Tulsa Law Review

Volume 35
Number 3 *Practitioner's Guide to the 1998-1999* Volume 35 | Number 3
Supreme Court Term

Spring 2000

Of One-Legged Marathoners and Legally Blind Pilots: Disabling the ADA on a Case-by-Case Basis

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OF ONE-LEGGED MARATHONERS AND LEGALLY BLIND PILOTS: DISABLING THE ADA ON A CASE-BY-CASE BASIS

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I. INTRODUCTION: THE ADA'S DIMINISHED PROTECTION

Using a contrived approach to statutory interpretation, the Supreme Court this term embraced the "disturbing trend" in the lower courts of "narrowing . . . the definition of disability"[1] under the Americans with Disabilities Act[2] ("ADA" or "the Act"), thus "depriv[ing] qualified individuals of the opportunity to prove . . . discriminat[ion] under the ADA."[3] In a cramped reading of the ADA that ignored relevant statutory language, explicit direction from Congress and the Court's own precedent, the Court severely limited the class of "individual[s] with a disability"[4] subject to the ADA's protections. A number of the ADA's drafters expressed disbelief and dismay at the Court's interpretation of this phrase to exclude those

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1. Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997).

2. 42 U.S.C. §§ 12101-12213 (1994).

3. Mayerson, *supra* note 1, at 487. For additional criticisms of courts' restrictive readings of "disability," *see generally* 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 (1997) [hereinafter referred to as "Substantially Limited" Protection]; 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 (1997); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1996).

4. All the various titles of the ADA contain the phrase "individual with a disability," and its three-pronged definition appears in a general section governing all titles under the ADA. 42 U.S.C. § 12102 (1994). One may be an "individual with a disability" if he or she has 1) an actual disability; 2) a history or record of a disability; or 3) is regarded as having a disability. *Id.* *See* text accompanying notes 48-59, *infra.*, for a discussion of the ADA's three-part definition of disability. Title I of the ADA prohibits discrimination in employment, *id.* at §§ 12111-12117; Title II prohibits discrimination in public services, *id.* at §§ 12131-12150; Title III prohibits discrimination in public accommodations and services operated by private entities, *id.* at §§ 12181-12189; Title IV amends the Federal Trade and Communications Act to require telecommunications services for the hearing and visually impaired, 42 U.S.C. § 12190 (1994); and Title V contains miscellaneous provisions, 42 U.S.C. §§ 12201-12213 (1994). This article will confine its discussion to the first prong of the ADA's disability definition.

whose mental or physical impairments are corrected or controlled by medication or devices such as hearing aids.[5]

Last term the Court had generated optimism among advocates for the disabled when, in *Bragdon v. Abbott,*[6] its first opportunity to interpret the ADA, it broadly construed "individual with a disability" to include persons infected with the human immunodeficiency virus ("HIV") but experiencing no serious symptoms of the infection. That optimism dissolved this term in a trilogy of cases arising under Title I of the ADA covering disability discrimination in employment[7]: *Sutton v. United Airlines,*[8] *Albertsons v. Kirkingburg,*[9] and *Murphy v. United Parcel Service.*[10] These cases reflect the basic holding, set out in *Sutton*, that "disability" is to be determined taking into account corrective measures [11] to ameliorate an impairment[12] Unlike *Bragdon*, these cases can affect a great number of employees in workplaces covered by Title I[13] by excluding those employees altogether from Title I's protections.

The Court's analysis in *Bragdon* acknowledged legislative history and followed Congress' statutory direction by deferring to agencies' interpretations of the ADA and its predecessor, the Rehabilitation Act of 1973 ("the Rehabilitation Act").[14] However, the Court refused to analyze this term's cases similarly. Instead, it interpreted the Act based on what it deemed a "plain language" reading of the ADA as a whole, central to which was just one of the Act's prefatory findings: A 1988 estimate of the number of people who are disabled.[15]

The irony of the Court's conclusion is that, although ADA plaintiffs must now prove a *prima facie* case of disability on the basis of their *corrected* impairments, the employers in each of the subject cases had denied the plaintiffs jobs on the basis of their *uncorrected* impairments. These plaintiffs might arguably have been

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5. Professor Chai Feldblum, in remarks heard by this author at the Plenary Session of the Annual Meeting of the Association of American Law Schools in Washington, D.C., on January 7, 2000, identified herself as one of the ADA's authors and told the group assembled that none of the Act's authors intended that disability determinations be made based on an individual's medicated state. *See AALS Centennial Annual Meeting Plenary Session--A Recommitment to Diversity,* AALS NEWSLETTER 15 (February 2000), for a listing of panel members. *See also* Susan J. McGolrick, *Supreme Court's Three ADA Decisions Disappoint Disability Rights Advocates,* 132 DAILY LABOR REPORT (BNA) C-1 (July 12, 1999).

6. 524 U.S. 624 (1998).

7. 42 U.S.C. §§ 12111-12117.

8. 527 U.S. 471 (1999).

9. 527 U.S. 555 (1999).

10. 527 U.S. 516 (1999).

11. The adjectives "ameliorative," "corrective, "controlling"" and "mitigating" will be used interchangeably to denote the effect on mental or physical impairments of medication, prostheses, devices such as hearing aids, and even the body's own compensation.

12. *Sutton,* 527 U.S. 471, 488 (1999).

13. Because the Court interpreted a definitional term of the ADA governing all its titles, the holdings are not limited to Title I. However, these cases all arose under Title I, and their holdings will have the greatest impact in the employment setting.

14. 29 U.S.C. §§ 701-795(I) (1994).

15. *Sutton,* 527 U.S. at 484-488 (1999).

excluded from Title I's coverage in any event as being unqualified for these jobs,[16] but the Court obviated that determination. As will be discussed below, a determination of whether an employee is entitled to the protections of Title I involves a two-step inquiry: first, whether that person is "an individual with a disability" and then whether that person is "a qualified individual with a disability"--i.e., whether the person is able to perform the essential functions of the job in question with or without a reasonable accommodation by the employer.[17] The Court, seemingly influenced by the cases' facts, conflated the analysis of the first step into that of the second. It is therefore unfortunate that these particular cases tested the issue of whether the Act protects those whose impairments are controlled; many individuals with mental or physical impairments would not be able to work at all but for the medications they take or devices they use to control their impairments. Yet these individuals may now lack protection under Title I from job actions taken against them because of their impairments.[18]

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16. In *Sutton*, the plaintiffs, because of their visual impairments (severe myopia), did not meet the employer's stated qualifications for the job of commercial airline pilot. *Sutton*, 527 U.S. at 476 (1999). In *Albertsons* and *Murphy*, the plaintiffs were not qualified because their impairments, monocular vision and high blood pressure, respectively, prevented them from holding commercial truck driver positions according to Department of Transportation regulations governing those positions. *Albertsons*, 527 U.S. at 560 (1999); *Murphy*, 527 U.S. at 520 (1999). The EEOC's regulations list compliance with conflicting federal laws or regulations as a possible defense to an ADA claim under Title I:

> It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation....

29 C.F.R. § 1630.15(e) (1999).

With regard to insulin-dependent diabetics, however, the Department of Transportation has been required by the Transportation Equity Act for the 21st Century, P.L. No. 105-178 (codified as amended in scattered sections of 16, 23, 40 and 49 U.S.C.) (6/10/98), to reevaluate its regulations that prohibit such persons from operating commercial vehicles that exceed a certain size or carry more than 16 passengers. Nancy Montwieler, *Arizona, North Carolina Agree to Hire Diabetic Drivers; DOT is Examining Ban*, 147 DAILY LAB. REP. (BNA) A-1 (7/31/98).

The federal government has also targeted state regulations disqualifying persons with certain health conditions. The Department of Justice settled ADA cases against Arizona and North Carolina, which agreed to rescind regulations prohibiting insulin-dependent diabetics from driving school buses and to implement new regulations that call for independent evaluations. *Id.*

In *Albertsons*, however, all nine justices seemed to endorse employers' reliance on federal regulations that disqualify individuals with certain mental or physical conditions from holding regulated jobs. *Albertsons*, 527 U.S. 555, 570 (1999).

17. *See* text accompanying notes 41-58, *infra*.

18. If one's impairment is held not to be substantially limiting under *Sutton*, such individual may still be protected under the "regarded as disabled" prong of the ADA's three-part definition of "disability," but the Court's analysis of the "regarded as disabled" prong of the definition in *Sutton and Murphy* provides little guidance. However, those cases do provide a lesson for plaintiffs in that the Suttons seemed to have committed a strategical error by claiming they were, or United regarded them as, substantially limited in the major life activity of *working* rather than *seeing*. *See Sutton*, 527 U.S. 471, 490 (1999). Likewise, Murphy alleged he was substantially limited, and alternatively, that UPS regarded him as substantially limited, in the major life activity of working. *Murphy*, 527 U.S. 516, 523 (1999). According to the EEOC's regulations, substantial limitation in working should be claimed only if one cannot claim substantial limitation in any other major life activity. With respect to working, the regulations define "substantially limited" as

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (1999). Without deciding the validity of this regulation, the Court relied on it to analyze the Suttons' claim that they were regarded as disabled in the major life activity of working. *Sutton*, 527 U.S. at 491-

In another ADA case decided this term, disabled plaintiffs fared somewhat better. In *Cleveland v. Policy Management Systems Corp.*,[19] the Court resolved disagreement among circuits to plaintiffs' advantage. It unanimously held that one who has applied for total disability benefits under the Social Security Act[20] ("SSA") is not "judicially estopped" from suing her employer under Title I of the ADA as a "qualified individual with a disability" whom the employer must reasonably accommodate.[21] However, the holding from *Sutton* may diminish the effect of *Cleveland's* rule, as the plaintiff must still prove she is an "individual with a disability" in her ADA claim.

After briefly discussing *Cleveland*, the remainder of this article will turn to the issue of taking ameliorative or corrective measures into account when determining whether an individual is disabled under the ADA. The language of the ADA, the EEOC regulations and guidance implementing it, and then the statute's legislative history will be examined. The reasoning of *Bragdon* will be contrasted to that of *Sutton, Albertsons* and *Murphy*, illustrating that the Court's "plain language" analysis of this term's cases fell short of the interpretive requirements mandated by the statute and by *Bragdon*. The discussion will then return to language of the ADA that actually does involve consideration of corrective measures and show that the Court's conclusion that such measures must be taken into account in determining disability is contrary to the statute's "plain language" regarding those corrective measures. Finally, the article will discuss the problems and ambiguities created by

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493 (1999). Because they did not allege they were denied employment in a broad range of piloting jobs, but rather that they were denied the specific job of global airline pilot, the Court held that they were not substantially limited with regard to the major life activity of working. *Id.* at 493. Had the Suttons claimed United regarded them as substantially limited in the major life activity of seeing, the above regulation would have not applied.

However, the Court erred in applying this regulation because it is inapplicable to the "regarded as" prong of the disability definition. Under that prong the focus is on the prejudicial attitudes of the employer, not the individual's impairment. It is intended to be used when the individual does not have an actual, substantially limiting impairment but is regarded as having one by an employer. The EEOC regulations, taken from the Department of Justice's regulations interpreting the Rehabilitation Act, define "is regarded as having such an impairment" as follows:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such impairment; or
>
> (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 none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(h). The Supreme Court acknowledged these definitions in *School Board of Nassau County v. Arline*, 480 U.S. 273, 279 n.4 (1987) (*citing* S. Rep. No. 93-1297, at 37-39, 63-64 (1974)). Because the focus of these definitions is on the employer's adverse reaction to the individual, whether the individual can perform other jobs is irrelevant. *See generally* Locke, *supra* note 3, at 115-146; Mayerson, *supra* note 1, at 598-609; Burgdorf, *"Substantially Limited" Protection*, *supra* note 3 ,at 454-469.

The Court's analysis of the "regarded as disabled" prong merits its own discussion. Therefore, as stated previously, this article is confined to the Court's treatment of the "actually disabled" prong of the disability definition. *See* text accompanying notes 41-58, *infra.*, for a discussion of the ADA's three-part definition of disability.

19. 526 U.S. 795 (1999).

20. 42 U.S.C. § 423(a)(1) (1994).

21. *Cleveland*, 526 U.S. at 795 (1999).

determining disability on the basis of corrected impairments and will conclude that legislative reversal is necessary.

