirements.⁵²⁰ All require far more than Section 12112(a)'s mandate that employers ignore an applicant's disability or physical or mental impairment.⁵²¹

As I argued in Part III.C., the ADA imposes additional duties on employers to ensure that persons with disabilities are brought into the economic, social, and political mainstream of American life.⁵²² As a general matter, Congress concluded that persons with actual, functional disabilities, defined as substantial limitations on major life activities, often do need employers to alter the "usual" way of doing things so that they can be a part of the economic mainstream. Persons with physical and mental impairments that are not substantially limiting generally do not need such alterations.

Requiring an employer to justify a job requirement or test as job-related and consistent with business necessity imposes a significant extra burden on an employer.⁵²³ Outside of the disability context,

⁵¹⁹ 42 U.S.C. § 12112(b)(1)-(7).

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² See *supra* notes 260-371 and accompanying text.

⁵²³ At the very least, placing the burden of proof on the employer means that the employer will have a difficult time disposing of the case on the pleadings and will have to bear the cost of the case at least through summary judgment. At any rate, courts and Congress have certainly perceived disparate impact litigation as imposing a significant burden on employers and have been leery of expanding the scope of disparate impact liability. See *supra* note 10 (discussing strong Republican opposition to 1991 Civil Rights Act, which in some respects expanded ability of plaintiffs to bring disparate impact causes of action under Title VII). The Supreme Court has recognized that defendants shoulder a reasonably heavy burden in proving tests to be job-related and consistent with business necessity, and in *Wards Cove Packing Co. v. Atonio*, the Court tightened the requirements for a disparate impact claim based on gender or ethnicity. 490 U.S. 642 (1989). As explained in Part I, Democrats in Congress fought an uphill battle to overturn the Court's *Wards Cove* decision, and their victory was only a partial one. See *supra* note 10 (explaining difficulties in passing 1991 Civil Rights Amendments). Republican members of Congress and the Bush Administration were concerned that a complete repudiation of *Wards Cove* and a broad cause of action for policies that have disparate impact on minorities or women would force employers to adopt racial or

employers have free reign to devise tests and requirements, job-related or not, so long as they do not have a substantial disparate impact on race, sex, or national origin. Apart from these factors, employers may use criteria that sort individuals based on nearly every other factor—social class, intelligence, performance, or strength—provided, of course, the criteria does not also have a significant disparate impact based on race, sex, or national origin. Under the ADEA, employers have even greater freedom and may use employment criteria that have a disparate impact based on age.⁵²⁴

The right to sue for disparate impact is thus a *special* privilege granted to particular groups.⁵²⁵ In light of this fact, it makes sense to limit the class of persons who may bring disparate impact actions

gender quotas to hedge against disparate impact suits. Regardless of whether this fear was realistic or not, the Bush Administration and congressional Republicans were able to exact a compromise in the 1991 Civil Rights Amendments. The 1991 Civil Rights Amendments only partially overturned *Wards Cove*, leaving intact a few aspects of the Court's opinion. First, a plaintiff challenging a practice or policy as having a disparate impact has to identify a *particular* practice or policy and isolate its particular disparate impact. 42 U.S.C. § 2000e-2(k)(1)(B)(i). This can be a difficult burden to meet when an employer uses a collection of requirements and tests to cull through applicants. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-58 (1989) (holding that plaintiffs must isolate effects of Wards Cove's word-of-mouth hiring practices for noncannery workers, its policy of giving preference to friends and family of current noncannery workers, and its policy of hiring cannery workers from unions whose members were predominately members of racial and ethnic minorities). Second, plaintiffs have to prove to a fairly high degree of certainty that the disparate impact is statistically significant. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999-1000 (1988) (discussing difficulty plaintiff might have in challenging disparate impact of subjective employment practices because sample may be too small to permit "meaningful" statistical analysis); *New York Transit Authority v. Beazer*, 440 U.S. 568, 584 (discussing statistical proof necessary to mount disparate impact challenge). Third, plaintiffs still have to prove that the policy in question caused the disparate impact and that some other factor did not. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (stating that complaining party must demonstrate defendant uses particular employment practice that causes disparate impact).

