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January 2000

Subordination, Stigma, and “Disability”

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VIRGINIA LAW REVIEW

VOLUME 86

APRIL 2000

NUMBER 3

ARTICLE

SUBORDINATION, STIGMA, AND “DISABILITY”

*Samuel R. Bagenstos**

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INTRODUCTION

THE last two years have marked the coming of age of the Americans with Disabilities Act ("ADA"). Though the statute has been on the books since 1990, and cases arising under it have flooded the lower courts, the Supreme Court had remained silent on the ADA until 1998. By deciding eight ADA cases in its 1997 and 1998 Terms, however, the Court has broken its silence in the most unmistakable of ways. In so doing, the Court has brought renewed public attention to the problem of disability discrimination, and it has forcefully placed its own stamp on the law.

Four of the Court's ADA cases—*Bragdon v. Abbott*,¹ *Sutton v. United Air Lines*,² *Murphy v. United Parcel Service*,³ and *Albertsons, Inc. v. Kirkingburg*⁴—involved what has become the most contentious issue in the administration of the statute: the definition of "disability."⁵ Because plaintiffs must establish that they have a

¹ 524 U.S. 624 (1998).

² 119 S. Ct. 2139 (1999).

³ 119 S. Ct. 2133 (1999).

⁴ 119 S. Ct. 2162 (1999).

⁵ The other four cases involved their share of controversy as well. In *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176 (1999), decided on the same day as *Sutton*, *Murphy*, and *Albertsons*, the Court gave an historic assist to a core effort of the disability rights movement by ruling that the unnecessary institutionalization of

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statutory "disability" to maintain an action under the statute, the meaning of that term is a possible issue in every ADA case. The statutory definition of "disability," however, is so ambiguous as to provide little guidance even in many run-of-the-mill cases. Particularly in the employment discrimination context, the ambiguity of that definition has led to great controversy.⁶ Employers argue that plaintiffs and courts have expanded the "disability" category to allow workers with minor physical or personality conditions to obtain, through the statutory vehicle of "reasonable accommodations," unjustified exemptions from generally applicable work rules.⁷ Disability rights activists argue, by contrast, that courts have inappropriately applied a restrictive definition of "disability" to squelch ADA cases at the summary judgment stage.⁸

persons with disabilities is discrimination that may be challenged under the ADA. See *id.* at 2186–87. In *Cleveland v. Policy Management Systems Corp.*, 119 S. Ct. 1597 (1999), the Court largely rejected the "judicial estoppel" doctrine that lower courts had developed to bar ADA suits by individuals who had applied for Social Security Disability Insurance. See *id.* at 1600. In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the Court resolved a split in the circuits and held that the ADA prohibits disability-based discrimination in the programs and activities offered by state prisons. See *id.* at 209. Only *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), which held that a collective bargaining agreement's general arbitration clause should not be interpreted to bar individual workers from suing their employer under the ADA, see *id.* at 82, was relatively uncontroversial.

⁶ See Arlene B. Mayerson, Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent, 42 Vill. L. Rev. 587, 587 (1997) ("[N]o issue has generated more controversy and divergence in judicial interpretation than the definition of disability . . ."); see also Peter David Blanck & Mollie Weighner Marti, Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act, 42 Vill. L. Rev. 345, 352 (1997) ("One of the most contentious aspects of disability law, research and policy involves the definition of disability."); Mary Crossley, The Disability Kaleidoscope, 74 Notre Dame L. Rev. 621, 623 (1999) (reporting the estimate that "disability" status is challenged in more than half of ADA cases); Catherine J. Lanctot, Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA, 42 Vill. L. Rev. 327, 329 (1997) (noting "widespread disagreement over what class of people Congress intended to protect when it passed the ADA").

⁷ Walter Olson has been a prominent exponent of this view. See Walter Olson, The Excuse Factory: How Employment Law Is Paralyzing The American Workplace 114–15 (1997).

