Denver Law Review

Volume 77 | Issue 1 Article 6

January 2021

The Americans with Certain Disabilities Act: Title I of the ADA and the Supreme Court's Result Oriented Jurisprudence

Frank S. Ravitch

Marsha B. Freeman

THE AMERICANS WITH "CERTAIN" DISABILITIES ACT: TITLE I OF THE ADA AND THE SUPREME COURT'S RESULT ORIENTED JURISPRUDENCE

FRANK S. RAVITCH*

MARSHA B. FREEMAN**

INTRODUCTION

Michele recently began working as a certified public accountant for a large accounting firm. She is epileptic, but fortunately she found a medication that controls her seizures exceptionally well. Consequently, she has remained seizure free for nearly ten years. While such medications sometimes cause serious side effects, she has experienced none beyond drowsiness in the morning. However, her doctor has told her that certain types of flickering lights can cause a seizure, particularly fluorescent lights. Unfortunately, the light bulbs in her office emit such a flicker, and she is concerned that she may therefore experience a seizure. Michele asked her employer to replace the bulbs with a different type of bulb that would reduce the risk of seizure, but would cost approximately seventy-five dollars more per year. Her employer refused, and as a result of her request—which had the effect of informing her employer of her epilepsy—Michele was turned down for a high profile assignment for which she was well qualified, in favor of a less qualified colleague.

---

* Assistant Professor of Law, Barry University of Orlando School of Law. Fulbright Scholar, Faculty of Law, Doshisha University (Spring/Summer 2001). I would like to thank Charles Abernathy for his helpful suggestions regarding this article, and Lawrence O. Gostin for years ago sparking my interest in disability law.

** Assistant Professor of Law, Barry University of Orlando School of Law.

Under the Americans with Disabilities Act ("the ADA"),[1] Michele would seemingly be entitled to the minimal accommodation she sought and be protected from the discrimination she suffered. In fact—prior to the Supreme Court's recent decisions in *Sutton v. United Air Lines, Inc.*,[2] *Murphy v. United Parcel Service, Inc.*,[3] and *Albertsons, Inc. v. Kirkingburg*[4]—all three agencies charged with implementing the ADA, and most of the courts that had addressed the issue of whether someone like Michele is covered by the Act, considered this threshold question a straightforward one:[5] she would have been covered. Of course, that would only be the beginning of the inquiry for she would still have to meet the other provisions of the ADA to win her claim.[6]

As will be discussed in greater detail below, the Supreme Court's recent decisions effectively preclude many individuals with impairments that substantially limit a major life activity from coverage under the ADA if their disabilities are controlled by mitigating measures such as medications.[7] Therefore, because Michele's medication has kept her seizure free for years, and she suffers no serious side effects from her medication, it is now possible the ADA, as interpreted by the Supreme Court, does not cover her.[8] Thus, her employer need not accommodate her by replacing the light bulbs, until of course, the current bulbs cause her to have a seizure; at which point, Michele would likely be considered disabled under the Court's recent decisions and covered under the Act. If,

---

1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (1994). In determining whether a plaintiff is covered under the ADA, the first issue is whether the individual has a "disability," which is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). If this threshold question is answered affirmatively, a court next considers whether the plaintiff is a "qualified individual with a disability." *See infra* note 6.

2. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999).

3. Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999).

4. Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999).

5. *See infra* notes 16 & 19 and accompanying text.

6. In the employment context the ADA prohibits discrimination against any "qualified individual with a disability." *Id.* § 12112(a). After proving that she is disabled under the Act, a claimant must also show that she is a "qualified individual" in that she can "with or without reasonable accommodation . . . perform the essential functions of the employment position [she] holds or desires." *Id.* § 12111(8). The claimant must prove that the employer acted "because of" the disability. *Id.* § 12112(a). The employer has several defenses available. *See id.* at § 12113. Assuming Michelle can perform the essential functions of her job, the accommodation of replacing the light bulbs in her office would appear reasonable.

7. *See Sutton*, 119 S. Ct. at 2146-47; *Murphy*, 119 S. Ct. at 2137; *Kirkingburg*, 119 S. Ct. at 2168-69; *See infra* notes 153–159 and accompanying text (discussing whether a person should be determined "disabled" in their medicated or unmedicated state). In *Sutton*, Justice O'Connor suggests that a well-controlled diabetic would not be covered under the Act—a scenario very similar to Michelle's well-controlled epilepsy. *Sutton*, 119 S. Ct. at 2147.

8. *See generally* Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998). *Bragdon* might provide the basis for an argument that Michelle is disabled for ADA purposes, but language from *Sutton* is problematic in this regard. *Sutton*, 119 S. Ct. at 2146-47.

under the Supreme Court's interpretation, she is not currently disabled, her employer could discriminate against her in regard to promotions and other benefits of employment because she is epileptic unless she can prove she was "regarded as"[9] disabled; a task also complicated by the Court's decisions in *Sutton* and *Murphy*.[10]

This is an odd result, as a primary motivating force underlying the employment provisions in Title I of the ADA was the prevention of employment discrimination based on unfounded stereotypes of disabilities and disabled individuals.[11] Yet, the ADA's definition of disability under the Court's approach does not necessarily cover individuals with well-controlled epilepsy, asthma, diabetes, or other conditions that are treatable with medication. This issue is further compounded by aspects of the Court's approach that may make it harder for some individuals to be covered under the ADA's provision protecting those "regarded as" having a disability.[12]

By removing individuals from the ADA's coverage in answering the threshold question of whether they are disabled, the Court denies them ADA protection entirely, thus denying them the opportunity to receive accommodation and even to obtain redress when they are victims of intentional discrimination based on their condition. Even if an accommodation would help avoid problems related to the condition, as in Michele's case, if those problems have not yet occurred and the individual is otherwise well-controlled by medication, prosthetics, etc., that individual is not disabled under the Court's analysis, and thus can not get to the issue of reasonable accommodation under the Act.[13] And, as the Court also made it less likely that such individuals will meet the "regarded as" having a disability standard, even an employer's use of broad-based stereotypes may not be availing to such individuals.[14] This "one-two

---

9. 42 U.S.C. § 12102(2)(C). A person is "regarded as" having a disability if "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 119 S. Ct. at 2149-50. Essentially, the covered entity imposes its misperceptions onto the individual. *See id.*

10. *See infra* Parts I.A. & I.B. (analyzing the Court's decisions in *Sutton* and *Murphy*).

11. *See* 42 U.S.C. § 12101(a)(7); *see generally* Robert L. Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 415-40 (1991) (outlining the origins of the ADA).

12. *See Sutton*, 119 S. Ct. at 2149-52 (holding that in order to prove that they were regarded as substantially limited in the major life activity of working, plaintiffs needed to show that they were regarded as unable to work in a broad class of jobs); *Murphy*, 119 S. Ct. at 2137-39 (finding that plaintiff "has failed to show that he is regarded as unable to perform a class of jobs" and thus that he had not established that he is "regarded as substantially limited in the major life activity of working." *Id.* at 2139).

13. *See Sutton*, 119 S. Ct. at 2146-47. Of course, if the medication only partially controlled the effects of the disability or has side effects, and as a result the individual still has an impairment that substantially limits a major life activity, that individual would be covered under the Court's approach. *See id.* at 2149.

14. *See infra* Part II.B. (discussing the "regarded as" provision under the ADA).

punch" effectively removes many employees with disabilities from coverage under the ADA, and may actually protect employers who discriminate based on unfounded stereotypes, misconceptions, or outright animus.[15]

All of this might be legally plausible if the text of the ADA, agency interpretations, legislative history, or ordinary methods of statutory construction supported it. Strikingly—while the Court argues that the text is clear on the subject—the interpretations of all three agencies charged with implementing the ADA,[16] and the seemingly clear intent of Congress embodied in the legislative history,[17] are diametrically opposed to the Court's allegedly obvious interpretation.[18] In addition, most of the courts that have interpreted the ADA on this issue,[19] and the dissenting

---

15. *See Sutton*, 119 S. Ct. at 2159 (Stevens, J., dissenting).

16. *See* 29 C.F.R. pt. 1630 app. § 1630.2(j) (1999) (Equal Employment Opportunity Commission stating 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 . . . ."); 28 C.F.R. pt. 35 app. A § 35.104 (1999) (Department of Justice stating that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures . . . ."); 49 C.F.R. § 37.3 (1999) (Department of Transportation: a disability is "a physical or mental impairment that substantially limits one or more of the major life activities of an individual . . . .").

17. *See* H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (stating "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures . . . ."); H.R. REP. NO. 101-485(III), at 28-29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450-51 (stating "[t]he impairment should be assessed without considering whether mitigating measures . . . would result in a less-than-substantial limitation."); S. REP. NO. 101-116, at 23 (1989) (stating "whether a person has a disability should be assessed without regard to the availability of mitigating measures. . . ."). *See also Sutton*, 119 S. Ct. at 2154-55 (Stevens, J., dissenting).

18. In fact, the agency interpretations and legislative history mandate an approach opposite to that of the Court in regard to the analysis of mitigating measures in disability determinations. *See supra* notes 16-17.

19. *See* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 187 (3d Cir. 1999) (explaining that a determination of disabilities is made by evaluating the effect a person's impairment has on a major life activity without considering mitigating measures); Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998), *cert. granted and judgment vacated*, 119 S. Ct. 2388 (1999) (holding that disabilities must be determined without considering mitigating measures); Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 470-71 (5th Cir. 1998) (holding that serious impairments should be considered in unmitigated state), *cert. granted and judgment vacated*, 119 S. Ct. 2388 (1999); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998) (evaluating a condition without regard to the effects of mitigating measures); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-66 (1st Cir. 1998) (concluding that plaintiff's diabetes should be considered without regard to whether his limitations were ameliorated through medication or other treatment); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (using the ADA and legislative history to support the decision to avoid considering mitigating measures when assessing disability); Gilday v. Mecosta County, 124 F.3d 760, 762-65 (6th Cir. 1997) (citing to the EEOC as a basis for deciding that mitigating measures will not be used for disability determinations); Doane v. Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (holding that mitigating effects will not be considered when determining disability); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996) (holding that the use of mitigating measures shall be considered on a case-by-case basis); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996)

Justices on the Supreme Court,[20] did not interpret it in the way that the *Sutton*, *Murphy*, and *Kirkingburg* majorities did. A significant aspect of this disparity may lie in the Court's presumption that there is an inherent conflict between applying the individualized approach mandated by the ADA and making disability determinations without regard to mitigating measures.[21] This presumption by the Court is directly contradicted by the interpretations of the agencies charged with implementing the Act and the clear intent of Congress.[22] Finally, as will be discussed in greater detail below, in interpreting the Act this way the Court strays from several generally accepted methods of statutory construction for civil rights statutes, and may create confusion regarding deference to agency interpretations.[23]

The Court's approach seems to focus on supporting a particular result, especially given the factually appealing scenarios the Court chose to hear. Unfortunately, the holdings, aside from perhaps *Kirkingburg*, are quite broad and could apply to many situations where the facts are not as appealing.[24] This Article will focus on the trio of cases, and some of the concerns they raise under the ADA and in regard to judicial interpretation. It is essential to note that this Article is not an exhaustive discussion of the ADA, its history, or its social context. Rather, it points out the deep concerns regarding the contradictions raised by the questionable and decontextualized approach applied in the majority opinions in *Sutton*, *Murphy*, and *Kirkingburg*.

Part I of this Article provides a review of the *Sutton*, *Murphy*, and *Kirkingburg* decisions. Part II addresses the connections and conflicts between the Court's interpretation of the definition of "disability" and the legislative history of the ADA, agency interpretations, and prior cases. Part II also discusses the same conflicts concerning the Court's interpretation of the ADA's "regarded as" having a disability provision. Part III examines the Court's novel statutory construction in the trio of cases and compares it with generally applicable methods of statutory construction. Part III also analyzes the Court's approach in light of its previous decisions regarding deference to administrative agency interpretations. Parts II and III demonstrate the apparently result/policy-oriented nature of the Court's approach. Finally, Part IV explores the

---

(stating that EEOC regulations dictate that mitigating measures are not to be considered when determining disability).

20. *Sutton*, 119 S. Ct. at 2152 (Stevens, J., dissenting), 2161 (Breyer, J., dissenting).

21. *See Sutton*, 119 S. Ct. at 2147.

22. *See supra* notes 16-17. *See also Sutton*, 119 S. Ct. at 2153-57 (Stevens, J., dissenting).

23. These issues are discussed *infra* Part III.

24. While the Court suggests flexibility in dicta, the holdings are rather broad. *See, e.g.*, *Sutton*, 119 S. Ct. at 2149. The mitigating measures holding, combined with the other aspects of the Court's interpretation of the term "disability," will exclude many individuals who would have previously been considered disabled under the disability determination threshold.

options remaining for individuals who are no longer "disabled" under the Court's approach in *Sutton*, *Murphy*, and *Kirkingburg*.