II. RECONCILIATION OF THE DISABILITY PROVISIONS OF THE SSA AND THE ADA: *CLEVELAND V. POLICY MANAGEMENT SYSTEMS CORP.*

In *Cleveland*, the Court was asked whether an employee's receipt of Social Security Disability Insurance ("SSDI") benefits[22] creates a strong presumption against her claim that her termination from employment violated the ADA; under the ADA a plaintiff must show she was a "qualified individual with a disability" and therefore could have performed her job with reasonable accommodation from the employer.[23] Lower courts had been split on whether a claim of total disability under the SSA would preclude or create a strong presumption against a claim of being qualified for a job under the ADA.[24]

After suffering a stroke while working for Policy Management Systems ("PMS"), Ms. Cleveland filed an SSDI claim under the Social Security Act stating she was totally disabled.[25] Before her claim was resolved, she returned to work at PMS; consequently the claim was denied.[26] Three months later, PMS fired her.[27] She requested reconsideration of her SSDI denial, claiming PMS "terminated her because she 'could no longer do the job' in light of her 'condition.'"[28] Cleveland was eventually awarded SSDI benefits retroactive to the date of her stroke.[29] One week prior to the award, Cleveland sued PMS under the ADA, claiming that it "'terminated' her employment without reasonably 'accommodating her disability'" and that "she requested, but was denied, accommodations such as training and additional time to complete her work."[30] The district court granted summary judgment to PMS, ruling that Cleveland's SSDI claim created a presumption that she was totally

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22. *Id.* SSDI benefits are available under the Social Security Act, 42 U.S.C. § 301 *et seq.*, to a person who can demonstrate "'inability to engage in any substantial gainful activity by reason of any ... 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'" and that the impairment is "of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy...." *Cleveland*, 526 U.S. at 725 (1999) (*quoting* 42 U.S.C. § 423(d)(1)(A), (d)(2)(A)).

23. *Cleveland*, 526 U.S. at 795 (1999). Title I of the ADA, governing disability discrimination in employment, protects an employee or applicant who can show that he is a "qualified individual with a disability." 42 U.S.C. § 12112(a). Title I defines such an individual as "an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* at § 12111(8). *See* text accompanying notes 41-58, *infra*.

24. *Cleveland*, 526 U.S. at 800 (1999). For a criticism of the preclusion and estoppel cases, *see* Burgdorf, *"Substantially Limited" Protection*, *supra* note 3, at 489-506.

25. *See Cleveland*, 526 U.S. at 798 (1999).

26. *See id.*

27. *See id.*

28. *Id.*

29. *Id.*

30. *See id.*

disabled and therefore estopped her from proving her ADA claim.[31] The Fifth Circuit affirmed.[32]

Justice Breyer, writing for the unanimous Court, explained that the apparent contradiction between the two claims may not actually exist in a number of circumstances. He outlined the differences in the analyses required by the SSA and the ADA, as the former is designed to address massive numbers of claims, while the latter requires a precise determination of whether an applicant can perform "the essential functions" of a job.[33] For example, the SSA analysis can result in someone being considered disabled and therefore eligible for benefits if that person's impairment simply appears on a SSA list.[34] On the other hand, the ADA analysis breaks down the "essential functions of the job" question even further by determining whether such essential functions can be performed "'with reasonable accommodation'" from the employer.[35] Moreover, one can, under certain circumstances, receive SSA benefits to bridge the initial period of reentry into the workforce, so one may not even be disabled to receive benefits.[36] Finally, one's disability status may change over time so that the individual may actually be capable of performing the essential functions of a job at the time an employment decision is made regardless of having previously filed a SSA claim.[37]

The Court also cited the federal pleading rules, which allow inconsistent, alternative and hypothetical claims; therefore, it reasoned, coexistent claims for SSA and ADA benefits should not be dismissed merely because they seem inconsistent.[38] Rather, the plaintiff must proceed as any other plaintiff by making the required showing on the claim's essential elements.[39] The ADA plaintiff must show she can perform the essential functions of the job with or without reasonable accommodation. If she previously asserted she is totally disabled for SSA purposes, she must be prepared to "explain" why that assertion does not conflict with or prevent her from making her showing under the ADA:

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."[40]

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31. *Cleveland*, 526 U.S. at 798 (1999).
32. *See id.*
33. *Id.*
34. *See id.*
35. *Id.*
36. *See id.*
37. *Cleveland*, 526 U.S. at 798 (1999).
38. *See id.*
39. *See id.*
40. *See id.*

The above instruction, stated in terms of summary judgment burden, indicates that such an "explanation" would, in essence, become an additional element of a claim of disability discrimination when the plaintiff has previously requested SSA disability benefits.

As stated above, however, *Cleveland's* holding is subject to that of *Sutton, Albertsons* and *Murphy*; the plaintiff who previously filed a claim for SSDI benefits will be determined to be "a qualified individual with a disability" in her medicated state, which may obviate her claim under the ADA altogether.

III. LIMITATION OF THE ADA'S PROTECTION: *SUTTON V. UNITED AIRLINES, ALBERTSONS V. KIRKINGBURG,* AND *MURPHY V. UNITED PARCEL SERVICE*

A. *The Language of the ADA*

a. Findings and Purposes

Congress's statements of findings and purposes, which preface the various titles of the ADA,[41] sweep broadly to recognize, address, and rectify myriad obstacles encountered by individuals with disabilities, particularly in securing meaningful employment. As will be discussed below,[42] the *Sutton* Court focused on the first of the findings: "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older"[43] and indeed based its holding for the most part the first *clause* of that one finding. However, that finding must be read in conjunction with the others *and with the statute as a whole.*

With respect to employment, the prefatory findings focus on the many and "increasing" numbers of individuals with disabilities who are qualified to participate in the nation's workforce but are denied access to meaningful employment, the various and pervasive forms of discrimination practiced against such individuals seeking entry into the workforce or to meaningful jobs, and the compelling national policy goals of ensuring those individuals access to the workforce.[44]

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41. *See* note 4, *supra*, for a listing of the titles.
42. *See* text accompanying notes, 48-58, *infra.*
43. 42 U.S.C. § 12101 (1994).
44. Congress' findings with regard to employment are as follows:
(2) historically, society has tended to isolate and segregate individuals with disabilities, and ... such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
(3) discrimination against individuals with disabilities persists in such critical areas as employment...
(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser ... jobs, or other opportunities;
(6) people with disabilities, as a group occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

All of these findings must be read in conjunction with Congress' statements of purpose for the ADA:

> It is the purpose of this chapter–
>
> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards for the elimination of discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, ... in order to address the major areas of discrimination faced day-to-day by people with disabilities.[45]

These findings and purpose statements mandate a broad construction of the ADA as well as a strong role for the various agencies interpreting and enforcing it.[46]

Moreover, as explained in the next section, Congress very broadly defined "disability" in the Act as describing many more persons than those who actually have disabilities--and it borrowed that expansive definition from preexisting legislation. Use of Congress' prefatory estimate of the number of disabled persons to limit the ADA's meaning of "disability" thus makes little sense in light of that Act's broad definitional section.[47]

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(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals;

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Id.

45. *Id.* at § 12101(b). The "sweep of congressional authority" faces challenge from state governments. The Supreme Court has granted certiorari on the issue of whether Congress lacked authority to abrogate states' 11th Amendment immunity under the ADA in Garrett v. University of Alabama at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), *cert granted* 120 S. Ct. 1669 (2000). The Court recently held in Kimel v. State Bd. Of Regents, 528 U.S. 62 (2000), that Congress lacked such authority under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.*

46. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 137, n.190 (1999).

47. *See Sutton*, 119 S.Ct. at 2152 (1999) (Stevens, J., dissenting):

> It is equally undeniable, however, that "43 million" is not a fixed cap on the Act's protected class: By including the "record of" and "regarded as" categories, Congress fully expected the Act to protect individuals who lack, in the Court's words, "actual" disabilities, and therefore are not counted in that number. *Id.*

b. Statutory Definitions of "Disability"

The ADA's definitions of "disability" were drafted verbatim from those contained in the 1974 amendments to the Rehabilitation Act of 1973,[48] which prohibits federal agencies, the United States Postal Service, and entities receiving federal grants from discriminating against individuals with disabilities.[49] Indeed, Congress states in the text of the ADA that it is not to be construed "to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title."[50]

The ADA says nothing about corrective measures in its "Definitions" section covering all titles.[51] Section 12102(2) of the Definitions section broadly defines "disability" in three distinct ways so as to cover individuals who have a disability, who have had a disability in the past, and who are regarded by others as having a disability, even though they do not:

> ... 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 [hereinafter referred to as the "actually disabled prong"];
>
> (B) a record of such an impairment [hereinafter referred to as the "no longer disabled prong"]; or
>
> (C) being regarded as having such an impairment [hereinafter referred to as the "regarded as disabled prong"].[52]

"Disability" is also a fundamental term in Title I, which proscribes discrimination in the workplace as follows:

> 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.[53]

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48. 29 U.S.C. §§ 701 *et seq.* *See also* Bragdon v. Abbott, 524 U.S. 624 (1998). The portion of the Rehabilitation Act containing the definition of "disability" appears at § 706(8)(B). That section originally used the word "handicap." For a comprehensive history and discussion of interpretations of the Rehabilitation Act, *see* Burgdorf, "Substantially Limited" Protection, *supra* note 3, at 415-449. The same author discusses history and analysis of the ADA in Robert L. Burgdorf, Jr., *Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991) [hereafter referred to as "Analysis and Implications"].

49. 29 U.S.C. § 794(a) (1994).

50. 42 U.S.C. § 12201(a) (1994).

51. *Id.* § 12102.

52. *Id.* §12102(2). Although use of corrective measures may have a bearing on the "record of impairment" or "regarded as impaired" prongs of the definition of "disability," this discussion will focus on its role in defining the first prong--"actually disabled"--for it is in this definition that the fundamental questions regarding disability determinations arise.

53. *Id.* § 12112(a).

Prohibited discrimination in employment takes a number of forms, including taking adverse employment actions against a qualified employee or applicant with a disability because of that person's disability, failing to reasonably accommodate a qualified employee or applicant with a disability, and using employment practices or policies that have an adverse effect on qualified individuals with a disability.[54] The definitions of "disability" from the Definitions section are embedded within Title I's definition of "qualified individual with a disability," i.e., one who is protected from workplace discrimination. A "qualified individual with a disability," defined in Section 12111(8) of Title I, is

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.[55]

Thus a determination of whether a person is entitled to the protections of Title I mandates a two-part inquiry: first, whether the person is an "individual with a 'disability'" and, second, whether the person is a "qualified individual with a disability."[56] The ADA does not define key terms within its definition of "disability." Rather, the terms "physical or mental impairment," "substantially limits," and "major life activities" are defined in the *Regulations to Implement the*

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54. Title I defines "discriminate" as follows:
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee;
(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter....;
(3) utilizing standards, criteria or methods of administration--
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to common administrative control;
(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
(5)(A) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business or such covered entity; or
(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
(6) using 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 unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
(f) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).
Id. § 12112(b).

55. 42 U.S.C. § 12111(8) (1994).

56. *Id.* § 12112(a).

Equal Employment Provisions of the Americans with Disabilities Act[57] ("the regulations"), promulgated by the EEOC in accordance with the notice and comment requirements of the Administrative Procedure Act ("the APA").[58] The EEOC was explicitly ordered by Congress in the text of the ADA to "issue regulations in an accessible format to carry out [Title I] in accordance with [Title 5 of the APA]" within one year from the date of the ADA's enactment.[59]

B. Regulations Defining "Individual with a Disability" under the ADA

The EEOC's regulations, taken verbatim from those of the two agencies responsible for implementing and enforcing § 504 of the Rehabilitation Act,[60] break down the ADA's definition of "disability" as follows: First, a "mental or physical impairment" is defined 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-uninary, 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.[61]

Second, "major life activities" are defined in the regulations as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[62] The regulations further state that these listings are not exhaustive.[63] Third, the regulations provide that an impairment "substantially limits" an individual in a major life activity if he or she is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the

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57. 29 C.F.R. § 1630 (1999).
58. 5 U.S.C. § 553 (1994).
59. 42 U.S.C. § 12116 (1994).
60. Initially, the Department of Health and Human Services (HHS) held this role. Its regulations appear at 45 C.F.R. § 84.3(j)(2) (1999). In 1980 the role was transferred to the Attorney General. Exec. Order. No. 12250, 3 C.F.R. § 298 (1981). The Justice Department regulations, still in effect, adopted the HHS regulations verbatim. They appear at 28 C.F.R. § 41.31(1) (1998). *See generally* Bragdon v. Abbott, 524 U.S. 624 (1998).
61. 29 C.F.R. § 1630.2(h) (app. 1998).
62. *Id.* § 1630.2(i).
63. *Bragdon*, 524 U.S. at 625 (1998). The Court held in *Bragdon* that reproduction is a "major life activity" within the meaning of the ADA. *Id.* at 639. *Bragdon* is discussed in the text accompanying notes 108-131, *infra*.