⁸ See, e.g., Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 Vill L. Rev. 409, 536 (1997) [hereinafter Burgdorf, "Substantially Limited" Protection]; Mayerson, *supra* note 6, at 587; see also Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. L. Rev. 99, 99–100 (1999) (finding that defendants in ADA employment cases prevail at

Similar battle lines have formed around the four decisions in the Supreme Court's "disability" quartet. When the Court in *Bragdon* held that a woman with asymptomatic HIV was protected by the statute,⁹ ADA critics decried the Court's seemingly expansive interpretation of the "disability" definition.¹⁰ A year later, when the Court rejected the claims of twin sisters who wear eyeglasses (*Sutton*), a man with high blood pressure (*Murphy*), and a man with monocular vision (*Albertsons*), disability rights lawyers decried what they regarded as the Court's substantial narrowing of that definition. In the aftermath of *Sutton*, *Murphy*, and *Albertsons*, a conventional wisdom began to emerge that the decisions marked a major defeat for the disability rights cause and effectively excluded people with conditions like epilepsy and diabetes from the Act's protections.¹¹

In this Article, I want to suggest that the criticism of the Court's "disability" quartet—from both sides—is overblown. I argue that the decision in *Bragdon* is eminently justifiable, and that the decisions in *Sutton*, *Murphy*, and *Albertsons*—while not without their problems—are not the disability-rights Waterloo they have been made out to be. I do this by offering a particular vision of the ADA's "disability" definition. As I argue in Part I, the statutory text and implementing regulations are sufficiently vague that inter-

the trial level 93% of the time, and that, when such cases reach the appellate courts, defendants prevail 84% of the time—a defendant-favoring pattern of outcomes comparable only to that in prisoners' rights cases); Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 *Mental & Physical Disability L. Rep.* 403, 404–05 (1998) (observing that ADA employment plaintiffs prevail 8% of the time, and asserting as one explanation that judicial decisions made it "increasingly clear that the Act's definition of disability was much more restrictive than those who drafted and supported the ADA thought it would be").

⁹ See *Bragdon*, 524 U.S. at 631.

¹⁰ See, e.g., Max Boot, *How Judges Can Make Friends in Washington*, *Wall St. J.*, July 13, 1998, at A15 (criticizing the *Bragdon* decision as "adopt[ing] the most expansive possible interpretation of the law in question").

¹¹ See, e.g., David G. Savage, *High Court Reins in Disability Law's Scope*, *L.A. Times*, June 23, 1999, at A1 ("Disability-rights advocates, stunned by the court's ruling, condemned the decisions for ignoring the intent of Congress."); Robin Toner & Leslie Kaufman, *Ruling Upsets Advocates for the Disabled*, *N.Y. Times*, June 24, 1999, at A24. In an op-ed published two weeks after the Court's decisions, the then-General Counsel of the National Council on Disability argued that those decisions left "many people with treatable conditions like epilepsy, diabetes, and, in my case, bipolar disorder, outside of the law's protection." Andrew J. Imparato, *Supreme Court Disables Disability Act*, *Milwaukee J. Sentinel*, July 11, 1999, at 3.

pretation of the definition of disability necessarily demands value judgments that even the most committed textualist cannot avoid. To give content to that definition, courts must accordingly look to some broader principle.

In Part II, I trace the beginnings of such a principle in the goals of the disability rights movement, which substantially informed the development of the ADA. Drawing on a strand of writings by disability rights activist-scholars in the 1970s, 1980s, and early 1990s, I argue that disability should be understood as a socially defined group status. The distinctive characteristic of that group status is systematic, socially contingent disadvantage. "Disability" is a condition in which people—because of present, past, or perceived "impairments"—are viewed as somehow outside of the "norm" for which society's institutions are designed and therefore are likely to have systematically less opportunity to participate in important areas of public and private life. Even though people with "disabilities" may have vastly different medical conditions—indeed, many may experience no medical limitations at all—they have one crucial thing in common: a socially assigned group status that tends to result in systematic disadvantage and deprivation of opportunity.