I. THE CASES

This Part contains a brief overview of the *Sutton*, *Murphy* and *Kirkingburg* cases. A more thorough discussion of the issues and concerns raised by those cases is contained in Parts II, III, and IV. The purpose of this Section is to provide some context for the later parts of this Article by giving a synopsis of the majority opinion in each of the three cases, as well as introducing the apparent contradictions contained within each decision.

A. Sutton v. United Air Lines, Inc.

Of the three ADA cases decided on June 22, 1999, *Sutton v. United Air Lines, Inc.*[25] may be the most significant because the other two cases rely heavily on it.[26] In *Sutton*, the majority decided that courts must consider corrective and mitigating measures in disability determinations under the ADA.[27] In doing so, it disregarded the holdings of the majority of circuits that have considered the issue,[28] the long-standing interpretations of the three administrative agencies charged with implementing the ADA,[29] and the bulk of the legislative history readily available (including specific language in both the House and Senate Committee Reports which clearly contradict the Court's findings).[30] The Court also held that the petitioners in *Sutton* could not support their claim that the respondent airline "regarded" them as disabled in violation of the ADA.[31] As will be discussed below, the holding on the "regarded as" claim may have farther-reaching ramifications well beyond this set of facts.

---

25. *Sutton*, 119 S. Ct. 2139.

26. *See* Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2137 (1999); Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2169 (1999).

27. *Sutton*, 119 S. Ct. at 2146.

28. *See, e.g.*, Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998) (holding that self-accommodations cannot be considered when determining a disability), *cert. granted and judgment vacated*, 119 S. Ct. 2399 (1999); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998) (holding that disabilities should be determined without reference to mitigating measures); Arnold v. United Parcel Serv., Inc. 136 F.3d 854 (1st Cir. 1998) (holding that plaintiff's diabetes should be considered without regard to whether his limitations were ameliorated through medication or other treatment); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (using the EEOC Interpretative Guidance to decide that mitigating measures will not be considered).

29. *See supra* note 16 and accompanying text; *Sutton*, 119 S. Ct. at 2155-56 (Stevens, J., dissenting).

30. *See supra* note 17 and accompanying text; *Sutton*, 119 S. Ct. at 2154-55 (Stevens, J., dissenting).

31. *Sutton*, at 2149-52.

The petitioners in *Sutton* were twin sisters who applied to United Air Lines for positions as global pilots.[32] Their applications were terminated when the airline realized they each had severe myopia resulting in uncorrected visual acuity of 20/200 or worse.[33] Although they both functioned identically to individuals when wearing their prescription glasses, they did not meet the airline's minimum requirement of 20/100-uncorrected visual acuity.[34] Petitioners filed suit under the ADA, alleging that they were disabled under 42 U.S.C. § 12102(2)(A), which defines "disability" as "a physical or mental impairment that substantially limits one or more . . . major life activities."[35] Petitioners further alleged that the respondent airline impermissibly "regarded" them as disabled under 42 U.S.C. § 12102(2)(C) because the airline found them unable to satisfy the requirements of the job of global pilot even though their impairments were controlled with corrective devices.[36]

The Court essentially used the disability claim in *Sutton* to redefine a major aspect of the definition of "disability" under the Act.[37] According to the reasoning in *Sutton*, in making disability determinations courts must examine claims *in light of* any corrective or mitigating measures.[38] The Court based this aspect of its holding on three grounds. First, the Court noted that "the phrase 'substantially limits'" in the definition of disability is in the present indicative verb form."[39] The Court concluded therefore that the language thus requires a person to be *presently* substantially limited in a major life activity, and that it is inappropriate to determine substantial limitation in regard to whether an impairment "'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken."[40] According to the Court, "[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."[41]

Second, the *Sutton* Court determined that the definition of "disability" requires courts to make disability determinations on an individualized basis.[42] Consequently, the Court concluded that making disability determinations based on an individual's level of impairment in an "uncorrected or unmitigated state runs directly counter to the individualized

32. *See id.* at 2143.
33. *See id.*
34. *See id.*
35. *Id.* at 2143-44.
36. *Id.*
37. *Id.* at 2146-47.
38. *See id.* at 2146.
39. *Id.* at 2146.
40. *Id.* at 2146-47.
41. *Id.*
42. *See id.* at 2147 (citing *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196 (1998); 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998)).

inquiry mandated by the ADA."[43] As a corollary to the Court's view of the individualized analysis, the Court pointed out that in making disability determinations based on an individual's impairment in an unmitigated state "courts and employers could not consider any negative side effects . . . resulting from the use of mitigating measures."[44] The Court presumably believes that this new interpretation will be beneficial to the individual who will now be judged in her corrected state.

Finally, the Court found that because congressional findings "enacted as part of the ADA" refer to "some 43,000,000 Americans" having one or more disabilities, Congress could not have intended the Act to require disability determinations to be made in regard to an individual's unmitigated state, because that would result in a number far greater than the 43,000,000 figure stated in the congressional findings.[45] The Court essentially ignored the legislative history directly relevant to the mitigation issue.[46]

As will be explained in Parts II and III of this Article, each of these points is specious, and is directly contradicted by agency interpretations, legislative history, and numerous lower court interpretations. Ironically, the Court used these same arguments to hold that the Act is clear on its face, and that it is thus unnecessary to examine the legislative history or follow the agency interpretations.[47] This is circular reasoning. The Court made numerous presumptions to support a disputed position it says is clear, and then used that alleged clarity to avoid referring to otherwise important sources that universally contradict the Court's presumptions.[48]

Next, the Court applied its new approach to disability determinations to the life activity of working.[49] Petitioners in *Sutton* based their claim on the major life activity of working, rather than that of seeing.[50] Basing

---

43. *Id.*

44. *Id.*

45. *Id.* at 2147-49.

46. *See id.* at 2154-55 (Stevens, J., dissenting).

47. *See id.* at 2146-49.

48. Justice Stevens' dissent powerfully drives home the discontinuity between the Court's conclusion and the numerous sources that canons of statutory construction suggest should be considered in this case, such as legislative history and agency interpretations. *Id.* at 2152-61 (Stevens, J., dissenting). *See also infra* Part III.A (addressing the issues of statutory construction and deference to administrative agency guidelines in greater depth).

49. *Sutton*, 119 S. Ct. at 2150-52. As will be seen, working is generally considered the "weak link" in the Equal Employment Opportunity Commission's ("EEOC") definitions of life activities.

50. *See id.* at 2150. Petitioners originally claimed a disability under the major life activity of seeing. The District Court held that while petitioners were impaired, the impairment did not substantially limit them in the life activity of seeing. The court stated that petitioners did not actually claim any other restrictions for the life activity of seeing other than the ability to obtain the positions sought, although the court does cite petitioners' allegations that they are impaired in everyday activities such as driving, etc. Sutton v. United Airlines, Inc., CIV.A.96-S-121, 1996 WL 588917, at *3 (D. Colo. Aug. 28, 1996).

The Tenth Circuit agreed that petitioners are impaired, but held that under 42 U.S.C. § 12102(2)(A) of the ADA, whether such impairment rises to the level of a disability depends on whether

their claim on work limited the possibility of relief under the ADA because the EEOC guidelines themselves suggest that claimants resort to this activity only as a last resort, where no other viable claim exists.[51] The Court appeared to latch onto this point to further limit the availability of a disability claim under subsection (A), at least where the claim is made under the "life activity" of working.[52] The Court took advantage of the lower courts' dismissal of petitioners' claimed disability in the major life activity of seeing to avoid any in-depth analysis on this point.[53] The result might have been different had the Court analyzed this argument, but Petitioners' visual condition was still controlled with the use of corrective/mitigating measures. Thus, adopting the Court's reasoning, the petitioners would not likely have prevailed under subsection (A) even under the major life activity of seeing because the condition was mitigated. The Court's approach diminishes the chances of being found disabled under subsection (A) when one has a disorder that responds well to corrective devices, no matter what "life activity" would be affected but for the mitigating measure. The Court clearly implies this in its analysis of the individualized nature of disability determinations.[54]

The best potential recourse left if a "controlled" disability is no longer covered, would be to claim a violation of subsection (C), where the employer must erroneously "regard" the individual as disabled or regard the individual as *still* disabled *despite the controlling measure.* The Court limited claims under subsection (C) that are based on the life activity of "working" by holding that such claims must now be even more specifically drawn to show that the individual is substantially limited to "a class of jobs or a broad range of jobs in various classes" (and ironically used the EEOC guidelines for support).[55] From now on, the applicant/worker will theoretically need to show an employer's unwillingness to hire him/her to perform *any* positions the employer may have, even one which may be below the abilities and/or training of the applicant.[56] A trained secretary with a controlled disability might be denied a

---

petitioners are substantially limited in light of mitigating or corrective measures. Sutton v. United Air Lines, Inc., 130 F.3d 893, 900 (10th Cir. 1997). The court held that petitioners' corrected vision did not limit them in the life activity of seeing, and rejected as an incorrect interpretation petitioners' reliance on the definition of "legal blindness" for purposes of Social Security disability benefits, holding that that definition contemplates corrected vision. *Id.* at 900-10. Yet the Supreme Court stated petitioners do not make the "obvious argument" that they are regarded as having a substantial limitation in the life activity of seeing, only that they are regarded as having a substantial limitation in the life activity of working. *Sutton*, at 2150.

51. *Sutton*, at 2150-51.

52. *Id.* at 2149-50.

53. *Id.* at 2150.

54. *See id.* at 2147.

55. *Sutton*, 119 S. Ct. at 2149-51.

56. As will be seen in Part II this might give employers a way to thwart claims under subsection (C) regardless of the major life activity involved, because the employer can simply claim: "We did not regard plaintiff as impaired in major life activity X, but rather we only considered her impaired as to her specific job."

position based on the employer's "regarding" her as still disabled in some way *for that job*, but if the employer believes she could perform a filing clerk's position it would seem the applicant might not be able to show discrimination under subsection (C).[57]

The Court did not even address whether the employer actually needs to offer another position. The Court based its opinion in great part on the fact that petitioners would meet respondent airline's visual test for other, non-global, pilot positions, but made no mention of whether an employer must offer another position.[58] Indeed, in another example of the Court's murkiness, on the issues, the Court declined to address whether United Air Lines acuity requirements for global pilots, which differ from those for other commercial pilots, has any relevance to the position and therefore to the airline's refusal to hire petitioners. As with the other two cases, the Supreme Court might have upheld the lower court's holding in *Sutton* on the basis that the petitioners were not qualified for the position *even with corrective measures,* assuming United Air Lines could justify those requirements. The Court, however, never reached this issue.

As noted above, the Court held that whether a person is disabled is an individualized inquiry, which includes consideration of the positive or negative effects on the individual from the measures used to control the disability.[59] At first blush this would seem a logical, perhaps even benevolent, interpretation of the Act. However, the Court applies this reasoning, in all three cases, in a manner which would appear to penalize individuals who are able to control their disabilities at least to some extent, but who may be subject to unfounded stereotypes or need workplace accommodation to effectuate total, or even further, control. The Court, in trying to explain its position, uses a form of reasoning that ranges from unclear to outright confusing, and seldom comes close to legitimizing its holding.

For example, in its analysis of the individualized nature of disability determinations, the Court states the following:

> For instance, under [the view that disability determinations should be made based on an individual's unmitigated state], 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 approach would create a system in which persons often must be treated as members of a group of peo-

57. *Id.* at 2151.
58. *See id.* at 2150-51.
59. *See id.* at 2146-47.

> ple with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.[60]

Prior to *Sutton*, in most jurisdictions, a diabetic would have met the definition of disabled; the level of control was used to determine whether she was a "qualified individual with a disability." Thus, poorly and well-controlled individuals alike were protected from stereotype-based discrimination. The Court's approach, however, essentially disadvantages the well-controlled individual by removing her from coverage, even if an employer discriminates based on unfounded perceptions or generalizations about the disability, and through its analysis of the "regarded as" clause the Court also limited the situations in which subsection (C) will be an effective alternative.[61] The broader implications of this will be discussed in greater detail in Part II of this Article.

First though, let us consider another all too plausible application of the Court's decision here, this time based on an application of subsection (C):

Jason suffers from a moderate form of schizophrenia. He responds well to medication, and has held a number of low-level clerking positions, receiving positive references. He applied for the position of customer service representative in a propane gas company, which pays an advertised rate of $8/hour. The position would require Jason to deal with both new and present customers in person at the service counter as they come in to apply for service or inquire about problems with their accounts. Jason would be responsible for taking the correct information from them, informing them of the company's services and policies, and referring any problems to the appropriate company personnel. The job description corresponds to those duties Jason has successfully fulfilled in the past.

The hiring manager is aware of Jason's condition, and she is concerned that Jason will not be able to handle the pressure of the service counter, which can become extremely busy during the winter months, with customers frequently angry over service problems. She offers Jason a position in the stock room instead, which pays minimum wage.