> average person in the general population can perform that same major life activity.[64]

In determining whether a physical or mental impairment "substantially limits a major life activity," the regulations further state that the following factors should be considered: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[65]

Thus, a determination of the threshold question of whether an individual is disabled under the "actually disabled" prong of the ADA's definition proceeds in three steps: first, whether the individual has a *physical or mental impairment*; second, whether the impairment affects some identified *major life activity*; and third, whether the impairment *substantially limits* that major life activity.[66] Again, the question of whether ameliorative or corrective measures should be taken into account in determining whether an individual has a disability is not addressed in the regulations. However, the EEOC appended to the regulations an *Interpretative Guidance on Title I of the Americans with Disabilities Act*[67] ("the guidance"), which was part of the regulations when they were submitted for notice and comment.[68] The purpose of the guidance was to illustrate "the Commission's interpretation of the issues discussed" and "to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities."[69] As stated above, the EEOC's guidance interprets the ADA as requiring that ameliorative or corrective measures not be taken into account in determining whether an individual is disabled.

The portions of the guidance regarding the effect of ameliorative or corrective measures address both the "impairment" step of the disability determination and the "substantially limits" step. With regard to determining whether an individual has a physical or mental impairment, the guidance states that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[70] Likewise, with regard to determining whether an impairment substantially limits a major life activity, the guidance states that "[t]he determination of 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."[71] The

64. 29 C.F.R. § 1630.2(j) (app. 1998).
65. *Id.* § 1630.2(j)(2).
66. *See Bragdon*, 524 U.S. at 650 (1998).
67. 29 C.F.R. § 1630 (app. 1998).
68. 56 Fed. Reg. 35,726 (1991); *see also* Colker, *supra*, note 46, at 134.
69. Introduction to 29 C.F.R. § 1630 (app.).
70. *Id.* § 1630.2(h) (app. 1998).
71. *Id.* § 1630.2(j) (app.).

guidance's language is quoted directly from House and Senate reports on the ADA.[72] A commentator illustrates the EEOC's rule on mitigating measures as follows:

> Under the mitigating measures rule, one would ask whether an insulin-dependent diabetic is an individual with a disability without reference to the mitigating effects of medication on that individual's day-to-day life. Thus, a diabetic who would fall into a coma if he or she failed to take insulin would be an individual with a disability irrespective of whether a combination of medication, diet, and exercise might alleviate virtually all diabetic symptoms.[73]

The EEOC has consistently maintained this interpretation of "disability." In 1997, it issued the *EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act*,[74] to "set[] forth the Commission's position on the application of Title I of the [ADA] to individuals with psychiatric disabilities." That guidance, although not issued by way of notice and comment procedures as was the guidance that accompanied the EEOC's regulations, reiterates the same position on ameliorative measures in a question-and-answer format[75]. The guidance says the following:

> 6. Should the Corrective Effects of Medications Be Considered in Deciding if an Impairment is So Severe That It Substantially Limits a Major Life Activity?
>
> No. The ADA legislative history unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without regard to mitigating measures, including medications. Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity. Relevant evidence for EEOC investigators includes, for example, a description of how an individual's condition changed when s/he went off medication or needed to have dosages adjusted, or a description of his/her condition before starting medication.[76]

The EEOC provides the following example of a substantially limiting mental impairment that is controlled by medication as an example of a covered disability under the ADA:

> Example B: An employee has taken medication for bipolar disorder for a few months. For some time before starting the medication, he experienced increasingly severe and frequent cycles of depression and mania; at times, he became extremely withdrawn socially or had difficulty caring for himself. *His symptoms*

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72. *See* text accompanying notes102-07, *infra*.
73. Colker, *supra*, note 46 at 153, n.284.
74. *EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act*, 59 DAILY LAB. REP. E-1 (1977).
75. *Id.*
76. *Id.* at 6 (footnotes omitted).

> *have abated with medication*, but his doctor says that the duration and course of his bipolar disorder is indefinite, although it is potentially long-term. *This employee's impairment (bipolar disorder) significantly restricts his major life activities of interacting with others and caring for himself, when considered without medication.* The effects of his impairment are severe, and their duration is indefinite and potentially long-term.[77]

The EEOC's position regarding ameliorative measures is again reflected in the portion of the guidance explaining the duty of an employer under Title I to make a reasonable accommodation to a qualified individual with a disability.[78] The guidance points out that an employer is not required by the ADA to provide corrective measures an employee may need to carry out daily activities on and off the job such as "a prosthetic limb, wheelchair, or eyeglasses."[79] That portion of the guidance indicates that such measures or devices are in the nature of accommodations and thus to be considered with respect to the question of whether one is "a qualified individual with a disability," which implicates the employer's duty to reasonably accommodate, rather than the determination of whether one is "an individual with a disability."

Other administrative bodies have interpreted the ADA to require that ameliorative measures not be taken into account in determining disability. The United States Department of Justice ("DOJ") has been charged by Congress to interpret, promulgate regulations and enforce Subtitle A of Title II, which prohibits discrimination on the basis of disability by state and local governments,[80] and Title III, which probibits discrimination in public accommodations.[81] The Department of Transportation (DOT) was charged with the implementation of regulations and enforcement of the transportation provisions of those titles. The appendix to the DOJ's regulations states that "disability should be assessed without regard to the

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77. *Id.* at 7 (emphasis added). The implications of taking the effects of ameliorative measures into account when determining disability are particularly ominous when considering mental impairments. Many devastating mental impairments, such as bipolar disorder in the above example, are effectively controlled by medications; however, but for the medication, persons with some kinds of mental impairments would usually not be able to work at all. Nevertheless, the status of such mental conditions as disabling impairments remains despite the effect of the medications.

78. 42 U.S.C. § 12112(b)(5)(A) (1994). Recall that Title I defines a "qualified individual with a disability" as "one who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). This definition creates a duty on the part of the employer to "reasonably accommodate" the known disability of the individual unless the employer can show that accommodation would impose an undue hardship on the operation of the employer's business. This duty is codified at *id.* § 12112(b)(5)(A).

79. 29 C.F.R. § 1630.9 (app. 1998) (emphasis added). This regulation derives from a statement in the Report of the Committee on Education and Labor: "The Committee wishes to make it clear that personal use items, such as hearing aids or eyeglasses, are not included in this provision, and therefore are not required to be provided by employers as reasonable accommodations. H.R. REP. NO. 101-485, pt. 2 at 64 (1990).

80. 42 U.S.C. §§ 12131-12134 (1994).

81. *Id.* §§ 12181-12189.

availability of mitigating measures."[82] Likewise, the DOT makes the same statement in its regulations.[83]

As stated previously, Congress explicitly empowered and ordered the EEOC to issue regulations "to carry out" the provisions of Title I.[84] These regulations were to be issued within a year of the date of passage of Title I[85] to give employers another year to learn their obligations under that title before it came into effect. The regulations and the appended guidance were promulgated in accordance with the notice and comment procedures of the Administrative Procedures Act,[86] and House and Senate reports explicitly indicated that the regulations would have "the force and effect of law."[87] Indeed, the ADA provides a cause of action for violations of Title I regulations themselves.[88] Congress thus delegated to the EEOC the power to make both legislative and interpretive rules under the ADA.[89]

Despite Congress' express delegation of such authority to the EEOC, the Court found in *Sutton* that *no agency* had been delegated to interpret the ADA's general "Definitions" section because that section precedes the various titles.[90] In light of Congress' emphasis in its findings on problems of the disabled with respect to employment, its clear delegation of legislative and interpretive rule-making ability, and the key role the term "disability" plays throughout the statute, such a finding makes little sense when reading the statute as a whole.

When a delegation like that appearing in the ADA is made to an administrative agency, the Supreme Court has stated that courts must defer to the agency's interpretation of the statute as long as its interpretation is not "arbitrary, capricious, or manifestly contrary to the statute."[91] In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[92] the Court reiterated the principle that an administrative agency's duty to administer programs created by Congress "'necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'"[93] It acknowledged that the making of policy choices in the interpretation of statutes is properly left to the agency, as the representative of the executive, rather than to the judiciary, because the executive is politically accountable.[94] The Court concluded:

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82. 28 C.F.R. § 35.104, app. A.
83. 49 CFR § 37.3 (1998).
84. 42 U.S.C. § 12116 (1994).
85. *Id.*
86. *Id.*
87. S. REP. NO. 116, 101ST CONG., 1ST SESS. 43 (1989); *see also* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation,* 1995 UTAH L. REV. 51, 69.
88. 42 U.S.C. § 12117(a).
89. White, *supra* note 87, at 89.
90. *Sutton*, 527 U.S. 471, 479 (1999).
91. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).
92. *Id.* at 837.
93. *Id.* at 843 (*quoting* Morton v. Ruiz, 415 U.S. 199, 231 (1974)).
94. *Id.* at 865-66. The Court's recognition of the political nature of statutory interpretation is unmistakable: Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges--who have no constitutency--have a duty to respect legitimate policy choices made by those who do.[95]

The analysis of whether a court must defer to an agency's interpretation of a statute under *Chevron* proceeds in three steps: First the court must determine whether Congress addressed the statutory question itself. If not, "the court must then determine whether Congress delegated interpretive authority to the agency."[96] This delegation may be either explicit or implicit.[97] Finally, if there has been such a delegation, "the court then determines whether the agency's construction is permissible and therefore binding on the court."[98]

Last term in *Bragdon*, the Court deferred to the EEOC guidance, citing *Chevron*,[99] but this term in *Sutton* it deemed such deference irrelevant, as it found that Congress had addressed the issue of corrective measures in the language of the ADA and that the EEOC guidance was contrary to the statute's language.[100] Moreover, the *Sutton* Court deemed examination of the ADA's legislative history--although directly contrary to the Court's holding--irrelevant for the same reason.[101] It will thus be useful to examine the legislative history of the ADA with regard to corrective measures before discussing the Court's decisions.

C. Legislative History: What Congress Said About the Meaning of "Individual with a Disability"

The committee reports and floor debates on the ADA undisputedly reveal Congress' intent that disability be determined without regard to corrective, or mitigating, measures. Three committee reports flatly state that mitigating measures are not to be taken into account when determining whether a person is disabled.[102]

> responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices--resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. For a complete analysis of *Chevron*'s reasoning that statutory interpretation is better entrusted to "the politically accountable agency," as well as commentators' reactions to *Chevron*, *see* White, *supra* note 87, at 76-79.

95. 467 U.S. at 866.

96. White, *supra* note 87, at 79.

97. *Id.*

98. *Id.*

99. *Bragdon*, 524 U.S. 624, 626 (1998). For a discussion of how the Court applied *Chevron* in *Bragdon*, *see* Colker, *supra* note 46, at 151-152.

100. *Sutton*, 527 U.S. 471, 480 (1999).

101. *Id.* at 482.

102. *See* S. REP. No. 101-116, at 23 (1989); H.R. REP. No. 101-485, pt. II at 52 (1990); H.R. REP. No. 101-485, pt. III at 28 (1990).

These reports are cited as authority in the EEOC guidance section on how to determine whether an individual is impaired.[103] But the reports' statements regarding mitigating measures are not limited simply to the "impairment" step of disability determination. Two of the three reports speak in terms of determining the ultimate question of *disability* when discussing consideration of mitigating measures. The Senate Report, in its overall discussion of the "actually disabled prong" of the ADA disability definition, states: "Moreover, whether a person has a *disability* should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[104] The House Labor Report makes the same statement and provides examples:

> Whether a person has a *disability* should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. 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 disability, *even if the effects of the impairment are controlled by medication.*[105]

The House Judiciary Report reiterates that point under the heading "Substantial limitation of a major life activity." The report states, "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."[106]

In an exchange on the floor about coverage of mental illness, Senator Harkin, one of the authors of the Senate Bill, cited the following examples of disabilities controlled by medication that would be covered by the ADA:

> ... in cases where a person has a disability, let us say schizophrenia, the employer has obviously every right to determine what that disability is and whether or not it would affect the performance of that person's job. If it did, then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive or whatever it might be is, let us say, *controlled by drugs, and the person is under a doctor's care, and the person is qualified for the job,* then the employer can say, "Well, I am not going to hire you based on your disability," but the employee then would be able to go to the EEOC and file a complaint and show, A. that that employee is qualified; B. that the *disability* in question does not inhibit his or her performance on that job.[107]

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103. 29 C.F.R. § 1630.2(h) (app. 1998).
104. S. REP. No. 101-116, at 23 (1989) (emphasis added).
105. H.R. REP. No. 101-485, pt. II at 52 (1990) (emphasis added).
106. H.R. REP. No. 101-485, pt. III at 28 (1990).
107. 101 CONG. REC. S19864 (1989) (statement of Sen. Harkin) (emphasis added).