An understanding of disability as subordination, I contend, should frame the approach of courts in interpreting the statutory "disability" definition. In Part III, I sketch such an antisubordinationist approach and contend that it accords with a powerful normative understanding of disability rights law and of civil rights law more generally. I then contrast my proposed approach with the two leading approaches to defining "disability" that currently compete in the discourse surrounding the ADA. One approach, dominant in the lower federal courts, treats the ADA as targeting a narrow group of people with physically severe impairments. That approach, I argue, ignores the social component to the disadvantage that constitutes disability, and it is jarringly inconsistent with the strongest justifications for the statute. The other approach, prominent among disability rights lawyers, treats the statute as mandating a universal regime of individualized accommodation. That approach, I argue, fails to pay sufficient heed to the statutory text and—contrary to the strongly pressed arguments of its proponents—is inconsistent with the best normative understanding of disability rights law.

In Part IV, I apply the antisubordinationist approach to evaluate the cases in the Supreme Court's "disability" quartet. A casual first glance at the bottom-line results might suggest that the four cases are consistent with an understanding of disability as a subordinated group status. A closer analysis reveals a more complicated picture, however. While *Bragdon* seems entirely correct under a subordination-focused approach, the Court might have rested on firmer ground had it focused more directly on the prejudice and stereotypes experienced by people with HIV. *Murphy*, by contrast, was wrongly decided: The Court seems to have misperceived the socially disadvantaging impact of the plaintiff's severe high blood pressure—a condition that would have excluded him from literally millions of jobs. And while the results in *Sutton* and perhaps *Albertsons* seem justified—and the Court's decisions need not have the disastrous implications disability rights advocates attribute to them—much of the reasoning in those cases is questionable. A subordination-focused approach provides a better way of resolving those cases as well as the issues they leave open for the future.

Through my analysis of the "disability" quartet and the issues the Court's decisions have implicated, I hope to show the value of a subordination-focused approach. Given the broad and open-ended statutory "disability" definition, it is hard to say that any particular approach to that definition is compelled as a matter of statutory interpretation. But a subordination-focused approach makes sense of the ADA's substantive provisions and fits neatly with the goals of the disability rights movement that inspired enactment of the statute. Such an approach also accords with the most powerful normative justifications for disability rights law and for civil rights law more generally. Finally, it provides a fruitful way of addressing specific fact settings that arise in application of the ADA. Taken together, these points provide a powerful argument for using a subordination-focused approach in interpreting the statutory "disability" definition.

I. THE NEED FOR A MEDIATING PRINCIPLE

The need to define "disability" stems from a basic difference between the ADA and most other civil rights laws. Unlike those laws, the ADA does not simply forbid particular kinds of *classifications*. Rather, it expressly limits its reach to members of a protected

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class—people with a “disability.”¹² A Title VII plaintiff, for example, might need to prove that she suffered adverse action on the basis of her race or sex, but she does not have to prove that she *has* a race or sex (a trivial requirement if ever there was one), nor does she have to prove that she has a *particular* race or sex.¹³ Title VII protects everyone against discrimination on the basis of their race or sex, whatever their race and sex may be. The ADA, by contrast, does not prohibit discrimination on the basis of “disability status,” nor does it prohibit preferential treatment of people with disabilities. It prohibits discrimination (a term defined to include the failure to provide reasonable accommodations¹⁴) only when directed against people with a statutory “disability.” Titles I and II of the Act (which prohibit, respectively, employment discrimination and discrimination by state and local governments) make this explicit. They state that no “qualified individual with a disability” shall be discriminated against because of that person’s “disability.”¹⁵ Title III (which prohibits discrimination by public

¹² The other major exception is the Age Discrimination in Employment Act (“ADEA”), which limits its protections to “individuals who are at least 40 years of age.” 29 U.S.C. § 631(a) (1994).

¹³ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–80 (1976). Some difficult definitional issues might still arise in determining whether discrimination occurred “because of” race, as required under Title VII. See 42 U.S.C. § 2000e-2(a)(1) (1994). For example, is discrimination against Jews race discrimination? Cf. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (holding that Jews are a “race” for purposes of 42 U.S.C. § 1982, which has been construed as prohibiting only “race”-based discrimination). But Title VII, at least, makes such questions unlikely by treating discrimination on the basis of “religion,” “color,” and “national origin”—the types of classifications that seem the most likely to raise such definitional issues—as equivalent to “race.” 42 U.S.C. § 2000e-2(a)(1).