Before *Sutton*, Jason would likely have been able to bring a claim showing: 1) that he is disabled under the ADA, because he has a disability which substantially limits one or more life activities, including, but not necessarily limited to, that of working; and, 2) that the potential employer "regards" him as disabled despite the fact that he can show a work history which supports his ability to do the customer service job. Now, however, it is questionable whether he could do either. Under subsection (A), if his schizophrenia is controlled by medication, it is unlikely that a court would find him substantially limited in a major life activity *at this*

---

60. *Id.* at 2147.

61. *Id.* at 2158-60 (Stevens, J., dissenting).

time.[62] He may also be unable to show discrimination based on subsection (C) because the employer found he could do another job in the "broad range" of the employer's jobs, albeit at a lower level of responsibility and pay. Although Jason has been precluded from a position based on nothing more than his disability, the Court's decision in *Sutton* and its progeny could well leave him without recourse. This is an all too likely result of the Court's murky approach.

When you add to the mix the Court's justifications for disregarding settled administrative law, and the legislative history relevant here, one has to wonder whether *Sutton* will prove to be the *Lopez*[63] of administrative law, with the lower courts left never quite sure how, when, or if, *Sutton* applies. Whether the Court will acknowledge this and seek to clarify its holding—or whether Congress will do it for them—remains to be seen. The ramifications for administrative law will be discussed in Part III of this article.

B. Murphy v. United Parcel Service, Inc.

In *Murphy*, the Court held that a mechanic with chronic and severe hypertension whose job required him to drive commercial vehicles was neither disabled nor "regarded as" disabled under the ADA.[64] The mechanic erroneously received Department of Transportation ("DOT") health certification although he did not meet the requirements for those who drive commercial vehicles.[65] In the time between the erroneous grant of certification and the discovery that he did not meet the certification requirements, Murphy apparently performed his job without incident.[66] Upon discovering the error, however, United Parcel Service, Inc. ("UPS") terminated Murphy's employment because he did not meet the DOT requirements.[67] The Court primarily relied upon the reasoning from *Sutton* in holding that Murphy was not disabled for ADA purposes, but expanded on the *Sutton* reasoning in addressing the "regarded as" disabled issue.[68]

Significantly, the case could have been decided on the "qualified individual with a disability" issue, particularly in light of the contempora-

---

62. *See Sutton*, 119 S. Ct. at 2146-47.

63. U.S. v. Lopez, 514 U.S. 549 (1995) (effectively reversing a half-century long trend of giving great deference to Congress in Commerce Clause cases by holding that the Gun-Free School Zones Act exceeded Congress' Commerce Clause authority). Just as *Lopez* reversed a half-century long trend of giving great deference to Congress on Commerce Clause cases, *Sutton* effectively overturns years of precedent giving deference to administrative agency decisions—without actually saying so. We are left to wonder how the lower courts will deal with this implicit change.

64. Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2136 (1999).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 2137-38; *See supra* Part I.A. (summarizing the *Sutton* opinion).

neous decision in *Kirkingburg*,[69] but the Court eliminated Murphy's claim at the threshold issue of whether he was covered by the ADA at all. The reasoning used to reach this result involved presumptions and inconsistencies in logic that will be discussed in greater depth in Parts II and III. The remainder of this subsection will simply provide an overview of the decision in *Murphy*.

In finding that Mr. Murphy was not disabled for ADA purposes, the Court explained that the holding in *Sutton* resolved the issue because "when medicated, petitioner's high blood pressure does not substantially limit him in any major life activity."[70] Thus, as the Court did in *Sutton*, the *Murphy* Court seemingly eliminated an entire class of individuals from ADA protection without ever reaching the question of whether such individuals are "qualified individuals with disabilities" or whether they need reasonable accommodation.[71] While this might be less troubling to some given the facts in *Murphy*, which involved DOT certification requirements, the holding is not so limited.[72]

Still, there is one significant limitation in the decision:

> 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. Instead, the question granted was limited to whether, under the ADA, the determination of whether an individual's impairment "substantially limits" one or more major life activities should be made without consideration of mitigating measures.[73]

As will be discussed later in this Article, when considered in light of aspects of the Court's holding in *Bragdon v. Abbott*,[74] this language could bring more individuals within the definition of "disability" under the ADA.

Given the holding in *Sutton*, however, many individuals with treatable and well-controlled chronic hypertension, epilepsy, diabetes, myopia, and other conditions, would not be covered under the ADA as a threshold matter. Thus, this limiting language from *Murphy* would not be helpful to Michele in the example above until the lights (and the failure to provide accommodation) actually caused her to have a seizure.[75] Moreover, that language would not be helpful to an individual with such well-mitigated conditions even where an employer acts on inaccurate

---

69. *See infra* Part I.C. (summarizing the *Kirkingburg* opinion).

70. *Id.*

71. *Compare Sutton*, 119 S. Ct. at 2143 (holding that courts should make disability determinations with reference to mitigating measures) *with Murphy*, 119 S. Ct. at 2136 (explaining that, with medication, petitioner is not substantially limited in one or more major life activities).

72. *Murphy*, 119 S. Ct. at 2137.

73. *Id.* at 2137.

74. 524 U.S. 624, 118 S. Ct. 2196 (1998).

75. *See Sutton*, 119 S. Ct. at 2146.

stereotypes regarding a disability, because such individuals are no longer considered disabled, and thus can not challenge discriminatory conduct unless they can support a claim that the employer "regarded" them as disabled or discriminated based on a record of disability. This is where *Murphy* becomes especially problematic, because it also limits the opportunity for individuals like Mr. Murphy and Michele to prove they are "regarded as" disabled by their employers, and thus limits the best alternative means for gaining coverage under the ADA.[76]

In addressing the "regarded as" issue, the *Murphy* Court again relied on the reasoning from *Sutton*. Significantly, as did the petitioners in *Sutton*, Mr. Murphy alleged that working was the major life activity in which he was limited.[77] The Court held that in order to meet the "regarded as" element in an ADA claim, an employee must show that her employer regarded her as having an impairment that substantially limits a major life activity.[78] If an employee alleges that an employer "regarded" her as substantially limited in the major life activity of working, the employee must demonstrate that she was regarded as "being precluded from more than one job."[79] The Court assumed, without holding, "that the EEOC regulations regarding a disability determination are valid."[80] Those guidelines (which were also a significant focus in *Sutton*) state that to be substantially limited in the major life activity of working, an employee must be "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."[81] In addition, the *Murphy* majority states that courts should consider "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area reasonably accessible to the individual, from which the individual is also disqualified."[82]

Applying this definition to Mr. Murphy's claim, the Supreme Court held that UPS simply regarded Mr. Murphy as "unable to meet the DOT regulations," and thus as precluded only from his particular job because he was able to perform other jobs that did not require him to drive commercial vehicles.[83] Thus, according to the Court, UPS did not preclude Mr. Murphy from working in a "class of jobs"; a requirement that a plaintiff must meet in order to establish that he or she is substantially limited in the major life activity of working.[84] This was fatal to Mr. Murphy's "regarded as" claim, as it was to the claims in *Sutton*. Still, as in

76. *Murphy*, 119 S. Ct. at 2137.
77. *Id.*
78. *Id.*
79. *Id.* at 2138; *Sutton*, 119 S. Ct. at 2151.
80. *Murphy*, 119 S. Ct. at 2138.
81. *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1998)).
82. *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(ii)(B) (1998)).
83. *Murphy*, 119 S. Ct. at 2138-39.
84. *Id.* at 2139.

Sutton, the Court only considered the major life activity of working. Therefore, it remains to be seen how the Court's approach would apply to a claim where another life activity is at issue. There are, however, two significant points to be made in this regard.

First, while the Court has only considered the major life activity of working, and has acknowledged the unique hurdles a complainant must overcome to demonstrate an impairment in regard to that major life activity, its holdings in *Sutton* and *Murphy* have ramifications for all claims based on the "regarded as" element (as well as claims based on the disability element). This is because in analyzing the "regarded as" claims in those cases, the Court required the complainant to demonstrate that the employer regarded him or her as substantially impaired in a specific major life activity or activities.[85] Thus, an employer who does not understand a given impairment well enough to know what life activities might be affected, or an employer with an aversion or animus toward those with an impairment, could discriminate without "regarding" an employee or applicant as substantially limited in any major life activity other than working at the particular job the individual seeks or holds. As a result, unless an employer regards an employee's impairment as substantially limiting in regard to a specific life activity or activities, the employer can discriminate based merely on the perception that the employee cannot perform a particular job. That is exactly what occurred in *Sutton* and *Murphy*.[86]

Second, the Court's focus on working might actually limit its holding, and provide a means by which some employees with impairments that substantially limit another major life activity, but who are not so impaired with mitigating measures, can successfully bring a claim when their employers treat them as though they are so impaired. As noted above, the *Sutton* Court hinted that it might have responded differently to a claim based on the major life activity of seeing.[87] This possibility will be discussed in greater depth in Parts II and IV of this Article. As also discussed in those Parts, the *Sutton* plaintiffs would probably have lost at the next level of inquiry—whether they were qualified individuals with disabilities. That is the appropriate issue on which to consider these cases, but the Court eliminated the claims at the threshold issue of whether petitioners were covered under the ADA. For individuals like Michele, Jason, and Mr. Murphy, this approach could make it exceedingly hard to ever get to the discrimination issue.

C. Albertsons, Inc. v. Kirkingburg

Kirkingburg involved an employee who lost his job as a truck driver for Albertsons, Inc. because his visual acuity did not meet DOT require-

85. *Id.* at 2137; *Sutton*, 119 S. Ct. at 2149-50.
86. *Murphy*, 119 S. Ct. at 2139; *Sutton*, 119 S. Ct. at 2151-52.
87. *Sutton*, 119 S. Ct. at 2150.

ments.[88] He suffered from a condition called amblyopia that resulted in 20/200 vision in his left eye, which effectively left him with monocular vision.[89] Significantly, the DOT had implemented a waiver program, and Mr. Kirkingburg ultimately received a waiver. Albertsons nevertheless refused to rehire him because the waiver program was experimental and Kirkingburg did not meet the basic DOT vision requirements absent the waiver.[90]

The Court applied the reasoning from *Sutton*, and held that Mr. Kirkingburg was not disabled under 42 U.S.C. § 12102(2)(A)[91] because he was not substantially limited in a major life activity given his innate ability to compensate for the poor vision in his impaired eye through natural adjustments.[92] The majority reinforced the *Sutton* holding that courts should make disability determinations under the ADA on an individualized basis in light of any mitigating measures.[93] In determining that Mr. Kirkingburg was not disabled, the Court held that whether a mitigating measure is artificial, such as medication or prosthetics, or naturally created, "consciously or not, with the body's own systems," is irrelevant to the importance of the mitigating measure in the disability determination.[94]

Another significant aspect of the case arose from the definition of "significantly restricts" in the EEOC interpretation of the substantial limitation element of claims of disability under 42 U.S.C. § 12102(2)(A).[95] The Ninth Circuit Court of Appeals had held that Mr. Kirkingburg's impairment substantially limited him in regard to the major life activity of seeing, because Mr. Kirkingburg "demonstrated that 'the manner in which he sees differs significantly from the manner in which most people see.' "[96] The Supreme Court held, however, that this was an improper interpretation of the substantial limitation element as defined in the EEOC regulation relied upon by the Ninth Circuit.[97]

The EEOC regulation defines "substantially limits" to require an impairment to significantly restrict the manner in which an individual can perform a major life activity as compared to the manner in "which the average person in the general population can perform that same major life activity."[98] The Court held that the Ninth Circuit erred in equating

88. Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2165-66 (1999).

89. *Id.* at 2164-66 (describing Mr. Kirkingburg's "monocular vision" as "an uncorrectable condition that leaves him with 20/200 vision in his left eye").

90. *Id.* at 2166.

91. *Id.* at 2168-69.

92. *Id.*

93. *Id.* at 2169.

94. *Id.*

95. *Id.* at 2168.

96. *Id.* at 2167 (quoting Kirkingburg v. Albertsons, Inc., 143 F.3d 1228, 1232 (9th Cir. 1998)).

97. *Id.* at 2168.

98. 29 C.F.R. § 1630.2(j)(ii) (1998).