The foregoing statutory language, regulations and legislative history pertaining to the definition of "disability" in the ADA resulted in two divergent opinions regarding the meaning of that term.

D. *The Court's Divergent Analyses of "Disability"*

a. *Bragdon v. Abbott*

As stated previously, *Bragdon* provided the Court with its first opportunity to interpret the meaning of "individual with a disabilty" under the ADA. The case posed the question of whether someone who has the Human Immunodeficiency Virus ("HIV"), but is asymptomatic, is "an individual with a disability."[108] Dr. Bragdon refused Ms. Abbott dental services in his office after she revealed she was HIV-positive but at that time suffered no serious symptoms of the infection.[109] Bragdon offered to fill her tooth in a hospital in accordance with his infectious disease policy,[110] but Abbott declined and sued him under Title III of the ADA, which prohibits disability-based discrimination by private entities that operate public accommodations.[111]

With regard to the issue of disability, the questions presented by both parties focused on the issue of whether someone who is infected with HIV but asymptomatic is "per se disabled."[112] They did not ask the broader questions of whether someone is disabled if that person has some other medical condition but is asymptomatic, or if the person does not exhibit symptoms because the condition is controlled by medicine.[113]

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108. *Bragdon*, 524 U.S. at 624 (1998).

109. *See id.*

110. *See id.*

111. 42 U.S.C. § 12182 (1994). As explained at the outset of this article, the same definition of "disability" applies to all titles of the ADA. *Id.* § 12102.

112. *See, e.g.*, Brief for Petitioner at ii, Bragdon v. Abbott, 524 U.S. 624 (1998)(No. 97-156)[hereinafter Brief for Petitioner] The Court did not answer this question, as it found that Abbott's HIV infection limited her major life activity of reproduction:

> Testimony from the respondent that her HIV infection controlled her decision not to have a child is unchallenged.... Respondent's HIV infection is a physical impairment which substantially limits a major life activity, as the ADA defines it. In view of our holding, we need not address the second question presented, i.e., whether HIV infection is a per se disability under the ADA.

Bragdon, 524 U.S. at 641 (1998).

However, as will be discussed, the Court cited with approval judicial and agency authority, as well as congressional reports, that considered asymptomatic HIV infection to be a disability without considering its effect on the individual.

113. The briefs-in-chief contained only one allusion to the issue of whether a person is disabled if his or her condition is controlled by medication. Dr. Bragdon's brief cited in a footnote to a discussion of legislative history some district court opinions concluding that statements in the Congressional Committee reports about not taking ameliorative measures into account in determining disability are inconsistent with the plain language of the ADA. Brief for Petitioner at 39, n. 31.

Significantly, however, several congressmen who "were primary authors and sponsors of" the ADA filed an *amicus* brief on behalf of Abbott.[114] This brief addressed the more general questions of whether conditions that are asymptomatic or are controlled by medication can nevertheless constitute disabilities. These "authors and sponsors" of the ADA emphatically answer these questions in the positive:

> Petitioner's argument that, in passing the ADA, Congress intended to condone discrimination against an individual with asymptomatic HIV infection based on unfounded fear of contagion, threatens the very core of the ADA. *With the advance of technology, many individuals with a variety of disabilities from epilepsy to schizophrenia are or will become asymptomatic.* [Footnote:] *It is for this reason that the Committee Reports and authoritative agency regulations require limitations to be assessed without regard to mitigating measures.* [End footnote.] To argue that Congress intended to strip them of anti-discrimination protection for this reason is not only illogical, but also totally ignores *Congress' recognition that disability status alone often invokes discrimination.*[115]

Another of the original authors of the ADA stated the following in response to the issues presented in *Bragdon* before that case was decided: "It would be the height of irony if the medicines that enabled people to do their jobs and engage in society were then used to deny such individuals anti-discrimination coverage because they were not disabled."[116] Unfortunately, that irony surfaced in the Court's second attempt to interpret the term "disability."

The *Bragdon* Court briefly mentioned the broader question of whether to consider ameliorative measures in determining disability but declined to decide it.[117] In holding that an individual with asymptomatic HIV infection is disabled under the ADA, Justice Kennedy, writing for a majority of five,[118] adhered to the Act's plain-language mandate "to apply [no] lesser standard than the standards applied under

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114. Brief of Senators Harkin, Keffords, and Kennedy and of Representatives Hoyer, Owens and Waxman as Amici Curiae in Support of Respondents [sic] at 1.

115. *Id.* at 5-6 and n.4. (Emphasis added.)

116. Statement of Professor Chai Feldblum quoted in Ellen Goodman, *AIDS and ADA*, THE BOSTON GLOBE, April 5, 1998, at D7.

117. *Bragdon*, 524 U.S. at 624 (1998). The Court noted that in argument over whether HIV infection alone substantially limits an individual, Dr. Bragdon asserted that the risk of transmitting the virus from mother to infant could be reduced with antiretroviral therapy from twenty-five to eight percent. It then noted that the Solicitor General, in an *amicus* brief on behalf of Ms. Abbott, "questions the relevance of the 8% figure, pointing to regulatory language requiring the substantiality of a limitation to be assessed without regard to mitigating measures." *Id.* But the Court sidestepped the issue of whether to take ameliorative measures into account in determining substantial limitation, stating, "We need not resolve this dispute in order to decide this case, however. It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction." *Id.*

118. The others joining the opinion were Justices Stevens, Souter, Ginsburg and Breyer. Chief Justice Rehnquist and Justices Scalia, Thomas and O'Connor dissented from the holding that HIV infection substantially limits the major life activity of reproduction, stating that Abbott had not shown "that any of her major life activities were substantially limited by her HIV infection," criticizing the majority for not making an individualized determination as to Abbott herself. *Id.* at 657 (Rehnquist, C.J., dissenting). Justice O'Connor wrote a separate dissent, stating that reproduction is not a major life activity. *Id.* at 665 (O'Connor, J., dissenting).

title V of the Rehabilitation Act ... or the regulations issued by Federal agencies pursuant to such title."[119] The Court first noted that the ADA's definitions of "individual with a disability" are derived "almost verbatim" from those of "handicapped individual" in the 1974 amendments to the Rehabilitation Act and that of "handicap" in the Fair Housing Amendments Act of 1988.[120] It therefore examined those statutes' regulations with regard to the key terms "mental or physical impairment," "major life activities," and "substantially limits." First it examined the regulations defining "physical or mental impairment."[121] Even though HIV infection had not been identified at the time the Department of Justice (DOJ) issued regulations interpreting the Rehabilitation Act, the Court cited medical evidence detailing the course of the infection and found that it "fall[s] well within the general definition [of physical impairment] set forth by the regulations."[122]

The Court next considered the parties' focus on reproduction as a "major life activity." Again looking to the Rehabilitation Act regulations, it rejected Bragdon's argument that "major life activity" in the ADA's definition of "disability" is restricted to activities having a "public, economic, or daily character."[123] That argument, the Court stated, is inconsistent with the regulations' "representative list"[124] of "major life activities": "The [regulations'] inclusion of activities such as caring for one's self and performing manual tasks belies the suggestion that a task must have a public or economic character."[125] The Court further found that reproduction is "no less important than" the included activities of working and learning.[126]

With regard to the third step of the disability determination, whether the physical or mental impairment "substantially limits" one or more major life activity, the Court observed that the Rehabilitation Act regulations did not address this issue. Therefore, it looked at medical evidence regarding the effects of HIV infection on reproduction and then applied a customary method of statutory interpretation by

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119. 42 U.S.C. § 12201.

> In construing the statute, we are informed by interpretations of parallel definitions in previous statutes and the views of various administrative agencies which have faced this interpretive question.... Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.... In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing [it]....

Bragdon, 524 U.S. at 631, 632 (1998).

120. *Id.* at 624 (*citing* 29 U.S.C. § 706(8)(B) (1988) and 42 U.S.C. § 3602(h)(1) (1988)).

121. *Id.* at 632. Those regulations, along with commentary, were first promulgated by the Department of Health, Education and Welfare ("HEW"), the agency initially responsible for interpreting the Rehabilitation Act; later the regulations were adopted verbatim, with the commentary incorporated into their text, in 1980 by the Department of Justice ("DOJ"), which now administers that Act and has adhered to the same regulations to date. *Id.* at 633. As stated previously, the ADA definitions of "disability" are derived verbatim from the Rehabilitation Act regulations. *See* text accompanying notes 48-49, *supra*. Likewise, the ADA regulations defining terms within the definitions are derived from the same regulations. The ADA regulations defining "physical or mental impairment" are set out in the text accompanying note 61, *supra*.

122. *Id.*

123. *Id.* at 638.

124. The ADA regulations presenting examples of "major life activities," which are the same as the Rehabilitation Act regulations, are set out in the text accompanying notes 62-63, *supra*.

125. *Bragdon*, 524 U.S. at 639 (1998).

126. *Id.*

examining the following sources: agency interpretation of the Rehabilitation Act and the Fair Housing Amendments, including administrative guidance and commentary, lower courts' interpretation of the Rehabilitation Act, agency guidance interpreting the ADA, including that set out in the EEOC's Interpretive Manual, and legislative history.[127] Finding virtual unanimity among all these sources, the Court held that asymptomatic HIV infection "is an impairment that substantially limits the major life activity of reproduction."[128]

A commentator has observed that *Bragdon*'s analysis "makes clear that lower courts should accord substantial deference to agency views under the ADA."[129] Applying *Bragdon*'s analysis to the EEOC's guidance on mitigating measures, she explains, "should involve a two-step process. First, one should inquire about the status of that rule under prior section 504 regulations and case law. Second, one should inquire about the status of that rule under current ADA regulations."[130] In *Sutton*, however, the Court virtually ignored *Bragdon*, citing it only as support for its rule that disability determinations must be made on an individual basis.[131]

b. *Sutton v. United Airlines, Murphy v. United Parcel Service,* and *Albertsons v. Kirkingbird*

In each of the three disability cases this term, the plaintiffs had been denied jobs because of their uncorrected impairments. *Sutton* involved twin sisters who, despite being severely myopic, were certified pilots. Both had uncorrected vision of "20/200 or worse in her right eye and 20/400 or worse in her left eye,"[132] but both wore lenses that corrected their vision to "20/20 or better."[133] They applied for commercial pilot positions with United Airlines. Both met United's qualifications with respect to age, education and experience, and both were certified by the Federal Aviation Administration.[134] However, United further required that its pilots have uncorrected vision no worse than 20/100.[135] Because they did not meet the uncorrected vision requirement, United did not offer them the positions.[136]

In *Murphy* and *Albertsons*, both plaintiffs were denied mechanic and driver positions, respectively, because their uncorrected impairments did not qualify them for federal Department of Transportation (DOT) certification. Murphy had suffered from hypertension since childhood. His unmedicated blood pressure was 250/160, but with his medication, his doctor testified, his "'hypertension does not significantly restrict his activities ... and in general he can function normally and can

127. *Id* at 631
128. *Id.* at 641-42.
129. Colker, *supra* note 46, at 150.
130. *Id.* at 154.
131. *Sutton*, 527 U.S. 471, 483 (1999)..
132. *Id.* at 475.
133. *Id.*
134. *See id.* at 475-476.
135. *See id.* at 476.
136. *Id.* at 476.

engage in activities that other persons normally do.'"[137] United Parcel Service (UPS) hired Murphy as a mechanic. DOT certification was a qualification for that job, but in order to be certified, one could not have a "current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely.'"[138] Murphy had been mistakenly issued DOT certification, even though at the time he was hired by UPS his blood pressure of 186/24 exceeded DOT requirements.[139] UPS later discovered the error, retested him and found his blood pressure to be 160/102.[140] As a result, it fired him because it believed his blood pressure exceeded DOT requirements.[141] Plaintiff Kirkingburg, initially hired by Albertsons as a truck driver, suffered a similar fate. He had many years of experience and performed well on the company's driving test, despite having monocular vision.[142] The DOT requires interstate truck drivers to possess "corrected distant visual acuity of at least 20/40 in each eye and distant binocular acuity of at least 20/40."[143] Although Kirkingburg's vision did not meet these requirements, Albertsons' physician mistakenly certified him.[144] More than two years later, when he returned from a leave of absence, the company physician told him his vision did not meet DOT requirements. Albertsons then fired him. Kirkingburg subsequently received a waiver from the DOT of its vision requirements,[145] but Albertson's would not rehire him.[146]

Justice O'Connor, *Sutton*'s author, was one of the dissenters in *Bragdon* who criticized the majority *inter alia* for failing to individualize the effect of HIV infection on Abbott's reproductive capability.[147] She used this criticism as a basis for her holding in *Sutton* that the EEOC's guidance regarding mitigating measures is contrary to the plain language of the ADA[148] and that mitigating measures must

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137. Murphy v. United Parcel Service, 527 U.S. 516, 527 (1999) (*quoting* Murphy v. United Parcel Service, Inc., 946 F. Supp. 872, 875 (D. Kan. 1996)).