⁵²⁴ *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-14 (1993) (concluding that firing employee because he is close to vesting in his pension does not violate ADEA); *Ellis v. United Air Lines, Inc.*, 73 F.3d 999, 1007-09 (10th Cir. 1996) (stating ADEA does not permit disparate impact suits).

⁵²⁵ *Cf. Kelman, supra* note 251, at 26-28 (discussing neutral tests with disparate impact and suggesting that requiring employers to justify such tests as job-related is akin to providing individual with accommodation because employer must expend resources to ensure inclusiveness of workplace); *but see id.* at 88 n.84 (concluding that disparate impact analysis does not implicate accommodation and is properly viewed as way of "insur[ing] that rights against simple discrimination are affirmative rights," not merely rights to be free from "impermissibly motivated conduct").

under the ADA to persons who actually *have* substantially limiting impairments. Consistent with this interpretation, an employer should only have to validate the test or requirement as job-related and consistent with business necessity if it has a disparate impact on persons who *have* a disability. The ADA appears to view medical tests and examinations with more jaundiced eye. All such tests and examinations must be justified by an employer as job-related and consistent with business necessity whether they have a disparate impact or not.⁵²⁶

E. ACCOMMODATING SUTTON

Even if the foregoing analysis is a fair interpretation of the statutory language, correctly describes what Congress intended the “regarded as” prong to cover, and is consistent with the EEOC regulations on “regarded as,” it is of little consequence if the Court’s analyses in *Sutton* and *Murphy* completely foreclose a more generous reading of the “regarded as” prong of the statute. One could of course urge the Court to revisit the issue (they certainly should) or prod Congress to amend the ADA to make its meaning on the “regarded as” issue clearer (that *would* be nice). Neither exhortation, unfortunately, gives any aid or guidance to parties now involved in ADA litigation.

Happily, exhortations to overturn and to rewrite do not exhaust all available options. *Sutton* was silent on the issue of the EEOC regulations’ somewhat more generous reading of “regarded as.”⁵²⁷ As I will show, nothing in *Sutton* necessarily contradicts the regulations. *Sutton*, read in conjunction with the EEOC regulations, provides some room to advocate an interpretation of “regarded as having such an impairment,” that affords ADA protection to persons with perceived or real physical or mental impairments from discrimination based on negative stereotypes about that impairment.⁵²⁸ Given that the ADA is hardly a model of clarity, the

⁵²⁶ 42 U.S.C. § 12112(c)(4).

⁵²⁷ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491-92 (1999) (presuming without deciding validity of EEOC regulations); see also *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 563 n.10 (1999) (same).

⁵²⁸ See *Sutton*, 527 U.S. at 489 (stating that misperceptions about physical or mental

EEOC's regulations are entitled to deference, so long as they are a reasonable interpretation of the phrase "regarded as having such an impairment."⁵²⁹

Admittedly, there is some tension between the Court's holding that the "apparent" meaning of "regarded as having such an impairment" is met if an employer mistakenly believes the individual to have a substantially limiting impairment,⁵³⁰ and my argument that relying on unverified stereotypes about a physical or mental impairment constitutes "regarding" that individual as disabled. Two parts of *Sutton* make resolving this tension possible. First, the Court acknowledges and holds that the ADA's purpose in protecting those "regarded as disabled" is to forbid employers from relying on misperceptions about an individual's fitness for a job based on "stereotypic assumptions not truly indicative of . . . individual ability."⁵³¹ Second, the Court cites *Arline* for the proposition that "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."⁵³² In other words, stereotypes and negative attitudes about physical and mental impairments may severely circumscribe the opportunities and options of a person who is perceived to have such an impairment. The Court recognizes that Congress meant to proscribe the use of such stereotypes in the employment context.⁵³³

Recall that *Sutton* states that there are "two apparent ways in which individuals may fall within the statutory definition of "regarded as": "(1) a covered entity mistakenly believes that a person has a [substantially limiting] physical impairment," or "(2) a covered entity mistakenly believes that an actual, nonlimiting

impairments often result from stereotypic assumptions not truly indicative of individual ability).