¹⁴ See 42 U.S.C. §§ 12112(b)(5)(A), 12182(b)(2)(A)(ii) (1994); 28 C.F.R. § 35.130(b)(7) (1999).

¹⁵ 42 U.S.C. § 12112(a) (Title I) (“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual [in employment]”); *id.* § 12132 (Title II) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). Certain special provisions of the statute are not limited to individuals with disabilities. Titles I and III prohibit discrimination “because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” *Id.* § 12112(b)(4) (Title I); see also *id.* § 12182(b)(1)(E) (Title III) (similar). And regardless of whether they in fact have disabilities, individuals are protected against retaliation and coercion in attempts to vindicate rights afforded under all of the statute’s substantive titles. See *id.* § 12203;

accommodations) does not expressly limit its protections to “individuals with disabilities.”¹⁶ But as the *Bragdon* Court recognized,¹⁷ that Title reaches the same result by prohibiting discrimination only when it occurs “on the basis of disability,” a provision that is best read as limited to discrimination “on the basis of [the plaintiff’s] disability.”¹⁸

The “disability” category thus serves a gatekeeping function in the statute. If a person wishes to bring an ADA suit alleging that an employer discriminated against her or denied an accommodation that she needed to perform the job, she must first establish that she has a “disability” as defined in the statute. Even if she does so, however, she may not ultimately prevail. The statute forbids employment discrimination only when directed against “qualified” individuals with disabilities, and it mandates workplace accommodations only where “reasonable.”¹⁹ Accordingly, the de-

see also *Fredenburg v. Contra Costa County Dep’t of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999) (holding that a plaintiff need not have a “disability” to challenge an employer’s unlawful use of a medical examination under 42 U.S.C. § 12112(d)(4)). The discussion in the text refers to the Act’s core nondiscrimination and reasonable accommodation requirements rather than these special provisions.

¹⁶ 42 U.S.C. § 12182(a) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . .”).

¹⁷ See *Bragdon*, 524 U.S. at 637 (holding under Title III that “[t]he statute is not operative, and the definition not satisfied, unless the impairment affects a major life activity”).

¹⁸ 42 U.S.C. § 12182(a). Immediately after setting forth its general rule against discrimination, Title III contains a number of specific provisions applying that rule to particular circumstances. Those provisions refer exclusively to actions taken “on the basis of a disability or disabilities of such individual or class,” *Id.* § 12182(b)(1)(A)(i) (prohibiting denial of participation “on the basis of a disability or disabilities of such individual or class”); see also *id.* § 12182(b)(1)(A)(ii) (prohibiting the provision of unequal benefits on the same basis); *id.* § 12182(b)(1)(A)(iii) (prohibiting the provision of separate benefits on the same basis), or to actions that harm “individuals with disabilities,” see *id.* § 12182(b)(2)(A)(i) (prohibiting use of eligibility criteria “that screen out or tend to screen out an individual with a disability”); *id.* § 12182(b)(2)(A)(ii) (requiring reasonable modifications where necessary to serve “individuals with disabilities”); *id.* § 12182(b)(2)(A)(iii) (requiring the provision of auxiliary aids and services where necessary to serve an “individual with a disability”). In context, it is apparent that the plaintiff must have a “disability” to invoke Title III’s protections.

¹⁹ *Id.* § 12112(a) (“qualified” individual); *id.* § 12112(b)(5)(A) (“reasonable” accommodations). Similar limitations apply under the public services and public accommodations titles. For Title II, see *id.* § 12132 (“qualified” individual); 28 C.F.R. § 35.130(b)(7) (1999) (requiring that the public entity make “reasonable modifications”

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fendant will have the opportunity to show that the plaintiff's condition rendered her unable to perform the "essential functions" of the job, and that no modification to job tasks or physical structures would make her able to do so without imposing "undue" hardship.²⁰ But those inquiries will never be entertained—and the employer will never be forced to defend the substance of its decision to exclude the plaintiff—unless the plaintiff can establish a statutory "disability."