"significant difference" with "significant restriction," because doing so improperly limited the ADA's "requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities."[99] Thus, as interpreted by the Court, a significant difference between the way an impaired individual can perform a major life activity and the way most people can perform the same activity is not sufficient to establish a substantial limitation in that major life activity.[100]

The Court also held that the Ninth Circuit erred in not assessing Mr. Kirkingburg's disability on an individualized basis as outlined in the holding in *Sutton*.[101] Nevertheless, the *Kirkingburg* Court is arguably more generous in its interpretation of this issue. The Court stated: "While some impairments may invariably cause a substantial limitation of a major life activity we cannot say monocularity does."[102] Although only dicta, this statement implies a less rigid approach concerning some impairments which might be considered virtually per se disabilities. Given Justice O'Connor's opinions for the Court in *Sutton* and *Murphy*, however, it remains to be seen if this possible flexibility suggested in Justice Souter's opinion for the *Kirkingburg* Court will come to fruition. Still, almost immediately following this language, the opinion suggests that many monocular individuals will meet the definition of disability so long as they can prove that their impairment is substantially limiting.[103] Further, the Court suggests that people with monocular vision will "ordinarily" be considered disabled.[104]

This could prove significant because the *Sutton* and *Murphy* Courts addressed only the major life activity of working. This language implies that it may be substantially easier to satisfy the Court's new approach to disability determinations when a life activity other than working is alleged. Of course, even then, if mitigating measures make the impairment less than substantially limiting, as in Michele's case, this language adds nothing. If this language were applied to claims based on being "regarded as" disabled, an issue not before the Court in *Kirkingburg*,[105] it might be even more significant. As for Mr. Kirkingburg, the Court held he did not make the proper showing that the impairment was substantially limiting in his case.[106]

Ironically, the main issue in *Kirkingburg* was not whether Mr. Kirkingburg was disabled, but whether he was a "qualified individual with a

---

99. *Kirkingburg*, 119 S. Ct. at 2168.
100. *See id.*
101. *See id.* at 2169.
102. *Id.* (citation omitted).
103. *Id.*
104. *Id.*
105. *Kirkingburg*, 119 S. Ct. at 2167 n.9.
106. *Id.* at 2169.

disability," because he did not meet the DOT requirements.[107] It is quite interesting, in light of the treatment of the agency regulations in *Sutton* and *Murphy*, that the Court in *Kirkingburg* is quite deferential to the DOT regulations.[108] Nonetheless, there is nothing new or surprising about the holding that when an individual does not meet government safety requirements for a specific job, that individual is not qualified for the job.

If, for example, the DOT required uncorrected visual acuity of at least 20/100 in each eye for commercial drivers with no exceptions, anyone who did not meet that requirement would not be qualified to be a commercial driver. The employer could not accommodate the employee/applicant, because even if the employer believed there to be a safe accommodation, the employer would still be in violation of the government regulation by allowing the person to drive a commercial vehicle.[109] The DOT waiver program made *Kirkingburg* a tougher case.

The Court held that the employer need not hire a driver based on the fact that he or she could receive a waiver under the DOT's new program. It reasoned that the employer was entitled to rely on the clear mandate of the safety regulation, regardless of the availability of a waiver under an explicitly experimental program.[110] The waiver program, the Court stated, "did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety" to the same extent as the general visual acuity standards in the DOT regulation.[111] Nor did the waiver program modify the substance of the regulation; rather it "was simply an experiment with safety . . . whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards."[112] Thus, it would be inappropriate to force Albertsons to hire Mr. Kirkingburg simply because he received an experimental waiver of an otherwise binding safety regulation.[113]

This aspect of the case is less problematic for purposes of this Article because it is factually limited to cases involving government safety regulations.[114] Moreover, as will be discussed in Part II of this Article, by addressing whether an employee or applicant is a "qualified individual with a disability," the Court is addressing the appropriate issues at the appropriate stage of the ADA analysis. It was in analyzing the threshold disability determination that the *Kirkingburg* Court, as well as the *Sutton* and *Murphy* Courts, erred by coming to a conclusion contrary to the leg-

107. *Id.* at 2169-70.
108. *Id.* at 2169-70 n.13; *see infra* Part III.
109. *Kirkingburg*, 119 S. Ct. at 2171-72.
110. *Id.* at 2171-74.
111. *Id.* at 2173.
112. *Id.* at 2174.
113. *Id.*
114. *See id.* at 2070-74.

islative intent of the ADA,[115] the interpretations of the agencies charged with implementing the Act, and most of the courts that have analyzed the issue.[116]

II. LET'S PRETEND: AN INTERPRETIVE MORASS

As the brief overview in Part I suggests, the three cases exhibit an almost surreal disregard for the legislative history, agency interpretations, and context of the ADA. Justice Stevens' dissent in *Sutton* does an excellent job of pointing this out.[117] Many of those involved in the process of drafting, passing, interpreting, and enforcing the language in the ADA came to the exact opposite conclusion from that of the Court. Given that fact, the authors of this Article were somewhat stunned by the Court's holding that "by its terms, the ADA cannot be read" to allow courts to ignore mitigating measures in making their disability determinations; thereby implying that the "plain meaning" of the Act dictated the outcomes in *Sutton*, *Murphy*, and *Kirkingburg*.[118] It would seem that what was "plain" to the Court was not so evident to the members of Congress who passed the ADA, the agencies charged by Congress to implement it, and most of the courts to consider the issue.

A. Defining "Disability" Under the ADA

The first point of concern arising from the *Sutton*, *Murphy*, and *Kirkingburg* cases arises from the definition of "disability" in the ADA. Specifically, it stems from whether courts should make disability determinations with or without regard to mitigating measures such as medications and medical devices. As the above hypotheticals involving Michele and Jason demonstrate, the answer to this question can have significant ramifications for both employers and employees.

The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[119] The focus in this section will be on part (A) of the definition. As explained above, the Court held that in making disability determinations courts should consider the effects of any mitigating measures on the individual's impairment.[120] In *Sutton*, the Court essentially held that the plain meaning of the statutory language

---

115. *See supra* note 17 and accompanying text.

116. *See supra* notes 16-19 and accompanying text.

117. *Sutton*, 119 S. Ct. at 2152-61 (Stevens, J., dissenting). In fact, the dissenting opinions of Justices Stevens and Breyer raise several of the concerns discussed in this Article. *Id.*; *Id.* at 2161-62 (Breyer, J., dissenting).

118. *Id.* at 2146-47.

119. 42 U.S.C. § 12102(2) (1994).

120. *Sutton*, 119 S. Ct. at 2145-46; Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2137 (1999); Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2169 (1999).

supported this result.[121] As noted in Part I.A. of this Article, there were three primary bases for this conclusion: 1) the grammatical form of the phrase "substantially limits" requires that an impairment "presently" substantially limit an individual; 2) the statutory language refers to "individuals with disabilities," rather than undifferentiated disability categories; and, 3) legislative findings in the Act refer to 43,000,000 individuals with disabilities, yet if all persons impaired in a major life activity in their un-medicated state were included, a dramatically larger number of people would be within the Act's purview.[122] Ironically, the Court, which dismisses the need to explore the legislative history regarding the mitigating measures issue because of the supposed clarity of the statutory text, uses the legislative history to support its third basis for finding that text to be so clear.[123]

If, as the Court suggests, these three bases really do mean that "by its terms, the ADA cannot be read" to allow courts to make disability determinations without regard to mitigating measures,[124] the Court's conclusions on this issue would seem correct, perhaps even inescapable. Thus, a closer examination of the Court's bases for this conclusion is essential to determining whether the Act's language really does mandate the conclusion the Court reaches. When examined, each of the Court's bases proves tenuous or specious. It is not that the Court's reasoning is not plausible under some reading of the Act, but that the Court's reading is not the only, or even the best, reading of the Act.

As will be discussed further in Part III of this Article, under such circumstances the Court ordinarily looks beyond the text of the statute, to sources that may clarify the meaning of the statutory language.[125] However, in this case the Court cannot afford to do that because such sources confirm that the Court's interpretation of the statutory language is weak.[126] Thus, by pretending the statutory language mandates its conclusion, and does not permit the alternative, the Court is able to avoid considering equally plausible alternative interpretations.

1) The Present Indicative Verb Form

The first basis for the Court's conclusion—that the grammatical form of the definition of disability requires that an impairment "presently" substantially limit an individual, and thus mandates consideration of mitigating measures—is not the most logical reading of the Act especially when its purpose, structure, and legislative history are

121. *Sutton*, 119 S. Ct. at 2146.
122. *Id.* at 2146-49.
123. *Id.* at 2149.
124. *Id.* at 2146.
125. *See infra* notes 214-18 and accompanying text.
126. *See generally supra* notes 16-20; *Sutton*, 119 S. Ct. at 2154-61 (Stevens, J., dissenting).

considered.[127] The statutory language the Court relies upon here comes from 42 U.S.C § 12102(2)(A), which defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[128] Based on this definition, the Court holds that:

> Because the phrase "substantially limits" appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. 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.[129]

Yet there is no inconsistency between the statutory definition of disability and the making of disability determinations without regard to mitigating measures. The fact that Congress used the term "substantially limits" in the statute, rather than another form such as "substantially limited," does not support the Court's interpretation any more than it supports the opposite interpretation. A basic grammatical analysis demonstrates this. Both of the following would seem perfectly appropriate: 1) a disability is "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual despite the use of mitigating measures (essentially the Court's view); 2) a disability is "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual without regard to mitigating measures (essentially the view expressed in the legislative history and administrative agency interpretations).

The use of the present indicative verb form says nothing about whether courts should consider the individual in a mitigated or unmitigated state. The implication of the Court's interpretation is that the verb form implies determinations should be made in regard to an individual's *present* condition, and therefore must refer to the mitigated state.[130] While even this presumption seems highly questionable as a structural matter, it still does not support the Court's conclusion. An individual's disability could "presently" be evaluated in regard to his or her unmitigated state (in many instances a doctor could easily assess the person's condition in an unmitigated state and, in many cases, readily available medical information would make such an assessment obvious even to an untrained observer). After all, as the term would suggest, "mitigation" of the un-

127. *Sutton*, 119 S. Ct. at 2154 (Stevens, J., dissenting).
128. 42 U.S.C. § 12102(2)(A) (1994); *See Sutton*, 119 S. Ct. at 2146.
129. *Sutton*, 119 S. Ct. at 2146.
130. *Id.*

derlying condition (as opposed to curing) means that the underlying condition still exists in a clinical state. The Court presumes that requiring an analysis of whether the person "might," "could," or "would," be disabled in an unmitigated state necessitates a hypothetical analysis that is inconsistent with the definition.[131] As the two grammatical examples above demonstrate the Court is hanging a heavy presumption on a very thin thread.

Moreover, the Court's interpretation goes against an obvious structural interpretation based on the definition of "disability" as a whole. Subsection (B) of the definition specifically covers those who have a "record of . . . an impairment" that substantially limits a major life activity or activities.[132] This is a specific acknowledgment that those whose impairment is not a "present" impairment, are covered by the Act.[133] Justice Stevens wrote in his dissent in *Sutton*:

> Subsection (B) of the definition, in fact, sheds a revelatory light on the question whether Congress was concerned only about the corrected or mitigated status of a person's impairment. 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 been completely cured. Still, if I correctly understand the Court's opinion, 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.
>
> The three prongs of the statute, rather, are most plausibly read together not to inquire into whether a person is currently "functionally" limited in a major life activity, but only into the existence of an impairment—present or past—that substantially limits, or did so limit, the individual before amelioration. This reading avoids the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations.[134]

Moreover, subsection (B) of the definition uses the terminology "a record of *such* an impairment."[135] The word "such" refers back to subsection (A) and its present indicative verb form, despite the fact that subsection (B) refers to past conditions (of course, the Court might respond that *the*

---

131. *Id.*
132. 42 U.S.C. § 12102(2)(B) (1994); *See Sutton* at 2154 (Stevens, J., dissenting).
133. 42 U.S.C. § 12102(2)(B) (1994).
134. *Sutton*, 119 S. Ct. at 2154 (Stevens, J., dissenting) (citations omitted).
135. 42 U.S.C. § 12102(2)(B) (1994).

record addressed in subsection (B) must by definition "presently" exist).[136] Because the Court's interpretation is not the only possible interpretation of the statutory language, the legislative history would be helpful in interpreting the term, and canons of statutory construction would support looking at that history here.[137] Of course, such analysis would suggest that the Court's interpretation is incorrect.

2) The Individualized Approach

The second basis for the Court's conclusion is quite important given the ADA's individualized approach and concern about disability-based stereotypes. There is a great deal of merit to the Court's approach of assessing claims on an individualized basis. After all, no one should judge disabled individuals based on presumed traits associated with their disability. For example, it would be wrong to treat a well-controlled diabetic like a poorly controlled diabetic in most situations. Yet, as will be explained below, the Court's reasoning turns the purpose of this individualized approach on its head by excluding from coverage well-controlled individuals and others whose impairments can be mitigated.

Ironically, the structure and text of the Act make it unlikely that the Court's approach is in keeping with the ADA, and the legislative history confirms this.[138] There is no question that the ADA requires consideration of mitigating measures to determine whether an individual is a "qualified individual with a disability," which is the next level of analysis in an ADA claim.[139] To be "qualified" under Title I of the ADA, an individual must be able to perform the essential functions of the job with or without reasonable accommodation.[140] At this level of analysis, mitigating measures such as medications and devices are clearly relevant because they go to whether an individual can perform the essential functions of the job and to what accommodation may be necessary, if any.[141] In fact, this is the level of analysis where the Court's concept of the "individualized" approach under the ADA is most relevant.[142]

If, however, mitigating measures are considered in the initial disability determination the result is the removal from ADA coverage of disabled individuals who are capable of performing the essential functions of their jobs with little or no accommodation. Such individuals may still be the victims of stereotyping and employment action based on such

---

136. *Id.*

137. *Sutton*, 119 S. Ct. at 2153-54 (Stevens, J., dissenting).