⁵²⁹ Cf. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 859-66 (1984) (holding that when statute is unclear, agency's interpretation of statute is entitled to deference if reasonable).

⁵³⁰ *Sutton*, 527 U.S. at 489.

⁵³¹ *Id.* at 490 (quoting 42 U.S.C. § 12101(7)).

⁵³² *Id.* (quoting *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)).

⁵³³ See *id.* (explaining that individuals rejected from jobs based on myths and fears about disability are covered).

impairment substantially limits one or more major life activities.”⁵³⁴ “Apparent” need not mean “only.” The Court’s citation to the ADA’s purpose section and to *Arline* suggests that there might be cases where an employer regards an employee as disabled besides the two “apparent” ways the Court specifically outlines.

The EEOC regulations illustrate two ways not captured by the *Sutton* court’s interpretation in which an employer may regard an employee as “disabled.” First, a person who “[h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation” is considered disabled.⁵³⁵ Second, a person with a “physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment” is also considered disabled.⁵³⁶ Whether an individual is “treated as” having a substantially limiting impairment is a different inquiry than determining whether the employer subjectively perceives that the employee has a substantially limiting impairment. The phrase “treated as” focuses the inquiry on the employer’s actions and on what attitudes those actions evince, regardless of the employer’s actual, subjective perceptions. One way an employer might treat an employee as being disabled is if the employer disqualifies an individual “on the basis of an *actual or perceived physical or mental condition*, and . . . can articulate no legitimate job-related reason for the rejection.”⁵³⁷ A court may infer that the employer has a “concern about employing persons with disabilities.”⁵³⁸ In this case, the plaintiff would qualify for coverage under the ‘regarded as’ test.⁵³⁹

Nothing here is inconsistent with *Sutton*’s holding that an employer must regard someone as having a substantially limiting impairment. When an employer makes an employment decision based on a generalization or stereotype about an impairment, the

⁵³⁴ *Id.* at 489.

⁵³⁵ 29 C.F.R. § 1630.2(i) (1999).

⁵³⁶ 29 C.F.R. § 1630.2(1)-(2).

⁵³⁷ H.R. REP. NO. 101-485, pt. 3, at 30-31 (1990), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 470-71 (emphasis added).

⁵³⁸ *Id.* at 31, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 100, at 471.

⁵³⁹ *Id.*

employer must believe that the perceived deficiency that the impairment causes is substantial enough to justify firing or refusing to hire a person with that impairment. If a perceived impairment is a sufficient reason to refuse to hire someone, we might reasonably conclude that the employer perceived the impairment as imposing a substantial limitation on that individual.⁵⁴⁰

The second definition of "regarded as" in the EEOC regulations—a person with a "physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others"⁵⁴¹—supports this broader reading of "substantially limited." To illustrate, consider a few examples of stereotypes about physical or mental impairments: that a depressed person cannot handle stress, that a person with cancer in remission is unlikely to be a long-term employee, and that a person with diabetes will be an erratic worker. If people generally believe in and act upon these stereotypes, these stereotypes will seriously curtail the life opportunities of people who have such impairments, even if the impairment is not in and of itself substantially limiting. In other words, the individual's impairment will substantially limit her life activities due to the stereotypes held by others.