138. *Id.* (*quoting* 49 C.F.R. § 391.41(b)(6) (1998)).

139. *See id.*

140. *See id.*

141. *See id.*

142. Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 558 (1999). The medical term for Kirkingburg's vision impairment is "amblyopia," causing him to have 20/200 vision in one eye. *Id.* at 559.

143. *Id.* at 558-559 (*quoting* 49 C.F.R. § 391.41(b)(10) (1998)). The Court explains the term "visual acuity" at *id.* at 559, n.2.

144. *Id.* at 559.

145. The DOT had begun a waiver program four months prior to Kirkingburg's firing in which applicants whose vision did not meet DOT requirements could nevertheless receive certification if they

> had three years of recent experience driving a commercial vehicle without a license suspension or revocation, involvement in a reportable accident in which the applicant was cited for a moving violation, conviction for certain driving-related offenses, citation for certain serious traffic violations, or more than two convictions for any other moving violations. A waiver applicant had to agree to have his vision checked annually for deterioration, and to report certain information about his driving experience to the Federal Highway Administration....

Id. at 560 (*citing* 57 Fed. Reg. 31458, 31460-61 (1992)).

146. *Id.*

147. *Bragdon*, 524 U.S. 624, 664-65 (1998) (O'Connor, J., concurring in part, dissenting in part). O'Connor also joined the other dissenters in faulting the majority for finding that reproduction is a major life activity. *Id.*

148. *Sutton* overruled seven of the nine circuits that had deferred to the EEOC's guidance in holding that ameliorative measures should not be taken into account in determining whether one is "an individual with a disability." The EEOC's guidance was followed in the First, Third, Fifth, Seventh, Eighth, Ninth and Eleventh

be considered when determining disability.[149] O'Connor based this conclusion on three provisions of the Act "read in concert"[150] and on "[l]ooking at the Act as a whole"[151]: the "present indicative verb form" of the ADA's overall definition of "disability"[152]; the same definition's use of the phrase "of such individual"[153]; and the language in the preface of the ADA stating Congress' finding that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[154] A closer examination of these provisions indicates, however, that the language of the ADA is not as plain as the Court reads it.

Recall that the "actually disabled" prong of the three-part definition of "disability" in § 12102(2)(A) of the ADA states: "The term 'disability' means, with

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Circuits, which considered a number of different impairments and mitigating measures. Diabetes mellitus controlled by insulin was held to be a disability in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859-866 (1st Cir. 1998); the same condition was assumed a disability in *Daugherty v. City of El Paso*, 56 F.3d 695, 696 (5th Cir. 1995) (citing the guidance). On a certified question of whether the guidance should be accepted, the Fifth Circuit held that Adult Stills Disease (a form of rheumatoid arthritis) controlled by medicine must be assessed in its nonmedicated state. *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-471 (5th Cir. 1998). Epilepsy controlled by medication was held to create a question of fact as to disability in *Matczak v. Frankford Candy and Chocolate Co.*, 133 F.3d 933, 937-938 (3d Cir. 1997) (accepting the guidance). Strabismus (crossed eyes) improved by a contact lens was held not to be a disability under the guidance in *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1448 (7th Cir. 1995); *see also Baert v. Euclid Beverage, Ltd.*, 149 F.3d 933, 937-938 (7th Cir. 1998). Monocular vision was held to be a disability by the Eighth Circuit, *Doane v. City of Omaha*, 115 F.3d 624, 625, 628 (8th Cir. 1997), *cert. denied*, and to create a question of fact in *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1237 (9th Cir. 1998), *rev'd* 527 U.S. 555 (1999); *see also Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 364, 366 (9th Cir. 1996). The Eleventh Circuit, citing the guidance, held that Graves' Disease (of the thyroid gland) controlled by medication created a fact question as to disability in *Harris v. H & W Contracting Co.*, 102 F.3d 516, 517, 523 (11th Cir. 1996).

On the other hand, the Sixth and Tenth Circuits rejected the EEOC's guidance: Non-insulin-dependent diabetes mellitus controlled by medicine, diet and exercise was held to create a question of fact as to disability, but two judges rejected the third's opinion accepting the guidance in *Gilda v. Mecosta County*, 124 F.3d 760, (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part). Finally, the Tenth Circuit rejected the guidance in the subject cases, *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir. 1998), *aff'd* 527 U.S. 516 (1999), and *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *aff'd* 527 U.S. 471 (1999).

149. Consequently, because the Suttons' visual impairments were corrected to 20/20 by corrective lensess, and Murphy's blood pressure was controlled enough, according to his doctor's testimony, to enable him to function normally, none of these plaintiffs were disabled within the meaning of the ADA. Murphy might have avoided the issue altogether, however, had he claimed he was disabled even when taking his medicine. Presumably he was taking it when UPS fired him because of high blood pressure readings. Indeed, the Court noted that Murphy could have challenged the Tenth Circuit's finding that he was not substantially limited when medicated, but he did not:

> Because the question whether petitioner is "disabled" when taking medication is not before us, we have no occasion here to consider whether petitioner is "disabled" due to limitations that persist despite his medication or the negative side effects of his medication.

Murphy, 527 U.S. 516, 521(1999).

Another interesting aspect of *Murphy* is that Justice O'Connor, its author, presented the question on mitigating measures as "whether the determination of petitioner's disability is made with reference to the mitigating measures *he employs*." *Id.* This raises the question of whether the mitigating measures the person "employs" must rise to some level of adequacy or appropriateness before the person would be covered by the ADA. As discussed *infra*, as a result of *Sutton* courts are not only assessing individuals' impairments in their mitigated state, but are deciding whether individuals who do not use mitigating measures *should* be using them. *See* text accompanying notes 243-250, *infra*.

150. *Sutton*, 527 U.S. 471, 482 (1999).

151. *Id.*

152. *Id.*

153. *Id.* at 483.

154. *Id.* at 484 (*quoting* 42 U.S.C. § 12101(a)(1)).

respect to an individual--(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; . . ."[155] The Court construed the statute's use of the verb "limits" in its "present indicative verb form" to "requir[e] that a person be presently--not potentially or hypothetically--substantially limited in order to demonstrate a disability."[156] The Court explained:

> A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity. *To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment*, but if the impairment is corrected it does not "substantially limit" a major life activity."[157]

The Court's acknowledgment that the individual "still has an impairment" within the meaning of "disability" belies the logic of its conclusion, however. First, a forthright grammatical analysis of subpart (A) of the definition of "disability" reveals a most common structure: The subject of the clause is "impairment"; the verb, or predicate, is "limits," a transitive verb; and the noun "activities" completes the predicate, which is required by the transitive verb.[158] The clause distilled to its base sentence structure becomes *impairment limits activities*. The adjectives "physical or mental" and "major life" simply describe the nouns "impairment" and "activities," respectively. The adverb "substantially" describes the verb "limits."[159] Putting these pieces back together, it is the individual's "mental or physical *impairment*" that *"substantially limits"* the "major life activities of such individual." Thus, if an individual's impairment is determined under the ADA's definition of "disability" without regard to mitigating measures, as the Court indicates, the entire clause comprising subpart (A) of the disability definition must be interpreted without regard to mitigating measures because it is the *impairment* that substantially limits one's major life activities. The question of whether mitigating measures are to be considered goes to the interpretation of the noun "impairment," not the verb clause "substantially limits."[160] For the Court's holding to be logical from a plain-

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155. 42 U.S.C. § 12102(2)(A).

156. *Sutton*, 527 U.S. at 482 (1999).

157. *Id.* at 482-483 (emphasis added).

158. *See, e.g.*, HANS P. GUTH, NEW ENGLISH HANDBOOK, 2d ed., at 26 (1985).

159. *See, e.g., id.* at 20.

160. *Cf.* Arnold v. United Parcel Service, Inc., 136 F.3d 854 (1st Cir. 1998). The portion of the guidance that addresses the effect of mitigating measures on determining whether an individual is substantially limited would thus appear to be extraneous, or added for emphasis. Indeed, a commentator explains that the guidance originally issued for notice and comment referred to mitigating measures "in the context of defining an impairment, but not in the context of defining a substantial limitation." Reference to use of mitigating measures in determining whether one is substantially limited appeared in the guidance appended to the EEOC's final rules:

> In its final rule, the EEOC wrote specifically on the mitigating measures issue. As it explained in its comments,
>
> the Commission has revised the Interpretive Guidance accompanying § 1630.2(j) to *make clear* that

language grammatical standpoint, then, Congress would have had to have modified "impairment" with the adjectives "mitigated" or "corrected." The Court's "present indicative verb form" reading of "limits" requires a sleight of hand that changes the meaning of "impairment" to "impairment that is mitigated."

Second, the Court's reading of the clause as requiring consideration of mitigating measures mischaracterizes the nature of a mitigated impairment. If one has an impairment, even though it may be corrected, there is nothing "hypothetical" or "potential" about it to that person. For example, if one of the Sutton sister's glasses were knocked off, she would certainly experience the substantially limiting effect of her visual impairment. If Murphy forgot to take his blood pressure medicine, he would experience the substantially limiting effect of his impairment of severe hypertension. If Kirkingbird's impairment of monocular vision prevented him from accurately gauging the distance between his truck and the vehicle ahead in order to avoid a collision, he would likewise experience its substantially limiting effects. As a matter of fact, the extent to which an individual's impairment is mitigated may often be a *precise measure of the limiting effects* of the impairment on that individual and thus a measure of whether the impairment *substantially* limits that individual.[161]

The second portion of the statute the Court relied on to support its holding is the use of the word "individual" in the same definition, but the Court's logic does not reveal the clarity it attributes to that language. Citing *Bragdon* and the EEOC's appendix to its regulations interpreting Title I of the ADA, the Court determined that "whether a person has a disability under the ADA is an individualized inquiry."[162] Thus, the Court continued,

> The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA. The agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition.[163]

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the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. This interpretation is consistent with the legislative history of the ADA.

Accordingly, the EEOC added the following sentence to the interpretive guidance: "The determination of 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." Colker, *supra* note 46 at 154-155 (emphasis added).

161. The Suttons did not allege that their major life activity of *seeing* was substantially limited. Instead, they claimed to be substantially limited in the major life activity of *working*. *See* note 18 , *supra*.

162. *Sutton*, 527 U.S. 471, 483 (1999) (*citing* Bragdon v. Abbott, 524 U.S. 624, 641-642 (1998) and 29 C.F.R. § 1630.2(j) (app.)).

163. *Id.*

Again, however, the Court did not explain how such a determination is "speculative."[164] Furthermore, the Court failed to acknowledge that differences in the limiting effects of impairments from one individual to another can be determined:

> For instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. Thus, the guidelines [sic] approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.[165]

The Court's "plain language" analysis supporting its conclusion that disabilities must be determined on an individual basis derives from the general "Definitions" section's use of the phrases "with respect to *an individual*" and "major life activities of *such individual.*"[166] Equally plausible, however, is a plain-language reading of those phrases within the definition as contemplating the use throughout the statute of the phrase "individual with a disability" to denote the class protected by the statute. As the Court pointed out in *Bragdon*, the latter phrase was adopted from the Rehabilitation Act's phrase "handicapped individual."[167] In devising the phrase to be used in the ADA, however, Congress substituted the word "disability" for the outmoded word "handicap" and determined that the abilities of such individuals should be emphasized rather than their disabilities. Therefore, instead of the phrase "disabled individual" it used the phrase "individual with a disability" to denote the class protected by the ADA.[168] The terms used in the statute's definition of "disability" ("with respect to an individual" and "of such individual") could then be read as simply conforming to subsequent language in the statute ("individual with a disability").