All of this makes the definition of "disability" crucial. But the term is notoriously difficult to define.²¹ For one thing, it can refer to an enormously diverse array of conditions. Common understandings of "disability" embrace conditions ranging from deafness to quadriplegia, from epilepsy to cancer, from blindness to mental retardation, from mental illness to heart conditions.²² People may acquire these conditions at all different stages of life, and they may experience their conditions very differently as a result.²³ Such broad diversity confounds any attempt to locate a single, uncontestable

in its practices for individuals with disabilities). For Title III, see 42 U.S.C. § 12182(b)(2) (requiring that public accommodations also make "reasonable modifications").

²⁰ See 42 U.S.C. § 12111(8) (1994) (stating that a "qualified individual" must be able, "with or without reasonable accommodation, . . . [to] perform the essential functions of the employment position that such individual holds or desires"); *id.* § 12112(b)(5)(A) (stating that "reasonable accommodation" is not required where it "would impose an undue hardship on the operation of the business of" the employer).

²¹ For authors noting the lack of consensus on any definition of "disability," see Edward D. Berkowitz, *Disabled Policy: America's Programs for the Handicapped* 5 (1987); John Gliedman & William Roth, *The Unexpected Minority: Handicapped Children in America* 9, 428–29 nn.29–30 (1980); Anita Silvers, *Disability Rights*, in 1 *Encyclopedia of Applied Ethics* 781, 784 (Ruth Chadwick ed., 1998) [hereinafter Silvers, *Disability Rights*] ("[D]efining who is disabled is a matter of remarkable contentiousness.").

²² See, e.g., Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 5 (1993); U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 4 (1983). Deborah Stone has traced this definitional diversity to the evolution in the English Poor Laws of the disability category as a method of identifying groups of "deserving poor" who were exempt from various regulations on begging, mandates to live in the workhouse, and requirements imposed on workhouse residents. See Deborah A. Stone, *The Disabled State* 29–51 (1984); see also *id.* at 55 (noting that the category of "disability" grew up as "a series of separate conditions more unified in the notion of vagrancy than in any concept of common cause").

²³ See, e.g., Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* 32–36 (1963); Anita Silvers, *Reprising Women's Disability: Feminist Identity Strategy and Disability Rights*, 13 *Berkeley Women's L.J.* 81, 100 (1998) [hereinafter Silvers, *Reprising Women's Disability*].

example that would represent the “core” of the category.²⁴ If statutory interpretation generally proceeds by analogy from paradigmatic cases,²⁵ the inability to identify such a core is likely to leave us stymied in trying to give content to the term “disability.” Because abilities occur on a spectrum, moreover, identifying the point at which “disability” begins will require contentious “judgments of degree.”²⁶

The ADA provides its own definition of “disability,” but the statute has not avoided the difficulties that have marked all attempts to demarcate the boundaries of the “disability” category. To the contrary, its definition is essentially ambiguous: “The term ‘disability’ means, with respect to an individual—[A] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [B] a record of such an impairment; or [C] being regarded as having such an impairment.”²⁷

²⁴ See, e.g., Walter Y. Oi, Employment and Benefits for People with Diverse Disabilities, *in* Disability, Work & Cash Benefits 103, 112–23 (Jerry L. Mashaw et al. eds., 1996); Richard K. Scotch & Kay Schriener, Disability as Human Variation: Implications for Policy, 549 *Annals Am. Acad. Pol. & Soc. Sci.* 148, 154 (1997); Jacobus tenBroek, The Right to Live in the World: The Disabled in the Law of Torts, 54 *Cal. L. Rev.* 841, 861 (1966). For recognition of this point in the case law, see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–43 & n.9 (1985); *Board of Educ. v. Rowley*, 458 U.S. 176, 202 (1982). The diversity of the category of people with disabilities operated in the past to impede the formation of a unified disability rights movement. See, e.g., Susan M. Olson, Clients and Lawyers: Securing the Rights of Disabled Persons 47–51 (1984) [hereinafter Olson, Clients and Lawyers].

²⁵ See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The most reliable guides . . . will be found in the instances of unquestioned application of the statute.”); Cass R. Sunstein, *Legal Reasoning and Political Conflict* 83–90 (1996) [hereinafter Sunstein, *Legal Reasoning*] (defending analogical reasoning in statutory interpretation as both a positive and a normative matter).