Individuals subject to discriminatory treatment based on negative stereotypes about their physical or mental impairments can rely on these aspects of the EEOC regulations to argue that they are covered by the ADA. Two arguments are possible. First, one could argue that an employer who makes an adverse employment decision based on a stereotype or a negative attitude about a physical or mental impairment *treats* the impairment as though it were substantially limiting. In that case, the employer perceives the condition as imposing substantial enough limits on an individual's abilities to justify a refusal to hire. Second, an individual could argue that the particular stereotype held by the employer would impose substantial limitations on the opportunities of someone believed to have that impairment, if the stereotype were generally

⁵⁴⁰ See Mayerson, *supra* note 426, at 597 (arguing that if employer considers individual to be unqualified because of impairment when individual is in fact qualified individual, individual should fall within "regarded as" prong); *but see* Kelman, *supra* note 251, at 45 n.50 (doubting that this formalistic argument succeeds as interpretation of ADA).

⁵⁴¹ 29 C.F.R. § 1630.2(1)-(2).

held and acted upon. In either case, the employer can be said to “regard” an individual as “having an impairment that imposes a substantial limitation on one or more major life activities.”

The Fifth Circuit has applied the Court’s decision in *Sutton* in a manner quite similar to the one I suggest here. The court held in *EEOC v. R.J. Gallagher Co.* that R.J. Gallagher’s former president, Michael Boyle, was covered under the “regarded as” prong of the ADA.⁵⁴² The company demoted Boyle to a far less prestigious position and cut his pay in half when it learned Boyle had a rare form of blood cancer, despite the fact that Boyle’s doctor had certified he could work.⁵⁴³ Boyle had also arranged to take chemotherapy on weekends to minimize time away from the office.⁵⁴⁴ Considering a person unfit for “a single job,” especially a high level job, does not suffice to show that a person is “regarded as” disabled.⁵⁴⁵ Had the Fifth Circuit applied *Sutton* mechanically, the ADA would not have protected Boyle. The Fifth Circuit read *Sutton* more generously, holding that the company’s concern about Boyle’s ability to work, along with the demotion, sent a clear message that the company considered Boyle unfit to continue working for the company and, consequently, regarded him as disabled.⁵⁴⁶

F. A COHERENT INTERPRETATION OF THE ADA

The provisions of a complicated statute fall sensibly, if not neatly, into place when interpreted in the manner set out here. Persons who *have* physical or mental impairments that actually substantially limit a major life activity can sue under Section 12112(b) of the ADA if an employer fails reasonably to accommodate their disability, administers tests that have a disparate impact on persons with that disability, or administers tests in a manner that unnecessarily deprives persons with a disability from demonstrating their

⁵⁴² 181 F.3d 645, 657 (5th Cir. 1999).

⁵⁴³ *Id.* at 649.

⁵⁴⁴ *Id.*

⁵⁴⁵ Cf. 29 C.F.R. § 1630.2(j)(3)(i) (stating that being excluded from doing one job is not substantial limitation on major life activity of working).

⁵⁴⁶ *R.J. Gallagher Co.*, 181 F.3d at 657.

facility at the skill the test purports to measure.⁵⁴⁷ A "qualified person with a disability" has a consistent definition for each of the provisions of Section 12112(b) of the ADA.

If the term "disability" is interpreted more broadly for purposes of the "regarded as" and "record of" prongs, then qualified persons who are discriminated against due to stereotypes about perceived or past mental or physical impairments may sue for employment discrimination under the general antidiscrimination provision of Section 12112(a).⁵⁴⁸ Having a broader definition of "disability" for the general antidiscrimination provision of Section 12112(a) and a narrower one for the accommodation provisions set out in Section 12112(b) makes practical sense as well. Persons "regarded as" disabled or who have a "record of" a disability generally do not require reasonable accommodations. The whole point of prohibiting discrimination based on stereotypes is that an impairment imposes few or no actual limitations on a person's present capabilities.