The Court apparently recognized the insufficiency of its "plain language" reading, however, as it turned to precedent and agency interpretation to bolster its conclusion. It first cited *Bragdon* as an *indirect* source for its conclusion, indicating that *Bragdon* "declin[ed] to consider whether HIV infection is a per se disability."[169] Clearly *Bragdon* indicates that the Court had not yet ruled on the issue of whether the ADA recognizes certain impairments as per se disabilities. But the point that an individualized determination of disability must be made was asserted by *Bragdon's*

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164. Harry F. Tepker, Jr., *Writing the Law of Work on Nero's Pillars: The 1998-99 Term of the U.S. Supreme Court*, 15 THE LABOR LAWYER 181, 188, n.42.

165. *Sutton*, 527 U.S. at 483-484 (1999).

166. *Id.* at 483 (emphasis added).

167. *Bragdon*, 524 U.S. 624, 631 (1998).

168. *See* Burgdorf, *"Substantially Limited" Protection, supra* note 3 at 527-528; Burgdorf, *Analysis and Implications, supra*, note 15 at 414, n.7.

169. *Sutton*, 527 U.S. at 483 (1999) (*citing* Bragdon v. Abbott, 524 U.S. 624 (1998)).

dissenters–i.e. *Sutton's* majority. Indeed agency and judicial interpretative authority cited by the *Bragdon* majority consider HIV infection per se disability under both the Rehabilitation Act and the ADA.

The only *direct* source cited for the Court's conclusion is a portion of the EEOC guidance explaining the term "substantially limits," which the Court then used to invalidate the portion of the *same* guidance regarding mitigating measures. (Interestingly, the Court cited the EEOC's guidance despite its finding, discussed below, that the EEOC was not authorized to interpret the ADA's general definition of "disability.[170]) However, the language cited from the guidance hedges on the issue of whether disability must be determined on an individual basis: "'The determination of whether an individual has a disability is not *necessarily* based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.'"[171]

As Justice Stevens pointed out in dissent, *Sutton* would require that an individualized determination be made as to whether someone who wears a prosthesis replacing part of his leg is "an individual with a disability" within the meaning of the ADA.[172] To illustrate, he compared the abilities of a hypothetical injured worker or war veteran wearing a prosthesis to those of "an average couch potato":

> With the aid of prostheses, coupled with courageous determination and physical therapy, many of these hardy individuals can perform all of their major life activities just as efficiently as the average couch potato. If the Act were just concerned with their present ability to participate in society, many of these individuals' physical impairments would not be viewed as disabilities. Similarly, if the statute were solely concerned with whether these individuals viewed themselves as disabled--or with whether a majority of employers regarded them as unable to perform most jobs--many of these individuals would lack statutory protection from discrimination based on their prostheses.[173]

The majority could muster only an equivocal response to Stevens' argument:

> The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection A if, notwithstanding, the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run.... The use or nonuse of a corrective device does not determine whether an individual is disabled;

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170. *See* text accompanying notes 194-199, *infra.*
171. *Sutton,* 527 U.S. at 483 (1999) (*quoting* 29 C.F.R. § 1630.2(j) (app.) (emphasis added).
172. *Id.* at 498 (Stevens, J., dissenting).
173. *Id.* at 497-498 (Stevens, J., dissenting).

> that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting.[174]

Under the majority's analysis, Stevens' hypothetical veteran, or indeed someone whose abilities *exceed* those of the average person, would surely not be disabled under the ADA. For example, neither the late Terry Fox, who for 144 days ran a marathon (26 miles) a day across Canada on an artificial leg and inspired many other amputees to take up running,[175] nor Heather Mills, who runs half-marathons, snowboards, skis and skates using a prosthesis for half of a leg,[176] would be disabled under the ADA.

A commentator points out the inadequacy of the above response to Stevens' criticism:

> The Court does not quite prove Justice Stevens is wrong. It merely shows that he is not necessarily or inevitably right.... The Court relies on individualized, case-by-case, person-by-person inquiry guided by the phrase "substantially limits".... [It] all but admits that in some cases, some individuals without limbs, but using a prosthesis, might not be disabled within the meaning of the Act.[177]

Stevens further explained that the Court's individualized analysis is contradicted by the Act's three-part definition of disability, which belies the accuracy of the Court's construction of the Act "as a whole":

> If the Court is correct that "[a] 'disability' exists only where" a person's "present" or "actual" condition is substantially impaired, there would be no reason to include in the protected class those who were once disabled but who are now fully recovered. Subsection (B) of the Act's definition, however, plainly covers a person who previously had a serious hearing impairment that has since been completely cured. Still ... it holds that one who continues to wear a hearing aid that she has worn all her life might not be covered--fully cured impairments are covered, but merely treatable ones are not. The text of the Act surely does not require such a bizarre result.[178]

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174. *Id.* at 488. The Court's reference to running as a major life activity is far more generous than the EEOC's interpretation of that phrase; the regulations do not list running as a major life activity. It is difficult to imagine a class of jobs other than professional sports for which running is a qualification and for whose participants running is a major life activity. Surely the average person cannot be a professional athlete, and running is not a major life activity of such person. Avid exercisers may view running as a major life activity, but certainly the average person (couch potato?) does not.

175. *See, e.g.*, Frank Calleja, *Terry Fox's Mother Holds His Torch High*, THE TORONTO STAR (September , 1999).

176. *See, e.g.*, Leslie Doolittle, *McCartney and Ex-Model "Are an Item,"* THE ORLANDO SENTINEL A-2 (March 16, 2000).

177. Tepker, *supra* note 164, at 191.

178. *Sutton*, 527 U.S. 471, 498-499 (1999) (Stevens, J., dissenting) (citations omitted).

The Court itself displayed some confusion about the application of its individualized analysis when it confronted in *Albertsons* a plaintiff with monocular vision. Unlike the plaintiffs in the other two cases, Kirkingburg employed neither a corrective device nor medication; "mitigation" consisted of his brain's adjustment to the impaired eye.[179] In that case the Court came very close to admitting that some impairments are by their nature substantially limiting. Justice Souter, writing for the majority, attempted to bring Kirkingburg's impairment within *Sutton*'s rule:

> While some impairments may invariably cause a substantial limitation of a major life activity, we cannot say that monocularity does.... *This is not to suggest that monocular individuals have an onerous burden* in trying to show that they are disabled. On the contrary, our brief examination of some of the medical literature leaves us sharing the Government's judgment that people with monocular vision "ordinarily" will meet the Act's definition of disability, and *we suppose that defendant companies will often not contest the issue.* We simply hold that the Act requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience ... is substantial.[180]

The Court does not explain what it means when it says the burden of proof of disability for monocular persons is not "onerous." But it is surely much less onerous than the burden imposed by *Sutton*'s rule on individuals like Fox or Mills, who would be hard pressed, despite their amputated legs, to prove disability by offering evidence that the extent of their limitations *in terms of their own experience* is substantial. Moreover, by creating a heightened *prima facie* burden on employees claiming to be disabled, the Court has ensured that employers will "contest the issue" in virtually every case.

The final and "critical" provision of the ADA upon which the Court based its plain language reading is from the Act's preface, which states that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[181] That language, the Court concluded, "is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[182] It opined that had "Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."[183] Yet the Court admitted it could not identify the precise source of the 43,000,000 figure and therefore how the figure was derived and, significantly, Congress' intent in using that figure.[184] Rather than being a

179. Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999).
180. *Id.* at 566-567 (citations omitted; emphasis added).
181. *Sutton*, 527 U.S. 471, 484 (1999) (*quoting* 42 U.S.C. § 12101(a)(1)).
182. *Id.* at 487.
183. *Id.*
184. *Id.* at 484-486.

definitive "plain language" indication of Congress' intent, the prefatory language was revealed by the Court to be a mere "clue" as to Congress' intent.[185]

The author of the article cited by the Court as containing an accurate estimate of the number of disabled persons[186] had expressed his own doubts about the adequacy of that figure in the very article the Court cited. Professor Robert Burgdorf, a drafter of the ADA, wrote in his 1991 article analyzing the newly enacted ADA that the 43,000,000 figure has a "dubious derivation" and is only a "rough estimate."[187] Moreover, the Court focused solely on the first clause of the finding and ignored the remaining clause, "and this number is increasing as the population as a whole is growing older,"[188] despite the fact that the quoted figure's source appeared around 1986,[189] and likely the data were obtained earlier than that. The higher numbers that are derived from "nonfunctional approaches to defining disability" were cited by the Court from sources dating in the late 1990's.[190] No accounting was made by the Court in 1999 for the number of disabled persons increasing with passing years or differences in accuracy of devices used to count such persons.

Moreover, as Stevens pointed out in dissent, 43,000,000 could not have been meant as a "fixed cap on the Act's protected class," as Congress defined "disability" to include not only those who are actually disabled but those who have a record of disability or are regarded as having a disability.[191] And, as explained above, this three-part definition was adopted from the Rehabilitation Act,[192] which Congress certainly was aware of at the time it drafted the ADA.

Perhaps the most astounding pronouncement in *Sutton* was its finding that *no agency* had been delegated by Congress to interpret the overall "Definitions" section of the ADA. The only basis for this conclusion appears to derive from the Court's determination to view the Act "as a whole." The Court blithely stated that "the terms and structure of the ADA" belies the conclusion that the EEOC was delegated authority to interpret the meaning of "disability" because Congress placed its definitions in a section preceding the sections containing Title I and the other titles of the Act.[193] This finding laid the predicate for the Court to ignore the statute's explicit language delegating authority to the various agencies to interpret and enforce the ADA. The majority dismissed Justice Breyer's common-sense

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185. *See* Justice Ginsburg's concurrence, stating

> [t]he strongest *clues* to Congress' perception of the domain of the Americans with Disability Act (ADA), as I see it, are legislative findings that "some 43,000,000 Americans have one or more physical or mental disabilities," and that "individuals with disabilities are a discrete and insular minority," persons "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."

Id. at 494 (Ginsburg, J., concurring) (emphasis added).

186. *See id.* at 484.

187. Burgdorf, *Analysis and Implications, supra* note 48 at 434-435, n.117.

188. 42 U.S.C. § 12101(a) (1994).

189. *See Sutton*, 527 U.S. at 485 (1999).

190. *Id.* at 487.

191. 42 U.S.C. § 12102(2) (1994).

192. *See* text accompanying notes 48-49, *supra*.

193. *Sutton*, 527 U.S. at 479 (1999).

explanation for the placement of the "Definitions" section as "imaginative."[194] Yet the Court failed to explain what is "imaginative" about Congress' "stylistic" placement of the definition of a term that appears in all the titles in front of those titles, with the intent that the various agencies interpret the common term as it pertains to other language in the title they have been assigned to interpret and enforce.[195] Under Breyer's interpretation, the "Definitions" section becomes a part of each title, for it surely has no meaning separate from the context each title provides. Rather than repeating the disability definitions within each title, Congress simply wrote them once at the beginning of the Act. Under the Court's reading of the statute, however, the "Definitions" section stands alone; agencies must interpret and enforce their respective titles containing the term "disability" with no guidance from Congress other than the definition itself. Again, the Court had to construe the Act as containing this interpretive gap in order to ignore Congress' explicit delegations of authority to governmental agencies.

Yet the Court had previously recognized in *School Board of Nassau County v. Arline*[196] that the "primary focus" of the Rehabilitation Act was access to employment for individuals with disabilities. The Court pointed out that the "original definition of the term 'handicapped individual' reflected this focus by including only those whose disability limited their employability, and those who could be expected to benefit from vocational rehabilitation."[197] Enhancement of employment opportunities for individuals with disabilities was thus a major goal of this legislation, and Congress defined the class protected by the Act with this goal in mind. As stated previously, the definitions of "individual with a disability" in the ADA were drawn verbatim from those of "handicapped individual" in the Rehabilitation Act. Moreover, Congress' findings describe hurdles faced by individuals with disabilities in employment.[198] To divorce the ADA's definition of "individual with a disability" from the employment context, as the Court did in *Sutton* when it proclaimed that Congress did not authorize the EEOC to interpret that definition, is simply misleading.