138. *See supra* note 17 and accompanying text.

139. *See* 42 U.S.C. § 12112 (1994).

140. 42 U.S.C. § 12111(8) (1994).

141. Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983) (holding that the use of a hearing aid mitigated an impairment so that a person could perform essential job functions).

142. Justice Stevens suggests exactly this point in his *Sutton* dissent. *Sutton*, 119 S. Ct. at 2156 (Stevens, J., dissenting).

stereotypes, evils Congress designed the Act to combat.[143] These individuals would thus be removed from coverage before they ever get a chance to prove they were victims of discrimination. This is exactly the consequence of the *Sutton* decision.[144] Moreover, individuals like Michele, from the hypothetical above, who are not disabled under the Court's definition, may need an accommodation to avoid problems related to their disabilities. Yet, under the Court's approach they are not entitled to accommodation because they is not disabled.[145]

The Court presumed that an individualized assessment must be made in light of any mitigating measures. The Court reasoned that in an unmitigated state, the way one might respond to mitigating measures is unknown.[146] The Court also implied that many disabilities affect individuals identically in an unmitigated state; essentially bringing everyone with a particular disability, regardless of the mitigated level of impairment, within the Act's coverage.[147] The legislative history and agency interpretations seem to indicate this is exactly what Congress intended by enacting the ADA.[148]

Of course, this makes perfect sense because it is equally clear that the analysis of whether someone is "qualified" will address the Court's concerns. In fact, an individual whose impairment is completely mitigated is unlikely to ask for an accommodation, because she can perform the essential functions of her job without accommodation. Consequently, this individual will most likely raise ADA claims when subjected to disparate treatment or a hostile work environment based on her disability (or perceptions of that disability).[149] There is no question that one of the purposes of the ADA is to prevent such stereotype based disparate treatment,[150] but the Court's approach effectively removes from ADA coverage many of those intended to be protected from such conduct.[151] Even a cursory examination of the legislative history and agency interpretations demonstrates that the ADA is meant to protect individuals against disparate treatment even if their disabilities can be successfully and effectively treated through mitigating measures, again rendering the Court's hold-

---

143. 42 U.S.C. § 12101(a)(7) (1994); Burgdorf, *supra* note 11 at 436, 452.

144. *Sutton*, 119 S. Ct. at 2146.

145. *Id.*

146. *Id.* at 2147.

147. *Id.*

148. *See supra* notes 16-17 and accompanying text.

149. Disparate treatment discrimination violates the ADA as it did the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1994)); 42 U.S.C. § 12112 (1994). Hostile work environment is also actionable under the ADA, but raises some unique questions not raised under Title VII. *See* Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action For Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475, 1488-89 (1994).

150. 42 U.S.C. § 12101, 12112 (1994).

151. *See supra* notes 41-45 and accompanying text.

ings unsupportable.[152] The alternative means of bringing such individuals within the Act's protection, the "regarded as" disabled test, will be discussed in Parts II.B. and IV below.

The majority opinions in *Sutton*, *Murphy*, and *Kirkingburg* foster this problem by relying on the supposed clarity of the statutory language.[153] The claimed clarity enabled the Court to avoid analyzing and applying the legislative history and agency regulations. As was pointed out above, however, while it may be clear that courts must consider mitigating measures in regard to the "qualified" analysis, there is no basis to presume that even under the individualized approach of the ADA courts must consider such measures at the initial disability determination stage. It is just as consistent to consider whether an employee/applicant is "disabled" in her un-medicated state—and then to consider whether she is "a qualified individual with a disability" based on his ability to perform the job in a medicated state. In fact, this is far *more* consistent with the Act's focus on remedying and preventing adverse employment decisions made on the basis of stereotypes.[154] It is hard to believe Congress intended the ADA to preclude discrimination rooted in stereotypes that have evolved based on the unmitigated characteristics of a given disability, and yet excluded from coverage those subjected to job actions based on such stereotypes if they are able to mitigate the impact of their impairment.

When, as the authors of this Article suggest is the case here, the "plain language" of the statute does not "plainly" support an interpretation of that statute, courts, including the Supreme Court, often look to agency interpretations and legislative history for guidance on how best to interpret the law.[155] As Justice Stevens points out in his dissent in *Sutton*, neither the agency interpretations nor the legislative history support the Court's interpretation.[156] The EEOC, DOJ, and DOT—the three agencies charged with implementing the Act—have each issued guidelines that state that disability determinations are to be made without regard to mitigating measures.[157] While agency guidelines do not bind the Court, they are generally given a great deal of deference, even when only one agency's interpretation is relevant to an issue.[158] In fact, the Court specifically stated this general rule in *Bragdon v. Abbott*, a recent case involving the public accommodation provisions of the ADA.[159]

---

152. *See supra* notes 16-17 and accompanying text.

153. Albertsons Inc. v. Kirkingburg, 119 S. Ct. 2162, 2174 (1999); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2138 (1999); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146-50 (1999).

154. 42 U.S.C. § 12101, 12112 (1994).

155. *See infra* notes 207-18 and accompanying text.

156. *Sutton*, 119 S. Ct. at 2153-56 (Stevens, J., dissenting).

157. *See supra* note 16 and accompanying text.

158. *See infra* Part III (discussing deference to agency regulations).

159. Bragdon v. Abbot, 524 U.S. 624, 118 S. Ct. 2196 (1998).

The Court avoided this issue by holding that none of the three agencies is "empowered" to interpret the "definition" provisions of the ADA.[160] The Court determined that Congress charged each agency only with enforcing specific titles of the Act; none of which includes the provision defining "disability."[161] Still, as Justice Breyer points out in his *Sutton* dissent, the term "disability" is used frequently in each of the titles, and thus the agency that interprets and enforces a specific title must be able to define "disability."[162] As all three agencies agree on the mitigation issue, their interpretations of this issue are, at a minimum, probative.[163]

Significantly, the agency interpretations had great support in the legislative history of the ADA. Both the House and Senate committee reports reflect the fact that Congress intended courts to make disability determinations without regard to mitigating measures.[164] In fact, the clarity of the legislative history and the unusually clear record of agreement in Congress on the meaning of a significant provision in a civil rights statute are surprising, given the Court's holdings in the three cases.

Moreover, Congress intended that law developed under the Rehabilitation Act of 1973,[165] be used in interpreting claims under Title 1 of the ADA, where the provisions of the acts are consistent.[166] The definition of "handicap" (the Rehabilitation Act uses the term handicap instead of disability) under the Rehabilitation Act is almost identical to the definition of "disability" under the ADA.[167] The Rehabilitation Act arguably protects individuals with impairments that can be mitigated by medication or other means.[168] Where the provisions of the Rehabilitation Act and Title I of the ADA do not conflict, courts should apply the interpretation

---

160. *Sutton*, 119 S. Ct. at 2144.

161. *Id.*

162. *Id.* at 2161-62 (Breyer, J., dissenting).

163. *Bragdon*, 118 S. Ct. at 2207.

164. *See supra* note 17.

165. Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1994)).

166. *See* 29 C.F.R. § 1630.1(c) (1998); 42 U.S.C. § 12117 (1994); *See also* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (finding that the decisions made regarding regulations of the EEOC under the Rehabilitation Act can be used to interpret the same terms under the ADA).

167. *Compare* 42 U.S.C. § 12102(2) (1994) *with* 29 U.S.C. § 706(8)(B) (1994).

168. Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.C. 1997) (specifically holding that the Rehabilitation Act does protect individuals with impairments that are mitigated by medication and applying the EEOC interpretive guidelines for the ADA to a claim under the Rehabilitation Act); *see also* Strathie v. Dept. of Transp., 716 F.2d 227, 230 (3d Cir. 1983) (finding a hearing impaired individual, who alleged his hearing impairment could be mitigated, to be a "handicapped person" under the Rehabilitation Act). *Strathie* actually demonstrates one of the potential problems with the *Sutton* analysis. Strathie had to allege his condition could be effectively mitigated in order to prove he was "qualified," and that he could be accommodated under state requirements for school bus drivers. *Strathie*, 716 F.2d at 231. Thus, the Third Circuit considered the mitigation issue at the logical stage of analysis, i.e., the "qualification" stage. *Id.* Under *Sutton*, Strathie might never have gotten to that issue, because his ability to mitigate might remove him from protection because he would not be considered disabled.

of the former to interpret the ADA.[169] Moreover, Congress was aware of the broad definition of "handicap" in the Rehabilitation Act when it used that definition as the template for the definition of "disability" under the ADA.[170] This is yet another indication that the Court erred in its interpretation on the mitigation issue.

It is also important to point out that most federal appellate courts to consider the issue prior to the Supreme Court's recent pronouncements, held that disability determinations should be made without regard to mitigating measures.[171] While even a substantial number of lower court opinions do not bind the Supreme Court, when those interpretations are added to the agency interpretations, legislative history, and the law developed under the Rehabilitation Act, it becomes apparent that the Court erred.

A corollary to the Court's "individualized" assessment analysis is the suggestion that allowing courts to make disability determinations without regard to mitigating measures would lead to "the anomalous result" that side effects of medications could not be considered in the disability determination.[172] This is a very weak argument: If an individual with a disability is taking medication, and the medication causes severe side effects, the underlying disability is likely to be substantially limiting without regard to the mitigating measures. If the side effects of the medication treating an impairment are more severe than the impairment itself, it is unlikely an individual would be prescribed such treatment. The Court might counter that a progressive or fatal disease that poses few outward limitations may be slowed or cured by a course of treatment that causes significant limitations in other major life activities. To the extent that such situations arise, *Bragdon* would seem to suggest that the underlying condition would still be substantially limiting in regard to a major life activity(s).[173] Moreover, as Justice Stevens points out in regard to the Court's analysis on this point:

> It seems safe to assume that most individuals who take medication that itself substantially limits a major life activity would be substantially limited in some other way if they did not take the medication . . . . To the extent that certain people may be substantially limited only when taking "mitigating measures," it might fairly be said that just as contagiousness is symptomatic of a disability because an individual's 'contagiousness and her physical impairment each [may result] from the same underlying condition, side effects are symptomatic of a dis-

169. 29 C.F.R. § 1630.1(c) (1998).
170. *Sutton*, 119 S. Ct. at 2153, 2155 (Stevens, J., dissenting).
171. *See supra* note 19.
172. *Sutton*, 119 S. Ct. at 2147.
173. *See infra* note 282 and accompanying text.

> ability because side effects and a physical impairment may flow from the same underlying condition.[174]

Thus, this position adds little to the Court's assertion that "by its terms, the ADA cannot be read" to require disability determinations to be made based on an individual's impairment in an unmitigated state.[175]

3) Legislative Findings

Ironically, the Court attempts to strengthen its argument, that mitigating measures must be considered in disability determinations by relying on the Act's legislative history 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."[176] If disability is determined without regard to mitigating measures, the number of individuals covered is likely to be much higher.[177] This is the Court's third basis for its holding. The Court relied, at least in part, on the legislative history of the Act to find that Congress intended the ADA to cover the approximately 43,000,000 citizens cited in the reports.[178] If, as the Court asserts, the legislative history is not relevant to the mitigation issue due to the "plain language" of the statute, it would also be irrelevant to how many people were intended to be covered in light of mitigation.[179] In essence, the Court is utilizing legislative history on a tangential point to avoid the legislative history that directly contradicts its reading of that issue.[180]

Without the legislative history used by the Court, we are left with the figure of 43,000,000 contained in the Act.[181] This figure is contained in a broad legislative findings section of the Act, and not in any specific provision. While the use of this figure in the Act would seem to support the Court's position, it is not a specific provision, and is a weak basis for countering all of the countervailing evidence outlined in this Article. Moreover, the language surrounding this figure—i.e., "is growing," demonstrates that Congress *intended* the number to be flexible.[182] Additionally, in deriving its interpretation based on the figure, the Court relies in part on an Article (and studies cited therein) written by Professor Robert Burgdorf, a key figure involved in drafting the ADA.[183] As a general

---

174. *Sutton*, 119 S. Ct. at 2159 n.5 (Stevens, J., dissenting) (citation omitted).

175. *Id.* at 2146.

176. 42 U.S.C. § 12101(a)(1) (1994).

177. *Sutton*, 119 S. Ct. at 2147-48.

178. *Id.*

179. This demonstrates the odd way in which the Court deals with the legislative history and agency interpretations in *Sutton*. *See also infra* notes 247–250 and accompanying text.

180. *Compare Sutton*, 119 S. Ct. at 2147-48 *with supra* note 17.

181. *Sutton*, 119 S. Ct. at 2147-48.