²⁶ U.S. Comm’n on Civil Rights, *supra* note 22, at 6; see also *id.* at 94. Classic examples of seemingly arbitrary lines between “disabled” and “nondisabled” states are (1) the distinction between people defined as “legally blind” and others with severely impaired vision, and (2) the distinction between people classified as “severely hearing-impaired” and others classified as “profoundly hearing impaired.” See Harlan Lane, *Constructions of Deafness*, *in* *The Disability Studies Reader* 153, 158 (Lennard J. Davis ed., 1998) (arguing that these particular lines represent arbitrary and meaningless demarcations).

²⁷ 42 U.S.C. § 12102(2) (1994). The ADA’s definition of “disability” is drawn almost verbatim from the definition of “handicap” adopted in the Rehabilitation Act Amendments of 1974, Pub. L. No. 93–516, § 111(a), 88 Stat. 1617, 1619 (codified as amended at 29 U.S.C. § 706(8)(B) (1994)). The best discussion of the origins of the

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The first key term in this definition—"impairment"—is sufficiently broad to ensure that no serious question of application arises in the vast range of cases;²⁸ it basically includes any physiological or mental disorder, cosmetic disfigurement, or anatomical loss, whether or not the condition has any effect on an individual's life.²⁹ To be sure, some conditions press the boundaries of the "impairment" concept: pregnancy, obesity, and genetic predisposition to disease are good examples.³⁰ The application of the ADA to those conditions raises an exceptionally interesting theoretical question that requires much further study.³¹ Because cases involv-

1974 definition appears in Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy 64-68* (1984).

²⁸ See Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. Rev. 1405, 1475 (1999) (observing that "[i]n the vast majority of ADA cases, the impairment issue rarely surfaces as a point of contention").

²⁹ The relevant regulations define impairment as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more . . . body systems," or "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h) (1998). These regulations directly track the definition of "impairment" in the Rehabilitation Act regulations, see 45 C.F.R. § 84.3(j)(2) (1977), which Congress incorporated by reference in the ADA, see 42 U.S.C. § 12201(a) (1994).

³⁰ See Crossley, *supra* note 6, at 668-709. For a discussion of pregnancy as a "disability," see Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 Geo. L.J. 193 (1993). For a discussion of obesity as a "disability," see Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 Cal. W. L. Rev. 41 (1994). For a discussion of genetic predisposition to disease as a "disability," see, for example, Paul Steven Miller, *Genetic Discrimination in the Workplace*, 26 J.L. Med. & Ethics 189 (1998). Although nothing in the term "impairment" requires that a specific organic etiology be identified, conditions such as chronic pain and certain mental illnesses for which no such etiology has been identified also may create difficult line-drawing issues. See, e.g., Richard J. Bonnie, *Work Disability and the Fabric of Mental Health Law: An Introduction*, in *Mental Disorder, Work Disability, and the Law* 1, 7 (Richard J. Bonnie & John Monahan eds., 1997).

³¹ For a recent discussion focusing on the ambiguity of the term "impairment," and the theoretical issues raised by interpretations of that term, see Crossley, *supra* note 6, at 668-716. For a defense of interpreting "impairment" as coextensive with prevailing understandings among biomedical professionals about what conditions are appropriately subject to medical treatment, see Norman Daniels, *Mental Disabilities, Equal Opportunity, and the ADA*, in *Mental Disorder, Work Disability, and the Law*, *supra* note 30, at 281, 291-97. Disability studies scholars have begun to recognize that they have given far less theoretical attention to the underlying concept of impairment than to the higher-order concepts of disability and handicap. See, e.g., Michael Oliver, *Understanding Disability: From Theory to Practice 37-42* (1996).

ing such questions are distinctly marginal in practice, however, I do not focus in this Article on the definition of “impairment.”