Most significantly, the Court's manner of interpreting the ADA "as a whole" by picking and choosing terms to suit its ends ignores Congress' explicit direction to any entity--agency or court--interpreting the ADA: "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act ... or the regulations issued by Federal agencies pursuant to such title."[199]

Although the Rehabilitation Act regulations do not address mitigating measures, consistent interpretive "standards" have been applied to that Act by federal courts. For example, the Supreme Court has interpreted the Act's definition of "handicapped individual" broadly and, in doing so, deferred to agency

194. *Id.*
195. *Id.* at 515 (Breyer, J., dissenting).
196. 480 U.S. 273 (1987).
197. *Id.* at 279, n.3.
198. *See* text accompanying note 44, *supra.*
199. 42 U.S.C. § 12201(a) (1994).

regulations interpreting the Act, including the regulations' appendices, and cited legislative history of the Act. In *Arline* the Court held that "a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of § 504 of the Rehabilitation Act."[200] Again recall that § 504's definition of "handicapped individual" (now "individual with a disability")[201] is the same as the ADA's definition of "individual with a disability."[202] The Court found that agency regulations defining § 504 "are of significant assistance" and "provide 'an important source of guidance on the meaning of § 504.'"[203] The Court endorsed the breadth of the HHS's regulatory definitions, citing the its comments from regulations' appendix.[204] It further cited committee reports explaining the need for broadening the definition of "handicapped individual" in the 1974 amendments to the Act.[205]

Citing the regulations' definitions, the Court found Arline's tuberculosis, which required her to be hospitalized in the past, made her a "handicapped individual."[206] It interpreted the term "substantially limited" generously: "This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment."[207] The fact that Arline's impairment was a contagious disease, the Court reasoned, did not preclude her from establishing she was a handicapped individual. Significantly, the Court emphasized the difference between a plaintiff's *prima facie* showing that she is a "handicapped individual" and her ultimate showing that she is "an otherwise qualified handicapped individual" and thus entitled to the Act's protection:

> [T]he definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified."[208]

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200. *Arline*, 480 U.S. at 289 (1987).
201. 29 U.S.C. § 706(7)(B) (1994).
202. 42 U.S.C. § 12102(2) (1994).
203. *Arline*, 480 U.S. at 279 (1987) (*quoting* Alexander v. Choate, 469 U.S. 287, 304, n.24 (1985)).
204. Although many of the comments on the regulations when first proposed suggested that the definition was unreasonably broad, the Department found that a broad definition, one not limited to so-called "traditional handicaps," is inherent in the statutory definition. *Id.* at 280, n.5.
205. *Id. passim.*
206. The Court found Arline had a record of impairment under the handicap definition. *Id.* at 282.
207. *Id.*
208. *Id.* at 285 (emphasis in original).

It is also significant that the Court did not apply an individualized analysis to the question of whether a person who has a contagious impairment that substantially limits a major life activity is a handicapped individual. Rather, it held that all such impairments would entitle plaintiffs to meet their *prima facie* showing. Acccording to *Arline*, an individualized analysis applies to the ultimate question of whether the person is an otherwise qualified handicapped individual:

> The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct *an individualized inquiry* and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees....[209]

With respect to handicapped individuals whose impairments are contagious, the Court explained that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."[210]

Like *Arline*, the ADA places the question of whether the individual poses a "direct threat" not in the *prima facie* analysis of whether a person is an "individual with a disability," but rather in the ultimate analysis of whether the person is a "qualified individual with a disability." *Arline*'s holding on "significant risk" was drafted into the ADA in the "Defenses" section of Title I, which states, "The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[211]

Arline's analysis of a contagious impairment should be used to analyze a mitigated impairment. Just as the contagiousness of someone's impairment is assessed with regard to the question of whether that individual with a disability is "otherwise qualified," the effect of mitigation on a person's impairment should be assessed with regard to the question of whether that individual with a disability is "qualified."[212] Such an analysis conforms to the Court's holding in *Arline* that

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209. *Id.* at 287 (emphasis added).

210. *Id.* at 288, n.16. After *Arline*, Congress amended the Rehabilitation Act's definition of "individual with a disability" to exclude "an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job." 29 U.S.C. § 706(8)(D) (1999).

211. 42 U.S.C. § 12113(b) (1994). Title I defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3). The Supreme Court recognizes this as an affirmative defense, for which the employer bears the burden of proof. *See* Bragdon v. Abbott, 524 U.S. 624, 653 (1998).

212. *See* Lanctot, *supra* note 3 at 338 (emphasis added):

> The appropriate analysis would be to consider the individualized conditions of plaintiffs when determining whether they are "qualified" under the ADA--that is, whether they can perform the essential functions of the job with or without reasonable accommodation. Under this methodology, a person with diabetes who requires insulin would have a disability under the ADA because diabetes is a physical impairment that substantially limits a major life activity. Whether the person was "qualified" to perform

"disability" is broadly defined so as to allow those who have been denied employment opportunities a chance to prove they were qualified for the jobs they sought. *Sutton*'s construction of "disability" achieves the opposite result: It deprives those who have been denied employment opportunities, as were the Suttons, Murphy and Kirkingburg, of the chance to prove they were qualified for the jobs they sought. It places such plaintiffs in the limbo of being not impaired enough to be considered for a job that has been denied them because they are impaired. Considering mitigation with respect to whether the individual is "qualified," either with regard to the individual's burden of proof on whether she can perform the essential functions of the job with or without reasonable accommodation, or to the employer's burden of proving reasonableness of its qualification requirements,[213] would effect congressional purpose and allay any fear that the ADA requires an employer to hire someone who could not safely or effectively perform the job.[214]

The above standards used to interpret the Rehabilitation Act bind courts interpreting the ADA, through Congress' express direction that "nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act ... or the regulations issued by Federal agencies pursuant to such title."[215] Thus, courts must construe the ADA's definition of "individual with a disability" broadly, seek guidance from agency interpretations of the ADA and give effect to congressional intent, as discerned from the ADA's legislative history. Courts should also look to judicial interpretations of the Rehabilitation Act, which have generally not considered mitigating measures in determining whether one is a handicapped individual.[216]

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a particular job would require consideration of a number of factors, *including whether the diabetes was adequately mitigated by the insulin.*

213. For example, United may be able to show that its requirement for commercial pilots of a specific measure of unassisted visual acuity is proper under the ADA and therefore that the Suttons would not be qualified for that job. To successfully defend such a blanket requirement under the ADA, all United need do is show that its requirement is "job-related and consistent with business necessity." 42 U.S.C. § 12112(b)(6) (1994).

214. *See Sutton*, 527 U.S. 471, 503 (Stevens, J., dissenting) (citations omitted):

> If a narrow reading of the term "disability" were necessary in order to avoid the danger that the Act might otherwise force United to hire pilots who might endanger the lives of their passengers, it would make good sense to use the "43,000,000 Americans" finding to confine its coverage. There is, however, no such danger in this case. If a person is "disabled" within the meaning of the Act, she still cannot prevail on a claim of discrimination unless she can prove that the employer took action "because of" that impairment, and that she can, "with or without reasonable accommodation, ... perform the essential functions" of the job of a commercial airline pilot. Even then, an employer may avoid liability if it shows that the criteria of having uncorrected visual acuity of at least 20/100 is "job-related and consistent with business necessity" or if such vision (even if correctable to 20/20) would pose a health or safety hazard.

215. 42 U.S.C. § 12201(a) (1994).

216. Cases arising under the Rehabilitation Act that involve impairments controlled by medication or other mitigating measures are summarized in Colker, *supra* note 46 at 154 and n.295-296:

> The mitigating measures rule was not promulgated under section 504.... Although the courts did not explicitly consider the rule under section 504, their holdings are consistent with its application. In the ten cases brought under section 504 by individuals with conditions often controllable with medication such as epilepsy or diabetes, the courts assumed that these individuals were "disabled" without discussion of the significance of their medication's ameliorative effects. Thus, the section 504 case law supports a mitigating measures rule although no case directly addressed the appropriateness of such a

With respect to how mitigating measures factor into the analysis, deference to agency interpretation is required by *Chevron* because, as demonstrated above, the Court's characterization of the ADA's language as unambiguous on the question of mitigating measures is simply incorrect. As a matter of fact, other language in the ADA points strongly to the conclusion that Congress did indeed intend that mitigating measures not be taken into account in determining disability.

E. Overlooked Statutory Language

a. Title I: Definitions of "Qualified Individual with a Disability" with Regard to Illegal Drug Use and Use of Medication Taken Under Medical Supervision

The ADA actually addresses corrective measures in Title I, in the context of how employers are to treat illegal drug use and supervised use of medication; however, no court has considered this language. Although the term "disability" applies to all titles of the ADA, the issue of how corrective measures are to be treated is most relevant to Title I; indeed, *Sutton*, *Albertsons* and *Murphy* arose in the employment setting. Title I's language regarding illegal drug use and supervised medication is therefore significant because it illustrates that consideration of corrective measures applies not to whether one is disabled but rather one is qualified for a job.

Recall that "a qualified individual with a disability" under Title I is defined as: "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[217] The definitions of "disability" from the general Definitions section of the ADA are embedded within Title I's definition of one who is protected from workplace discrimination. Thus, as stated previously, a determination of whether a person is entitled to the protections of Title I mandates a two-part inquiry: first, whether the person is an "individual with a 'disability'" and, second, whether the person is a "qualified individual with a disability."[218]

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rule. [footnote:] *See, e.g.*, Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); Scanlon v. Atascadero State Hosp., 688 F.2d 1271 (9th Cir. 1982) (diabetes); Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) (diabetes); Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981) (epilepsy); Davis v. Meese, 692 F. Supp 505 (E.D. Pa. 1988) (diabetes); Salmon Pineiro v. Lehman, 653 F. Supp. 483 (D.P.R. 1987) (epilepsy); Martin v. Cardinal Glennon Memorial Hosp. for Children, 599 F. Supp. 284 (E.D. Mo. 1984) (diabetes); Chaplin v. Consolidated Edison Co. of N.Y., 579 F. Supp. 1470 (S.D.N.Y. 1984) (epilepsy); Cain v. Archdiocese of Kansas City, 508 F. Supp. 1021 (D. Kan. 1981) (epilepsy); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (epilepsy). *But see* Mackie v. Runyon, 804 F. Supp. 1510 (M.D. Fla. 1992) (finding individual with mental illness not substantially limited in one or more major life activities because medication stabilized her condition).

217. *Id.* § 12111(8).

218. *Id.* § 12112(a).

Additional language in Title I links illegal drug use to the definition of "qualified individual with a disability" and therefore to the embedded definition of "disability." This linkage and the structure of the resulting statutory provision indicate Congress' direction that corrective measures are not to be taken into account in determining disability. Section § 12114 of Title I states:

> (a) ... For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> (b) ... Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who--
>
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or who has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use;
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use ....[219]

This section of Title I tracks the ADA's three-pronged definition of "disability" and substitutes the term "illegal use of drugs" in the former for the term "disability" in the latter. This language substitution indicates that Congress intended to treat *illegal drug use* as a *disability*, albeit with the *further requirement* that one who has used illegal drugs must no longer be using those drugs. The structure of this statutory language is quite logical, given initial interpretations of the term "handicap" under the Rehabilitation Act to *include* use of illegal drugs.[220] Even when Congress attempted to resolve the ambiguity in the definition of "handicap" that fostered these initial interpretations, it came up with a limited exclusion of drug and alcohol use under the 1978 amendments to that Act.[221] In the ADA, Congress wanted to make certain that current illegal drug users would not be covered.[222]

One may be a *qualified individual with a disability* if he meets one of the conditions in subsection (b) of § 12114. Subsection (a) parallels the "actually

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219. *Id.* § 12114.

220. *See* Burgdorf, *Analysis and Implications*, *supra* note 48 at 452, n.197 (citations omitted):

> Previously, the issue of inclusion of drug addiction in the protection of section 504 of the Rehabilitation Act had been a controversial one. The Rehabilitation Act was amended in 1978 to specify that for purposes of employment discrimination requirements, the term "handicapped individual" does not include an individual whose current use of alcohol or drugs prevents job performance or constitutes a direct threat to the property or safety of others. Section 512 of the ADA ... amends the Rehabilitation Act to totally exclude from its coverage any individual who is a current user of illegal drugs.

221. *Id.*

222. *Id.*

disabled prong" of the general disability definition,[223] except that it is exclusionary; a person is *not* "a qualified individual with a disability" if that person is actually using illegal drugs. Subpart (b)(1) parallels the "no longer disabled prong" of the general disability definition,[224] in that someone with a history of illegal drug use who is no longer using is treated as a person who has a history of a disability. Similarly, subpart (b)(3) covering someone who is regarded as using illegal drugs parallels the "regarded as disabled prong" of the general disability definition.[225] The structure of subsections (a) and (b) clearly indicates that the term "use of illegal drugs" in § 12114 of Title I replaces the word "disability" in § 12102(2) in the general definitions section of the ADA.