V. CONCLUSION

Did *Sutton* betray the revolution set in motion by the ADA? Or was the revolution overstated? The popular depiction of the ADA as a law that would revolutionize American workplaces exaggerates and oversimplifies the ADA and its goals. To the extent that the ADA requires employers to accommodate the needs of workers whose impairments threaten to keep them on the margins of society, the ADA does significantly alter the American workplace. Never before have employers been required to provide more than de minimus accommodations to persons who cannot work without them.⁵⁴⁹ Never before the ADA did federal law make reasonable accommodations in all parts of American life a *civil right* of persons with disabilities. But not all persons with physical or mental

⁵⁴⁷ 42 U.S.C. § 12112(b)(1)-(7) (1994).

⁵⁴⁸ See 42 U.S.C. § 12112(a) (providing that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual" when making employment decisions).

⁵⁴⁹ Employers must provide reasonable accommodations for persons who need them for religious reasons. 42 U.S.C. §§ 2000e, 2000e-2, 2000e-15 (1994). *But cf.*, *Trans World Air Lines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (ruling that any accommodation that imposes more than a de minimus burden on an employer is not reasonable).

impairments are entitled to reasonable accommodations, and Congress never meant for that to be the case.

Persons whose disabilities can be ameliorated to the point where they can lead average, mainstream lives do not require the sorts of accommodations the ADA requires in order to enjoy and exercise their civil rights. The Court was therefore correct to hold in *Sutton* that corrective measures should be taken into account when determining if an individual *has* a disability. To this extent, *Sutton's* holding does not undercut the purpose of the ADA. This narrower definition of disability does provide a right to reasonable accommodations to a narrower class of persons than the EEOC guidelines would have. But courts might define the concept of reasonable accommodations more generously and find a greater range of accommodations to be reasonable if their holdings apply to the narrower class of persons that *Sutton* effectively defines. Such a result may actually better serve the ADA's goal of integrating disabled persons into the economic and social spheres of American life than a broad definition of the protected class and a cramped definition of the reasonable accommodations to which they are entitled. An expansion of the leave requirements of the Family Medical Leave Act⁵⁵⁰ may provide a more fitting remedy for persons with physical and mental impairments who need reasonable work accommodations to maintain their health.

Sutton's definition of what it means to "regard" an individual as disabled should arouse concern and attention. *Sutton* opines that an employer regards an individual as disabled if the employer mistakenly believes that an individual has an impairment that substantially limits a major life activity.⁵⁵¹ Taken literally, this part of the *Sutton* opinion could seriously undermine the ADA's goal of barring employers from making decisions based on stereotypes and generalizations about physical and mental impairments. But this reading of *Sutton* is not the only possible one. *Sutton*, read in conjunction with the EEOC's "regarded as" regulations, provides some room to argue for a more generous interpretation of the "regarded as" definition of disability, one that would protect persons

⁵⁵⁰ Pub. L. No. 103-2, §§ 2.101-2.109 (1993) (codified at 29 U.S.C. § 2602 (1999)).

⁵⁵¹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

subject to discrimination based on perceived physical and mental impairments generally, not simply those perceived as substantially limiting.

The overthrow of an old order does not build a new one, and the statutory revolution of the ADA is no exception. After a revolution is won, work still must be done to ensure that its ideals become practical reality. For courts interpreting the ADA, remaking the law in the wake of the ADA's revolution requires applying the ADA's twin ideals of integrating persons with disabilities into the workplace and eliminating the use of stereotypes to employment decisions concerning concrete, practical problems between workers and employers.

The Court has begun this process, and the results so far are mixed. Its holding that corrective measures must be considered when determining whether an individual has a disability and is entitled to reasonable accommodations properly embraces the ADA's functional and civil rights ideals. The Court's decision to limit those protected from discrimination based on stereotypes about physical and mental impairments, however, threatens to contradict the ideals of the ADA and the Congress that passed it by protecting only those perceived to have substantially limiting impairments. The sooner the Court and the EEOC reverse ground on this crucial aspect of the ADA, the closer the ADA will come to fulfilling its promise.