My focus is on the other key terms in the “disability” definition: “substantially limits” and “major life activities.” The difficulty with those terms is not merely theoretical. Rather, they raise vexing questions of application. For example, how much of a limitation is “substantial”? It is surely too much to ask of any verbal test to provide determinate answers to fine-grained line-drawing questions, but the ambiguity of the term “substantial” begins well before we get to such a narrow level of specificity. That word could, for example, refer to a “very large” or “overwhelming” limitation—one that almost completely prevents an individual from performing the major life activity at issue. The word “substantial” has a similar connotation when we say that our favorite candidate “won the election by a substantial majority,” to take an example the Supreme Court has used in another context.³² But the law recognizes other definitions of “substantial” as well. For example, when a court reviews an administrative agency’s finding for “substantial evidence,”³³ it does not inquire whether the agency decision is supported by a *large* amount of evidence. It asks simply whether “a reasonable mind” would find the evidence “adequate to support a conclusion.”³⁴ And when a court determines whether a (losing) government litigating position was “substantially justified” for purposes of denying an award of fees to the prevailing party under the Equal Access to Justice Act,³⁵ it asks only whether the position was “justified to a degree that could satisfy a reasonable person.”³⁶ By analogy, a “substantial” limitation on a major life activity could be one that, although small, is something a reasonable person would regard as a meaningful impediment to performing the activity. The statutory definition gives no hint as to whether “substantial” should be interpreted in a generous or a restrictive sense.

And what is a “major” life activity? One that is necessary for life, like breathing? One that is important in most people’s lives, like working? Or one that is particularly important to the plaintiff,

³² *Pierce v. Underwood*, 487 U.S. 552, 564 (1988).

³³ 5 U.S.C. § 706(2)(E) (1994).

³⁴ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

³⁵ 28 U.S.C. § 2412(d)(1)(A) (1994).

³⁶ *Pierce*, 487 U.S. at 565.

like scuba diving? Again, the undefined statutory language does not answer the question.

Under the prevailing doctrinal approach to statutory interpretation, we typically expect an implementing agency to give meaning to such ambiguous text.³⁷ The ADA might seem a particularly promising candidate for deference to administrative views, for the statute twice endorses the principle of agency interpretation. First, it authorizes the Equal Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ") to adopt regulations "to carry out" its provisions.³⁸ That language represents Congress's standard way of delegating legislative rulemaking authority.³⁹ The Supreme Court has previously considered the existence of such delegation (or the lack thereof) to be an important factor in determining whether agency constructions are entitled to deference. To take the most directly relevant analogy, the Court has denied *Chevron* deference to the EEOC's interpretations of Title VII of the 1964 Civil Rights Act, and it has defended that denial by noting that the statute does not grant the EEOC legislative rulemaking authority.⁴⁰ The express grant of such authority under the ADA might, conversely, entail an obligation to defer to the regulations the EEOC and DOJ adopt.⁴¹ Second, the ADA expressly incorporates the regulations the Executive Branch had previously promulgated to implement the antidiscrimination provisions (Sections 501 through 504) of the statute's direct ancestor, the

³⁷ See *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984). See generally Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 *Duke L.J.* 1013, 1059-62 (1998) (arguing that, in the post-*Chevron* era, "administrative agencies have become America's common law courts," charged with "apply[ing] incompletely specified legal doctrines to new contexts" and with "supply[ing] new understandings of those doctrines").

³⁸ 42 U.S.C. § 12116 (1994) (requiring EEOC to issue regulations implementing Title I—the employment discrimination provisions—of the ADA); see also *id.* § 12134(a) (requiring DOJ to issue regulations implementing Title II—the government services provisions—of the ADA); *id.* § 12186(b) (requiring DOJ to issue regulations implementing Title III—the public accommodations provisions—of the ADA).

³⁹ See, e.g., *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973).

⁴⁰ See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

⁴¹ First principles aside, the Court has left unsettled the question whether DOJ and EEOC regulations implementing the ADA are entitled to *Chevron* deference. I discuss this issue below. See *infra* notes 491-516 and accompanying text.