182. 42 U.S.C. § 12101(a)(1) (1994).

183. *Sutton*, 119 S. Ct. at 2147.

matter, however, Professor Burgdorf's Article does not support the Court's interpretation, and in fact, implies quite the opposite result.[184]

It seems the Court is concerned that if it allows courts to make disability determinations without regard to mitigating measures there will be too many claims brought under the ADA.[185] If that were the case, Congress could amend the statute.[186] As the courts, including members of the *Sutton*, majority have pointed out in other decisions, that is not the Court's job. The Court should not use such tenuous reasoning to limit rights in a poorly reasoned manner because of a fear of too many lawsuits. In fact, the Court has interpreted other civil rights statutes to cover even larger segments of society. For example, Title VII of the Civil Rights Act of 1964[187] in effect covers every employee.[188]

There is no reason to artificially limit who is covered under the ADA, especially because the determination of whether someone is a "qualified individual with a disability" resolves many of the cases about which the Court seems concerned. It is not the Court's role to erect artificial gates at the threshold of the ADA. Unfortunately, such a result-oriented approach was inherent in the reasoning in *Sutton* and *Murphy*; and in *Kirkingburg*, to the extent it follows *Sutton* and *Murphy*. Still, despite the artificial limitations created by the Court, the "regarded as" element of the ADA's definition of "disability" would seem, at least at first glance, to provide an alternative means for many eliminated from coverage to remain protected under the Act.[189] As will be discussed in the next section, however, the Court significantly limits that option as well.[190]

B. Defining "Regarded As" Having An Impairment Under The ADA

Despite the limitations wrought by the Court's analysis of the first element of the definition of "disability," the "regarded as" element might help some of those excluded from coverage under the Court's approach. The Court, however, placed considerable limitations on this element as well;[191] but, as will be discussed in Part IV, both the "regarded as" and the

---

184. Burgdorf, *supra* note 11, at 434-35 n.117, 445-49.

185. *Sutton*, 119 S. Ct. at 2148, 2160 (Stevens, J., dissenting).

186. Of course, the fact that the Congress could do so does not mean it should or would do so. If separation of powers means anything, however, it is not for the Court to amend a statute that is within Congress' enumerated powers.

187. 42 U.S.C. §2000e *et seq.* (1994); *see also* MacDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976) (applying Title VII to whites, despite Congressional focus on protecting blacks in passing Title VII).

188. 42 U.S.C. § 2000(e)(2)(a) (1994); *Sutton*, 119 S. Ct. at 2157-58 (Stevens, J., dissenting); *infra* notes 205-06 and accompanying text.

189. *See infra* Part IV (evaluating the avenues that remain for people seeking coverage under the ADA).

190. *See infra* Part IV (explaining that this element of the definition, although limited by these cases, may continue to provide several other avenues of coverage).

191. *See supra* Part I.A–C (analyzing the Court's holdings in *Sutton*, *Murphy*, and *Kirkingburg*).

"record of" elements may still provide coverage for some of the individuals excluded from coverage by the Court's interpretation of the first element of the ADA definition of disability.

In *Sutton*, the Court began its discussion of the "regarded as" element by explaining that "[t]here are two apparent ways in which individuals may fall within this statutory definition . . . ."[192] First, an employer or other covered entity could "mistakenly" believe that an individual has an impairment that substantially limits one or more major life activities.[193] Second, a covered entity could "mistakenly" believe "that an actual, non-limiting impairment substantially limits one or more major life activities."[194] It is the second point that may be of greatest use to those denied coverage under the first element of the ADA definition of "disability," because of the mitigated state of their impairments. The Court's broad explanation of the "regarded as" element is very much in keeping with prior interpretations of that provision.[195] While this seems, at first glance, to be quite expansive, the Court later placed some significant limitations on this provision.

There are two key ways in which the Court limited the "regarded as" element in *Sutton* and *Murphy*. First, the Court examined whether an employer regards an employee as substantially limited in a specific major life activity or activities.[196] Under this analysis, an employer who is ignorant about a particular disability, and therefore does not understand what major life activities might be affected, can simply stereotype an employee/applicant without regarding that employee/applicant as substantially impaired in regard to any particular life activity. If the disability is mitigated when the employer learns of it, the employer may be less likely to recognize a substantial limitation on any particular major life activity. The employer simply may view some, or all, disabled individuals as generally impaired. It would be in keeping with the purpose of the Act to allow a disabled employee/applicant in this situation to bring a claim under the "regarded as" provision, because such stereotyping in employment decisions is a focus of the Act, and specifically of the "regarded as" provision. It is unclear how the Court's interpretation will affect such claims because the Court does not specifically address this issue. Of course, what motivates a given entity to discriminate—i.e., a general bias or one tied to a limitation on a specific life activity or activities—is going to be a question of proof in each case.

The second limitation in the opinions is clearer, and perhaps more troubling. That limitation relates to the specific major life activity at is-

192. *Sutton*, 119 S. Ct. at 2149-50.
193. *Id.*
194. *Id.*
195. *See, e.g.*, 29 C.F.R. § 1630.2(l) (1998).
196. *Murphy*, 119 S. Ct. 2133, 2138 (1999); *Sutton*, 119 S. Ct. at 2146.

sue in both cases—working. The Court is quite clear that in order to be substantially limited in the major life activity of working, one must be limited in regard to "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."[197] Therefore, the inability to perform a particular job, including the one sought by a complaining employee/applicant, is insufficient.[198] Interestingly, while not deciding on the validity of the EEOC regulations that it ignored in the mitigation context, the Court does rely on those regulations for this characterization of the life activity of working.[199] The Court's interpretation is in keeping with those guidelines, but it is contrary to the interpretation of Professor Burgdorf, whose article the Court relies on elsewhere in the opinion.[200] Burgdorf specifically states that the EEOC interpretation of this issue is not in keeping with the intent underlying the Act.[201]

Significantly, the Court's analysis of the major life activity of working is relevant to the first element of the disability definition as well as to the "regarded as" element, but because of the way in which the Court decided the mitigating measures question, the "working" analysis is particularly troubling in the "regarded as" context. For example, if Jason, the schizophrenic employee from the hypothetical above, effectively mitigates his impairment through medication, and his employer nevertheless terminates him based on his "disability," he is not considered disabled. He might be "regarded as" disabled if the employer "regarded" him as disabled in reference to a specific major life activity, such as thinking or working, generally, but the employer can simply claim that he regarded Jason as impaired only with reference to doing his particular job and not to thinking or working in general. Under *Sutton* and *Murphy* the employer can presumably do so, as Jason is not disabled since he is able to mitigate the symptoms of his illness.

As will be explained in Part IV, *Kirkingburg* explicitly, and *Sutton* implicitly, recognize that substantial limitations in life activities other than working might be easier to establish.[202] For example, had the pilots in *Sutton* been allowed to assert "seeing" as the major life activity affected, they may have had a very good argument on the "regarded as" issue.[203] Working is essentially the life activity of last resort in ADA cases.[204] Because, however, most disabilities affect, or may be "regarded

197. *Sutton*, 119 S. Ct. at 2151 (citations ommitted).

198. *Id.*

199. *Id.*

200. *Id.* at 2147.

201. Burgdorf, *supra* note 11, at 522 n.186.

202. *See Sutton*, 119 S. Ct. at 2151; *Kirkingburg*, 119 S. Ct. at 2168.

203. *Sutton*, 119 S. Ct. at 2152. That this would not have helped them under the statutory definition of disability because their condition was effectively mitigated. 42 U.S.C. § 12102(2)(A) (1994) See note 50, *supra*, for a discussion of the lower court's reasoning on the life activity of seeing.

204. *See* 29 C.F.R. § 1630.2(j)(3)(i) (1999).

as" affecting major life activities other than working, the Court's "regarded as" analysis may have more impact on litigation tactics than results. Thus, a possible side benefit of the Court's analysis may be that claims that would have been based on the life activity of working, when other more, obvious activities could have been used, will now be brought based on those activities. Still, it is important to remember that in some cases working is the only activity an employee can prove is "substantially" limited, and the Court's mitigation analysis may in fact make such cases more common.

As noted above, the Court's analysis can lead to perverse results. For example, the employer in *Sutton* seems to have regarded the pilots as substantially limited in the major life activity of seeing, yet because the employer alleged that it only viewed them as limited in regard to working a particular job, the Court held they were not covered by the ADA (ironically, even if they had been, they may have failed the "qualified" test). Thus, if an employer alleges that it "regards" an employee as impaired with respect to that employee's particular job (rather than another life activity which may actually be the employer's focus), the employer may effectively remove the employee from ADA coverage. Perhaps this was not the Court's intent, and the employee might be able to prove otherwise in some cases, but because in a "regarded as" claim the employer's perceptions are at issue, the employer may find it easy to defend its discriminatory actions.

Finally, while a "regarded as" claim may provide an alternative for some individuals no longer considered disabled under the Court's analysis, in many cases it will not help those disabled individuals thus removed from coverage. For example, in the first hypothetical above, Michele is probably not "disabled" under the Court's approach, because her disability is effectively mitigated by medication. Moreover, when she is denied the reasonable accommodation she requests, she is not "regarded as" disabled, because the employer is simply denying her accommodation, not taking action against her based on a perception of her disability. Thus, in order to be eligible for the small accommodation that would prevent her from having a seizure, she must have a seizure, so that she can meet the Court's definition of "disabled."[205] If the employer later takes action against her based on a mistaken perception of her disability, she might then have a "regarded as" claim. This is significant because "regarded as" claims are most likely to be useful in cases of disparate treatment, but may not be terribly helpful when, as in Michele's case, an employee is denied a reasonable accommodation. The "regarded as" element will be discussed further in Part IV.

---

205. *But see* Bragdon v. Abbot, 524 U.S. 624, 118 S. Ct. 2196 (1998) (suggesting another possible argument to prove Michelle's disability in the hypothetical discussed throughout this paper).

III. MUDDYING THE WATERS: THE COURT'S DEVIATION FROM ACCEPTED METHODS OF STATUTORY CONSTRUCTION AND DEFERENCE TO ADMINISTRATIVE AGENCY LAW

In one fell swoop the Court has used these three cases, most notably *Sutton*, to deviate from accepted methods of statutory construction and precedent regarding deference to administrative agency interpretations. While the deviations were clearly necessary for the Court to justify reaching the conclusions it did, they raise questions for the future of both, with the possibility of consequences far removed from the particular arena of the ADA.

A. The Nitty Gritty[206]

It has long been held that in "all" cases of statutory construction, the Court must review the purposes promulgated by Congress, and interpret the words of statutes in light of those purposes.[207] In the Act, Congress expressly stated that "the purpose of [the ADA is] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[208] The ADA also expressly prohibits covered entities from "discriminat[ing] against a qualified individual with a disability because of the disability" in any of the terms, conditions, and privileges of employment.[209] These words, clearly and expressly set out in the Act, would seem on their face to direct the Court's interpretation of the Act in relation to determining a disability. Until now, they arguably have. After *Sutton*, however, the definition of disability itself has changed.[210] While the Court may argue that it continues to follow the mandates of Congress, the change in definition and the direction this Court has taken in the determination of disability, the interpretation of "major life activity," and the "regarded as" clause lead toward an approach different from that Congress suggests in the Act..

Statutory interpretation has always begun with an examination of three things, the result depending on what one finds in each.[211] Historically, courts have always examined first the "plain language" of the statute to determine if it speaks directly and clearly to the issue at hand.[212] If

---

206. This section is a basic explanation of general standards of statutory construction, as well as standards of review for Article III courts and administrative agencies. Although it is no doubt unnecessary to spend time on these for those familiar with the procedural aspects of court review, we felt that the far-reaching implications of these cases require us to provide some background for those who may be unfamiliar. This Article will also highlight the differences in the standards, and therefore the basic importance of the deviations made by the *Sutton* court. *See Sutton*, 119 S. Ct. 2139.

207. *See Sutton*, 119 S. Ct. at 2153 (citing Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)).

208. *Id.* (quoting 42 U.S.C. § 12101(b)(1) (1994)).

209. *Id.* (quoting 42 U.S.C. § 12112(a) (1994)).

210. *Id.* at 2139.

211. *See* Caminetti v. United States, 242 U.S. 470, 489 (1917).

212. *See id.* at 485.

it does, that is often the end of the examination because the court is able to determine Congress' purpose and intent directly.[213]

If, however, the "plain language" of the statute is unclear, or if the court needs clarification of the language, a court will generally look to the legislative history of the statute.[214] This will consist of all legislative parts that became part of the final bill.[215] Depending on the complexity of the statute and/or the overall enormity of the struggle to create it, this history may consist of a number of parts, including, but not limited to, the original bills from both Houses of Congress, the Committee Reports from each House, the Joint Committee Reports, any hearings which took place (including the testimony of witnesses), and, the words of the individual Representatives and Senators themselves, all of which culminate to represent the intent of Congress.[216] The court will generally use this cumulative history to shed light upon vague or missing language in the statute, or to bolster the plain meaning of the statute.[217] (As will be discussed below, the Court in *Sutton* in fact used favorable legislative history to bolster its holding; however, much of the consternation about the case is that the Court refused to look at more relevant history.) Where a court finds that societal changes dictate a change in the current law, it may also examine the legislative history for support in promulgating a new policy.[218]

This general statutory construction pertains to all statutes, whether they are subject to administrative agency interpretation or not. Courts may differ as to the actual meaning of the "plain language," which may not be so plain, after all. Similarly, courts may differ as to the meaning of, and reliance on, different parts of the legislative history.