Subpart (b)(2) of § 12114 pertains to corrective measures. It explicitly mandates that a person who is, for example, taking methadone in a treatment program for heroin addiction may be entitled to the protections of the ADA as "a qualified individual with a disability." Just as Title I's definition of "qualified individual with a disability" in § 12111(8) incorporates the general ADA definition of "disability" from § 12102(2), the term "qualified individual with a disability" in § 12114 incorporates the term "illegal use of drugs." Again, the structure of the statutory language makes it clear that one who no longer uses illegal drugs and participates in a supervised rehabilitation program would fit within the general statutory definition as an "individual with a disability" because of the *past illegal drug use* and within Title I's definition of "qualified individual with a disability" by virtue of being in rehabilitation, the corrective measure taken because of *past illegal drug use.*

Therefore, a person who is taking methadone in a treatment program for heroin addiction but whose addiction is "controlled" by methadone, may be entitled to the protections of Title I as "a qualified individual with a disability." However, if a former illegal drug user is in rehabilitation, the use of an ameliorative or corrective measure alone--e.g., methadone--does not *by definition* affect the person's status as "an individual with a disability" because the disability is the *past drug use.* In other words, the fact that the treatment program controls the impairment--drug addiction--is irrelevant to the determination of whether the individual is *disabled.* That fact is, however, relevant to whether the individual is *qualified.* As long as the individual is in some kind of treatment program, that person may be a "qualified individual with a disability" if he or she can perform the essential functions of the job with or without reasonable accommodation. The extent to which one's disability of past illegal drug use is corrected by rehabilitation pertains to the issue of whether he can perform the essential functions of the job.

This point was illustrated during Senate debates over an amendment to the Rehabilitation Act to add language that made that Act consistent with the ADA with respect to treatment of illegal drug users.[226] Senator Kennedy explained:

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223. *See* text accompanying note 52, *supra.*
224. *See* Burgdorf, *supra* note 48, at 482.
225. *See id.*
226. The amendment appears in the Rehabilitation Act at 29 U.S.C. § 706(7)(C) (1994).

> In addition, the act's protections extend to rehabilitated individuals who no longer use illegal drugs, but who continue to participate in treatment programs--such as a methadone maintenance treatment program--or continue to receive after-care counseling or participate in self-help programs. This reflects our recognition that these activities can be crucial to many individuals' ability to successfully sustain their recovery.[227]

Additional language in Title I adopts the same structure. It defines "illegal use of drugs" as excluding "the use of a drug taken under supervision by a licensed health care professional" and further defines "drug" as a controlled substance:

> The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812) [sic]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or other provisions of Federal law.
>
> The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].[228]

Congress of course assumed that some individuals with disabilities would be taking medications, including "drugs" as defined above, under the care of health professionals; this point was again explained by Senator Kennedy in a continuation of the above-quoted comments:

> In this connection, it is important to note that the definition of "illegal drugs" does not include controlled substances that are taken pursuant to a medical prescription. This includes all kinds of drugs taken under medical supervision, including experimental drugs. One example of such a controlled substance is methadone taken as part of a course of methadone maintenance treatment.[229]

This statutory exclusion, by appearing in Title I's definition of "illegal use of drugs," likewise relates to the ADA's general definition of "disability." Congress contemplated that many individuals with disabilities would be taking medications and that those individuals' disability status should not be affected by the taking of prescribed medications, even if the medication is a controlled substance that would be illegal to use without supervision of a health care professional. Thus the *effect* of the medication bears not on the question of whether the person is "an individual with a disability," but rather whether the person is "a qualified individual with a disability."

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227. 135 Cong. Record 19,873 (1989).
228. 42 U.S.C. §§ 12111(6), 12210(d) (1994).
229. 135 Fed. Reg. at 10,774-775.

b. Title V: Exclusion of Certain Conditions from the Definition of "Disability"

Additional language in Title V excluding the "parade of horribles" that some legislators crusaded to keep out of the ADA's definition of "disability"[230] refers to certain "impairments" or "conditions" and explicitly excludes them from the ADA's general definition of "disability" in § 12102(2). Section § 12208 of Title V states:

> For the purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.[231]

Transvestites get double mention, along with other conditions, in § 12211:

> (a) Homosexuality and bisexuality
>
> For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.
>
> (b) Certain conditions
>
> Under this chapter, the term "disability" shall not include–
>
> (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
>
> (2) compulsive gambling, kleptomania, or pyromania; or
>
> (3) psychoactive substance abuse disorders resulting from current illegal use of drugs.[232]

Congress' blanket exclusion of these conditions from the ADA's definition of "disability" further illustrates its intent that corrective measures are not be taken into account in determining disability. Someone who has been diagnosed *at any time* with any of these conditions is excluded from the three-part definition of "individual with a disability" regardless of whether that person correctly has the condition, is receiving treatment to correct the condition or the condition has been corrected (i.e. has a history of having the condition).[233] Like illegal drug use, these conditions are treated by the statute as disabilities, albeit ones specifically excluded from that statutory category.

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230. *See, e.g.*, Burgdorf, *Analysis and Implications, supra* note 3 at 451-52.

231. 42 U.S.C. § 12208 (1994).

232. 42 U.S.C. § 12211 (1994).

233. Someone who is discriminated against under the "regarded as disabled prong," which requires that the individual not actually be disabled--i.e., not actually have one of the conditions listed--would appear from the language above not even to be protected. For a criticism of these exclusions as being inconsistent with the precepts of the ADA, *see* Burgdorf, *Analysis and Implications, supra* note 3 at 452, n. 197.

The foregoing analysis of the plain language of the ADA, which derives from the language and structure of the statute, provides a clearer window into the meaning of "disability" under the ADA than the Court's "plain language" analysis of the ADA's general disability definition and prefatory finding of the estimated number of "disabled" persons. Unlike the Court's analysis, it actually does take into account the Act as a whole. The interpretation derived from the above analysis also fits consistently and cohesively with every other source available--regulations, guidance, legislative history--that can be used to explain the meaning of "disability" in the ADA. *Sutton*'s interpretation does not.

IV. CONCLUSION: THE IMPLICATIONS OF *SUTTON*

Whether the Court was motivated by skepticism about the efficacy of the ADA, contempt for "ambiguous government regulation interfering with employer prerogative," distrust of the legislative record or simply "judicial myopia,"[234] its decisions will bankrupt the ADA and those whom it was meant to protect, especially in the context of employment. The Court's refusal to recognize that some impairments are inherently substantially limiting and its resultant directive to assess the limitations of individuals' impairments on a case-by-case basis will, as one commentator predicted three years ago, "at best ... create massive confusion for employers and lower courts," as well as plaintiffs, and "[a]t worst, exclu[de] people with serious medical conditions from ADA protections" giving employers "free rein to discriminate against such employees."[235] Under the Court's approach, each plaintiff must be "considered in a vacuum, without reliance on other reported cases addressing the same disease," but on "the particular set of symptoms he or she possesses."[236]

The Court acknowledged that "'accumulated myths and fears about disability and disease'" can motivate employers' decisions.[237] Such "myths and fears" can not only cause an employer to see a disability where there is none,[238] but can cause the employer to misperceive the effects of an actual disability. In reacting out of "myths and fears," the employer does not first assess the degree to which the person is

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234. *See* Tepker, *supra* note 164 at 197.The Court has been accused of "judicial activism in service of judicial skepticism" about the ADA:

> Whether one shares the Justices' skepticism about the Act or believes that the law has been unfairly insensitive to the plight of the disabled, it is fair to sense that the trio of cases have roots in a legal trick unknown and unknowable when the Act was passed.

Id. at 197, 196.

235. Lanctot, *supra* note 3 at 333.

236. *Id.* at 332. She notes the irony that "courts show no comparable reluctance to uphold employer rules that discriminate on the basis of having a particular disease, regardless of the particularized medical condition of individuals adversely affected by the rule." *Id.* at 337, n.46.

237. *Sutton*, 527 U.S. 471, 489 (1999) (*quoting* School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987)).

238. As discussed previously, this is the situation the "regarded as disabled" prong of the disability definition would address. *See* note 18, *supra.*

substantially limited.[239] But in the face of such a reaction, the Court requires a person to show how the symptoms of his impairment substantially limit him before he can receive the ADA's protection.

The Court's rule will affect not only those who mitigate their disabilities but those who do not. In order to prevent the situation in which an individual may be entitled to accommodation by an employer under the ADA if he or she simply stops taking medication or using ameliorative measures, *Sutton*'s rule would require that courts deny ADA coverage to impaired individuals who *should have* mitigated their impairments. To make such a determination, courts will have to investigate why the individual did not use mitigating measures and what measures the individual should have used.[240]

This was done in *Tangires v. The Johns Hopkins Hospital*.[241] Plaintiff suffered from asthma and had been prescribed a steroid inhalant, but she refused to use it because she also suffered from a pituitary tumor and feared the steroid's effect on the tumor.[242] Plaintiff did use a non-steroid inhalant, but her doctor testified that her asthma symptoms could be brought under control if she used the steroid inhalant.[243] The Court determined that plaintiff's fear was unfounded because her treating doctors knew of both conditions and what had been prescribed. The court held that because "the plaintiff's asthma was correctable by medication and ... she voluntarily refused the recommended medication, her asthma did not substantially limit her in any major life activity."[244] (The court would not assess the substantially limiting effect of the plaintiff's impairment with regard to the nonsteroid inhalant.[245]) Although the court cited *Sutton's* rule elsewhere in the case, it did not cite *Sutton* for this holding, Rather it cited a case holding that a plaintiff who did not "avail herself" of proper treatment was not a "'qualified individual'" under the ADA.[246] Like the Supreme Court in *Sutton*, the district court seemed to confuse the determination of whether one is an individual with a disability with the issue of whether one is a *qualified* individual with a disability. As discussed above, consideration of the effect of mitigating measures on the individual is appropriate in determining whether the individual is qualified to do the job in question, but not whether the individual is disabled.

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239. By definition, prejudice against people with certain disabilities does not rest on a fact-specific inquiry. Prejudice is not tailored to a person's particular set of symptoms. Prejudice is not determined by the degree to which a medical condition substantially limits a major life activity. Prejudice stems from over generalizations, myths and stereotypes, unwarranted assumptions and fear. In short, prejudice by its very nature is not based on ad hoc reactions to particular individuals. Prejudice is inherently per se.
Lanctot, *supra* note 3 at 337 (footnotes omitted).

240. *See* Isaac S. Greaney, Note, *The Practical Impossibility of Considering the Effect of Mitigating Measures under the Americans with Disabilities Act of 1990*, 26 FORDHAM URB. L.J. 1267, 1292-1293 (1999).

241. 79 F. Supp. 2d 587 (D. Md. 2000).

242. *Id.* at 595.

243. *Id.* at 596.

244. *Id.*

245. *Id. See* note 149, *supra*, which discusses the Court's presentation of the question in *Murphy* as "whether the determination of petitioner's disability is made with reference to the mitigating measures *he employs*."

246. *Tangires*, 79 F. Supp. 2d at 596 (*citing* Roberts v. County of Fairfax, Va., 937 F. Supp. 541, 549 (E.D. Va. 1996)).

This result is troubling, for courts will now be making *ad hoc* factual determinations of the appropriate treatment for a plaintiff's impairment in the *prima facie* stage of a disability case. This adds a higher hurdle to the plaintiff's threshold burden of showing membership in the ADA's protected class. The primary factual question will become not whether the plaintiff is disabled by the impairment, but whether the plaintiff properly mitigated the impairment or whether plaintiff should have mitigated the impairment. Such a result runs far astray of the ADA's language, history and policy.

The Court has construed the ADA in a manner that blatantly disregards express statutory direction and contradicts every indication of Congress' intent. The *Sutton* trilogy validates federal courts' reluctance to apply the Act to claims of disability discrimination under Title I.[247] As a result, ten years after the passage of the ADA, disabled workers remain "severely underrepresented" in the workplace.[248]

247. Employers prevailed in 91.6 percent of cases between 1992 and 1997, 94.4 percent in 1998, and 95.7 percent in 1999, despite a constant 85 percent success rate at the EEOC from 1992 through 1999. 121 DAILY LABOR REPORT (BNA) A-7 (June 22, 2000).

248. Lois C. Rose, *Observers Assess 10 Years of ADA Activity; Predict Supreme Court's Next Move on Title II,* 133 DAILY LABOR REPORT (BNA) B-1 (July 11, 2000).