The real differences in statutory review relate more to where the case came from that what it says.[219] Generally, courts review administrative agency decisions under a highly deferential standard.[220] The Court has based this standard on the general purpose of administrative agencies: to provide a level of expertise not possessed by courts, in a less formal, costly, and time-consuming manner.[221] Because these purposes would be nullified if courts were constantly second-guessing the expertise of the

213. *See id.*
214. *See id.* at 489.
215. *See id.* at 489-90.
216. *See id.*
217. *See id.*
218. *See id.*
219. There are, of course, key differences in the way in which courts review decisions, depending on their origin. Decisions from Article III courts are reviewed under a range of standards, depending on the type of action under review and ranging from little to great deference to the lower court. However, administrative regulations generally carry a much higher standard of deference. *See* Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).
220. *See Chevron*,467 U.S. at 843-44.
221. *See Chevron*, 467 U.S. at 844.

agencies, the Supreme Court has ruled that courts should only overturn agency decisions when they are clearly undeserving of such a high level of deference.[222]

This Article will not attempt to discuss the appropriateness of the highly deferential standard of review afforded administrative agencies; that subject has been, and likely will continue to be, ripe for academic debate for years to come.

Or maybe not.

The standard of deference afforded administrative agency decisions is derived from (1) a number of cases dealing with the growing power of such agencies, (2) the Court's reluctance to insert itself into the administrative process, and (3) the Administrative Procedure Act (APA), passed by Congress to provide uniformity in administrative agency law.[223] *Citizens to Preserve Overton Park, Inc. v. Volpe*[224] involved the authorization by the Secretary of Transportation of federal highway funds for construction of a highway through a city park. In remanding, the Court held that it would not undertake a *de novo* review of the Secretary's decision, and that the Court, while making a "substantial inquiry" into the action, would nevertheless give the Secretary's decision the "presumption of regularity."[225] Although *Overton Park* theoretically stands for greater review-ability of agency decisions in the absence of a specific statute precluding review,[226] the Court also held that a court cannot substitute its judgment for that of the agency, but may only review the agency decision for reasonableness in light of a required record.[227] Even while stressing greater review-ability for certain agency decisions, the case contributed to the higher standard of deference for agency decisions.[228]

Two years later, in 1978, the Court reversed the D.C. Circuit in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, which had remanded a case involving the Atomic Energy Commission, with respect to the licensing of nuclear reactors.[229] The Court held that Congress had established the maximum rulemaking procedures it wished the courts to impose on federal agencies.[230] While the agencies themselves are free to add to those procedures in the exercise of their discretion, the courts may not impose additional procedures as long as

222. *See id.* at 843-44.
223. 5 U.S.C. § 551-59 (1994).
224. 401 U.S. 402 (1971).
225. *Overton Park*, 401 U.S. at 415.
226. RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 133 (1992).
227. *Overton Park*, 401 U.S. at 416.
228. *Id.* at 413-14.
229. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524 (1978).
230. *See id.* at 557-58.

the agency has provided at least the statutory minimum, regardless of whether the court determines more would have been reasonable.[231]

While *Overton Park* and *Vermont Yankee* dealt with deference to the agency decision-making processes, in 1984 the Court spelled out the precise test to determine if and when a court may interfere at all in this process.[232] In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court held that, with regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[233]

In application, this breaks down to a two-part test. First, did Congress speak directly to the issue? In other words, is there plain language on the subject and is it clear?[234] If so, the court's inquiry essentially ends, and the decision of the agency is deferred to so long as it followed the Congressional mandate.[235] However, if Congress was silent, vague, or ambiguous on the subject, the court must then examine the legislative history of the statute; but again only to determine if the agency's decision was based on a *permissible* construction.[236]

Congress passed the APA to achieve uniformity in the procedures of administrative agencies. The APA's provisions, generally read together with the case law, similarly require a reviewing court to set aside agency findings and conclusions only when the court finds that they may be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[237] The APA therefore, in words and practice, strengthens the deferential treatment accorded to agency decisions by the courts.

Although a quite basic analysis of the recognized deference due administrative agency law and interpretations, the above discussion illumi-

---

231. *See id.*

232. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

233. *Chevron*, 467 U.S. at 843.

234. *See id.* at 842-43.

235. *See id.* at 843-44.

236. *See id. See also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1990) (holding that the EEOC interpretation of the statute exceeded the deference allowed); General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) (establishing that where an agency was not authorized to promulgate rules or regulations concerning the ADA or Rehabilitation Act, the level of deference afforded "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); Fallacaro v. Richardson, 965 F. Supp. 87 (D.C. 1997) (exemplifying that even where the agency is not authorized, the courts have used an alternative means to give deference to their interpretations). *But see* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2145-46 (1999) (ignoring any alternative reasoning).

237. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971) (citing 5 U.S.C. § 706 (2)(A)-(D) (1994)).

nates the *Sutton* Court's failure to follow even such basic guidelines. The *Sutton* Court offers little or no explanation for the deviation.

B. New Rules, New Results

At first, the *Sutton* Court appears to follow the *Chevron* analysis, laying out petitioners' argument that the ADA does not clearly address the definition of disability, and that therefore the Court should defer to the agency interpretations of the EEOC and the DOJ.[238] The Court then discusses respondents' argument that the language of the ADA is clear, and that the agency guidelines conflict with it. The respondents contendedtherefore that the Court should merely look at the plain language and uphold respondents' argument; or in the alternative, if the language is indeed ambiguous, determine that the agency interpretations are still inaccurate.[239] The *Sutton* Court agrees with respondents that the agency interpretations clash with the plain language of the statute, and further that because Congress spoke clearly to the issue, there is no reason to even address the legislative history of the ADA.[240]

The Court discusses at length just how and why the ADA spoke to the issue. The Court reads the three provisions of the ADA, which deal with the determination here, in concert. The Court holds that when read this way, it is clear that Congress "plainly" spoke to the issue.[241] The Court reads the terms "disability" as defined in the ADA to be a mental or physical impairment which "substantially limits" one of the major life activities at present—not potentially or hypothetically.[242] The Court relies on its conception of the "individualized basis" analysis at this initial stage to hold that persons should be judged in their corrected state, and found that any other analysis is contrary to this individualized approach mandated by the ADA.[243] The Court acknowledges that a person with a controlled disability still has an impairment, but holds that it does not, at least necessarily, at present "substantially limit" a major life activity.[244]

One is faced with the curious question of just how (or if) the Court actually applied the *Chevron* test. As noted above, the Court determined that Congress spoke to the definition of "disability" in the ADA, reading the three parts in concert[245] and thus determined that there was no reason to examine the legislative history of the Act.[246] Yet the Court curiously does look to the legislative history to strengthen its view of the defini-

238. *Sutton*, 119 S. Ct. at 2146.
239. *See id.*
240. *Id.* at 2146.
241. *See id.*
242. *See id.* at 2149.
243. *See id.* at 2147.
244. *See id.* at 2149.
245. *See id.*
246. *See id.* at 2146.

tional language and individualized approach of the Act.[247] It relies on this history to assert that Congress never intended to cover persons with "controlled" disabilities, only those who have "substantial limitations" now.[248] In rejecting the very need to examine the bulk of the legislative history, which clearly contradicts its holding here, while using the small portion that nebulously supports it, the Court appears to be having its cake and eating it too.

The legislative history, which the Court refuses to consider, determining instead that there is no need to do so because the "plain language' is clear, refutes much of the Court's reasoning here. While the Court focuses on subsections (A), dealing with the definition of disability, and (C), the "regarded as" section, the Court speaks little of subsection (B), which states that the term "disability," with respect to an individual, also takes into account "a *record* of such an impairment."[249] (In his dissent, Justice Stevens argues that these words clearly indicate Congress' intent to cover persons with previous impairments, including those that may be totally controlled in the present.)[250]

Another disturbing aspect of the Court's approach here is the absence of any reliance on its recent holding in *Bragdon*; or more specifically, on its adherence in *Bragdon* to the legislative history of the ADA in reaching its holding.[251] While the subject matter in *Bragdon* is clearly different (involving an asymptomatic HIV patient), the Court, in holding that respondent's condition was a covered disability under the ADA, discussed the ADA's virtual adoption of the definition of "handicapped individual" in the Rehabilitation Act of 1973, as well as that in the Fair Housing Act Amendments of 1988.[252] In discussing the almost verbatim lifting of language from those Acts to the definitional section of the ADA, the Court held "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."[253] The *Bragdon* Court pointed out that Congress not only adopted the virtually identical definitions in the ADA, but further provided a specific statutory provision in the Act to ensure the construction of these terms in accordance with those of its predecessor Acts, instructing that "[e]xcept as otherwise

247. *See id.* at 2147.

248. *See id.* at 2149.

249. *See id.* at 2144 (Stevens, J., dissenting) (citing 42 U.S.C. § 12102(2)(B) (1994)) (emphasis added).

250. *See id.*

251. Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998).

252. *Bragdon*, 524 U.S. 631, 118 S. Ct. at 2202 (1998) (citing 29 U.S.C. § 706(8)(B) (1994); 42 U.S.C. § 3602(h)(1) (1994)).

253. *See id. See also* FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437-38 (1986); Commissioner v. Estate of Noel, 380 U.S. 678, 681-82 (1965); ICC v. Parker, 326 U.S. 60, 65, (1945) (demonstrating the long-held and still valid analysis of statutory construction, an analysis which seems to be inexplicably missing in *Sutton* and its companion cases).

provided . . . nothing in this [ADA] chapter shall be construed to apply a lesser standard than the standards applied under [the previous Acts]."[254] As discussed below, the legislative history of the ADA discussed by the *Sutton* Court similarly makes clear Congress' intent that the Act cover those individuals both with a record of impairment and without consideration of mitigating factors.[255] Yet the *Sutton* Court clearly, though inexplicably, repudiates some of the same legislative history it so clearly embraced in *Bragdon,* leaving only questions in its wake.

Specifically, because the Court does look to at least parts of the legislative history to bolster its new definition, it is even more confusing that it would ignore precedent on what history should be considered as well as the actual history available. Then-Justice Rehnquist stated in *Garcia v. United States*[256] that "[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill . . . ."[257]

The Committee Reports on the ADA are quite specific as to who should be covered under the bill, and contradict much of the Court's decision here. The Senate Report states "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[258] The report goes on to say in pertinent part:

> [an] important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. . . . Such denials are the result of negative attitudes and misinformation.[259]

The House Committees adopted and appeared to strengthen the wording from the Senate, in that "[t]hey clarified that 'correctable' or 'controllable' disabilities were covered in the first definitional prong as well."[260] The House Report goes on to state that "[t]he impairment should be assessed *without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation.*"[261] The House exemplified that statement by stating that the Act would cover persons such as those with hearing loss corrected by hearing aids.[262]

---

254. *Bragdon*, 524 U.S. 631, 118 S. Ct. at 2202 (citing 42 U.S.C. § 12201(a) (1994)).

255. *See infra*, notes 257–264.

256. 469 U.S. 70 (1984).

257. *Sutton*, 119 S. Ct. at 2154 (Stevens, J., dissenting) (quoting *Garcia*, 469 U.S. at 70).

258. *See Sutton* 119 S. Ct. at 2154 (Stevens, J., dissenting) (citing S. REP. NO. 101-116, at 23 (1989)).

259. S. REP. NO. 101-116, at 24 (emphasis added).

260. *See* S. REP. NO. 101-116, at 24.

261. *See id.* (emphasis added).

262. *See* H.R. REP. NO. 101-485, at 29.

One of the clearest statements comes from the Report of the House Committee on Education and Labor, which states that the assessment of disability should be made "without regard to the availability of mitigating measures . . . ."[263] This report goes on to state the following:

> 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.*[264]

These reports appear to specifically contradict the *Sutton* Court's conception of the first prong of the definitional test for disability as an individualized assessment that depends on whether the individual is functionally disabled at the present time.

Further, the Court's acknowledgment that persons with controlled disabilities are still impaired, even though not presently so, is one of the incongruities of the Court's decision. The Court clearly stated that a person with an impairment corrected by mitigating measures still has an impairment, the impairment however does not presently "substantially limit" a major life activity.[265] Later, the Court acknowledged that Congress, in passing the Act, was concerned that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[266] It goes on to explain that the "regarded as" prong was designed to cover individuals "rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities."[267] Yet the Court's holding here seemingly allows an employer to freely reject a worker *because* she has a controlled disability which does not now rise to the level of substantial impairment of a life activity, but who would need accommodation for the job to continue in a controlled state.

While the Court would argue that technically the employer is not being given free reign to discriminate in this fashion, the unfortunate result is likely to be just that. The rejected applicant, like Michele, can no longer claim discrimination under the Court's approach to subsection (A) because her disability is controlled by mitigating measures, and thus does not "substantially limit" her in a life activity right now. Neither can she claim discrimination under subsection (C), as the Court seems to leave

263. *See id.*
264. *See id.* (emphasis added).
265. *See Sutton*, 119 S. Ct. at 2149.
266. *See id.* at 2150.
267. *See id.*

open,[268] for the employer may not "regard her as" disabled in her controlled state. In practice, the employer is now free to reject an applicant, because of impairment, whom she would previously had to consider without her regard to impairment. Even an applicant like Jason, who an employer may "regard as" disabled even though his disability is controlled, may not have redress if he is offered a lower paying position in the "broad range of jobs." Justice Stevens points out in his dissent that the ADA was enacted in great part to address just this issue: applicants, such as Michele and Jason, are not generally "substantially limited" in their mitigated condition, yet employers stereotype applicants on assumptions "not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[269] For applicants with certain physical disabilities, particularly those dealing with mobility, subsection (A) would appear easier to hurdle, because there is obviously still a "substantial limitation" on most major life activities. But for those like Michele or Jason, or the petitioners in *Sutton, Murphy,* and *Kirkingburg*, the claim is far more difficult, and may result in true inequities.

Moreover, the dissent in *Sutton* points out that the Court has consistently interpreted statutes dealing with discrimination broadly, even when the class of individuals was beyond Congress' concern at the time of passage.[270] When Congress passed Title VII of the Civil Rights Act of 1964, its aim was to protect African-Americans.[271] Yet the Court placed great reliance on legislative history and accorded "great deference" to the EEOC's interpretations of the Act to extend it to other groups, including Caucasians.[272] Thus the Court's interpretation here is not only unprecedented, it is actually opposite not only to its previous decisions but also its earlier reasoning.

In fact, if the Court had agreed with all the entities which have previously interpreted the Act, and looked to the entirety of the legislative history to determine if the agency's interpretation was a *permissible* construction of the statute, the outcome clearly could have been quite different here. The bulk of the legislative history (possibly aside from, or even despite, the very specific portion cited by the Court in its opinion), would likely support the agency's interpretation as permissible. The *Bragdon* Court relied on just such a "uniform body" of judicial and administrative precedent in reaching its holding.[273] The *Bragdon* Court held that uniformity of precedent was "significant," finding that "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, [Congress'] intent to incorporate [such] inter-

268. *See id.*
269. *See id.* at 2159 (Stevens, J., dissenting).
270. *See id* at 2157.
271. *See id.*
272. *See id.* (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279-80 (1976)).
273. *Bragdon*, 118 S. Ct. at 2208.

pretations as well."[274] Relying on this history to find a protected designation would not even have necessarily given petitioners a victory, however. As noted earlier, each of these cases could have, and very probably would have, been upheld as applied against each of the petitioners based on the specific qualifications needed for each of the positions, which petitioners in each case were still not likely to meet. The Court, however, appears to have chosen to use these cases instead to ignore years of precedent and invalidate the statute for whole classes of people.

Another question that arises from *Sutton* and its instant progeny is whether then, the Court has signaled a change in the tests and/or levels of deference due administrative agency decisions. While it might be argued that that would not necessarily be a bad thing, the application to these cases shows that there is logic in the "presumption of regularity" given to agency decisions, based on their presumed expertise and experience in the subject areas.[275] No matter the original intention here, whether to weaken the application of the ADA, or to affect the wholesale levels of deference due administrative agencies in general, the holdings here may well result in both.

One of the justifications used by the Court to withhold deference to the three administrative agencies charged with implementing the Act is that none of the agencies was specifically charged by Congress with the authority to interpret the term "disability," and therefore, none is owed deference in interpretation.[276] This, again, is somewhat contradicted in the Court's earlier holding in *Bragdon*.[277] The *Bragdon* Court, in discussing its reliance on the guidance of the DOJ and other agencies charged with administering the ADA, held that the views of agencies charged with *implementing* a statute "are entitled to deference."[278] *Bragdon* follows a line of cases with similar procedural holdings.[279] Clearly, Congress gave none of the agencies involved there the direct authority to define the terms under the ADA any more than they did here. Yet the Court in *Bragdon* spoke of the agencies' responsibilities in implementing the Act, presumably requiring the same determination of terms as was done here, as entitling them to the deference due under *Chevron* and its progeny.[280] Most telling perhaps, is that the *Bragdon* Court specifically cited to *Chevron* in arriving at these conclusions; a significant omission in *Sutton,* and one which, as seen, triggers basic procedural questions about the case.

---

274. *See id.* (citing Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

275. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

276. *See Sutton*, 119 S. Ct. at 2145-46.

277. Bragdon v. Abbott, 524 U.S. 645, 118 S. Ct. 2196, 2208 (1998).

278. *See id.* at 2209 (citing Chevron v. Natural Resource Defense Council, 467 U.S. 837, 844 (1984)).

279. *See, e.g.*, Skidmore v. Swift and Co., 323 U.S. 134, 138-40 (1944).

280. *Bragdon*, 524 U.S. 646, 118 S. Ct. at 2209 (citing Chevron v. Natural Resource Defense Council, 467 U.S 837, 844 (1984)).

There appears to be a clear conflict between the procedural posture adopted only a year before in *Bragdon* and that adopted in *Sutton*. Further, it is a conflict without a clear resolution; one that is likely to leave the lower courts in confusion over whether *Sutton* is, indeed, a new direction, or whether the lack of reference to *Bragdon* is a procedural door left ajar for applicants. (As noted in Section IV below, *Bragdon* may also contain a substantive door to slip through.) It would not be surprising, perhaps, to see a new split in the circuits over the use and applicability of *Bragdon* in the post-*Sutton* application of the ADA.

While the Court surely clouds the application of the traditional deference tests to administrative agencies here, and arguably misapplies them, it never actually acknowledges a change in the test. This alone may well leave the lower courts without guidance, and injured employees without recourse, in an already highly litigated area of law.

IV. AVOIDING THE POTENTIALLY HARSH RESULTS OF *SUTTON* AND *MURPHY*

The Supreme Court's recent cases may be the death knell for many ADA claims brought by individuals with impairments effectively treated with medication or other means. Yet several avenues remain for such individuals to be covered by the ADA. First, as noted in Part I.A. of this Article, the *Sutton* Court left open the possibility that if a mitigating measure itself causes a substantial limitation on a major life activity, the individual is disabled.[281] For example, if an individual has high blood pressure or epilepsy, and is able to mitigate the effects of the impairment through medication, but the medication itself causes severe side effects that substantially limit the individual in performing a major life activity, that individual is "disabled" under the Court's analysis. Of course, under the Court's analysis, even if the mitigating measure has no side effects, if it does not mitigate the effect of the impairment sufficiently to prevent a substantial limitation on a major life activity, the individual would be disabled.

Significantly, in *Bragdon*, the Court recognized that asymptomatic HIV infection is a disability. Specifically, it found that despite the lack of significant outward symptoms at this stage of the disease, HIV easily meets the definition of disability because it is an impairment that substantially limits an infected individual in a number of major life activities (the one specifically alleged and addressed in that case was reproduction).[282] Thus, the Court has recently held that an outwardly asymptomatic impairment can be a disability if it still affects the body's systems in a manner that places a substantial limitation on a major life activity or

281. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146-47 (1999).

282. *Bragdon*, 524 U.S. 643, 118 S. Ct. at 2207. As explained in Part III, *supra*, *Bragdon* also might limit some troubling aspects of the *Sutton* Court's procedural holdings.

activities.[283] Thus, while there is a huge difference between epilepsy and HIV, and between the effectiveness of mitigating measures in regard to the two diseases—Michele from the earlier hypothetical could argue that despite the fact she is asymptomatic due to medication, since certain types of flashing lights could still cause her to have a seizure, she does "presently" have an impairment that substantially limits a major life activity.

One problem with this argument, however, is the language from *Sutton*, suggesting that a well-controlled diabetic would not necessarily be disabled; a situation similar to Michele's.[284] In both cases the individual is well controlled, is no different from anyone else in most ways, and will only have a problem if exposed to certain situations or substances (flashing lights, deprivation of food, or excessive sugar). Therefore, in both cases, one might argue based on *Bragdon*, that the individual has an impairment that affects a major life activity or activities, but whether the condition places a substantial limitation is called into question by *Sutton*.[285] *Bragdon* implies that HIV infection is a *per se* disability.[286] Whether after *Sutton* other impairments might, as the *Kirkingburg* Court suggests with regard to amblyopia, "ordinarily" meet the ADA's definition of disability, (and if so, which ones?) remain open question.[287]

Moreover, while the Court significantly limited the "regarded as" element in connection with the major life activity of working, *Kirkingburg* suggests that other life activities can still provide a basis for a finding of disability.[288] While this may not be terribly helpful in regard to the first element of the disability definition (the element discussed in *Kirkingburg*) for those whose conditions are effectively mitigated, it may prove very useful in the "regarded as" context. If an individual can demonstrate that despite mitigation, he or she is regarded as substantially limited in a major life activity such as seeing, hearing, walking, etc. The ADA would apply. Thus, if the employer acts based on a mistaken perception of an individual's disability, the individual would be covered under the "regarded as" provision. Of course, because this relates only to the threshold issue of whether the individual is protected under the ADA, the individual must still prove that he is a "qualified individual with a disability" and meet any other requirements under the Act for proving his claim.

Another possible avenue left open by the Court is the "record of" an impairment element, which is not directly addressed in any of the three opinions. If an individual with a currently mitigated disability has a record of an impairment that substantially limits a major life activity, such

283. *Id.* at 629-35.
284. *Sutton*, 119 S. Ct. at 2147.
285. *Id.* at 2146.
286. *Bragdon*, 524 U.S. 635-36, 118 S. Ct. at 2204.
287. *Kirkingburg*, 119 S. Ct. at 2169.
288. *Id.*

as a record of the disability in its unmitigated state or from a time when the mitigating measures did not mitigate the effects of the disability as well, that individual could be covered. Of course, one would need to demonstrate that a record exists, and that the employer relied on that record.[289] Because such records may provide an easy basis for misjudging a disabled employee's abilities regardless of mitigating measures, an individual who has such a record could avoid the concerns created by the Supreme Court's analysis by basing her claim on having a record of an impairment that substantially limits a major life activity or activities.[290] But again, this claim only helps an employee if such a record existed and was relied upon by the employer.

Given the possibilities set forth in this section, it is essential for those representing disabled individuals in ADA claims to understand what the Court's recent decisions do and do not permit. In this regard, it is important that courts applying the ADA remember that despite the Court's decisions in *Sutton*, *Murphy*, and *Kirkingburg*, some individuals with effectively mitigated impairments may still be covered under the ADA. While the Court's analysis makes it much harder for individuals with mitigated disabilities to be protected by the ADA, with the proper proof, many such employees may remain covered for the reasons set forth in this Part.

CONCLUSION

Regardless of what one thinks of the results in these cases, the Supreme Court's seemingly result-oriented approach appears questionable given the fact that it goes against Congress' intent as embodied in the ADA's legislative history, the interpretations of all three agencies charged with implementing the Act, the decisions of most courts to address the issues involved, and the language and structure of the Act as reflected in alternative textual interpretations. The Court seems afraid that too many people will be protected under the ADA, and that employers will suffer as a result. This is very troubling because that is a decision for Congress to make, and Congress has spoken on that issue through the Act and its legislative history. Perhaps after these cases, Congress will more directly speak on the issue to correct what appears to go against its intent, as it did in regard to several cases interpreting Title VII through the Civil Rights Act of 1991.

What is perhaps most troubling about these cases is that most of the Court's concerns are already dealt with through the "qualified individual with a disability" requirement. Thus, there is little risk of unqualified commercial drivers or pilots taking to the roads or skies with the protection of the ADA. To the extent that such situations are possible, strengthening the application of the "qualified" element would be a method of

289. 29 C.F.R. pt. 1630 app. § 1630.2(k) (1999).
290. *See id.*

addressing such concerns that is far more consistent with the ADA's underlying purpose and structure. As a result of these decisions many employees who are qualified with mitigating measures, will be kept from ever proving they are qualified or that they were discriminated against based on their disabilities, because they are removed from coverage under the Act. This might lower the number of questionable claims that make it past the initial pleadings stage (an arguably positive result), but it does so at the expense of the rights of many disabled individuals who have been discriminated against on the basis of disability, but who are no longer protected under the Act. This is a classic case of "throwing the baby out with the bath-water," and to make matters worse, in this case the Court used the wrong window.