Rehabilitation Act of 1973.⁴² Even if the regulations promulgated under the ADA were not themselves entitled to deference, therefore, the Court has made clear that the substantively identical regulations promulgated under the Rehabilitation Act would nonetheless provide a floor below which the ADA's coverage could not drop.⁴³

But neither the regulations adopted to implement the ADA, nor the Rehabilitation Act regulations on which they are based, provide meaningful assistance in making the vague "disability" definition concrete.⁴⁴ Those regulations do not define "major life activity" at all; they simply provide a list of illustrative conditions: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁴⁵ But what is

⁴² Sections 501 through 504 of the Rehabilitation Act are codified at 29 U.S.C. §§ 791-94 (1994 & Supp. III 1997). The ADA states that unless "otherwise provided," it should not "be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a) (1994) (emphasis added); see also *id.* § 12134(b) (providing that DOJ Title II regulations shall, with respect to most issues, be consistent with the then-Department of Health, Education, and Welfare's 1978 regulations coordinating implementation of Section 504 by federal funding providers and, with respect to other issues, be consistent with DOJ's regulations applying Section 504 to federally conducted activities).

⁴³ See *Bragdon*, 524 U.S. at 632 (noting that 42 U.S.C. § 12201(a) "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act").

⁴⁴ Nor does the ADA's legislative history offer any help, even if one believes that courts should appropriately examine that source of statutory meaning. Compare, for example, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992) (defending the practice of looking to legislative history) with, for example, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 29-37 (Amy Gutmann ed., 1997) (opposing that practice). With regard to the definition of "disability," the relevant passages from the committee reports accompanying the ADA have been incorporated almost verbatim in the statute's implementing regulations. See *infra* notes 45, 46. If, as I argue, the regulations are not helpful in providing a guide to interpretation of that definition, then the legislative history equally fails to answer the question.

⁴⁵ 29 C.F.R. § 1630.2(i) (1998) (EEOC Title I regulations); see also 28 C.F.R. §§ 35.104, 36.104 (1998) (DOJ regulations implementing, respectively, Titles II and III). This definition is drawn directly from the Rehabilitation Act regulations, 45 C.F.R. § 84.3(j)(2)(ii) (1977), and was endorsed in the ADA's legislative history. See S. Rep. No. 101-116, at 22 (1989) ("A 'major life activity' means functions such as

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the thread that connects this list? Frequency? If so, how frequently must one engage in an activity for it to be "major"? Must it be an everyday activity, like sleeping? Or is it enough that the activity be regularly engaged in, like shopping? Perhaps importance, rather than frequency, is the touchstone of "major" life activity status. The regulatory list seems to support an importance-based approach. The first seven terms on the list are daily (even continuous) activities for most people, but they are also essential to survival and to taking advantage of most economic and social opportunities in our society. By contrast, the last two listed activities ("learning" and "working") are not necessarily ones people perform every day. Those terms seem to be included because most people believe that learning and working are an important part of their personal development and self-actualization—and indeed their personhood itself (not to mention their economic success). What about other activities that most people find important, like reproduction? Or activities that an individual (perhaps idiosyncratically) finds particularly important to her identity, such as painting? The direction to look at activities "such as" the enumerated ones does not answer these questions.

The ambiguities are even more severe when we turn to the definition of "substantially limits." Although the EEOC regulations attempt to define that term, the key language in their definition is itself vague: A person's life activities are "[s]ubstantially limit[ed]" if her ability to perform them is "[s]ignificantly restricted" as compared to "the average person in the general population."⁴⁶ The

caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."); see also H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; H.R. Rep. No. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

⁴⁶ 29 C.F.R. § 1630.2(j)(1) (1998). The DOJ regulations implementing Titles II and III do not include such a definition, but a very similar one does appear in the Department's "interpretive guidance" to those regulations. See 28 C.F.R. pt. 35, app. A, § 35.104, at 479 (1999) ("A person is considered an individual with a disability ... when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."); 28 C.F.R. pt. 36, app. B, § 36.104, at 619-20 (1999) (same). Again, the relevant regulatory language comes directly from the ADA's legislative history. See H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to

“average person” language provides the beginnings of a useful point of reference, but replacing “substantially” with its synonym “significantly” (and replacing “limited” with its synonym “restricted”) does nothing to make the core test any more determinate.⁴⁷ The notion of a “significant” deviation from the “average” implies a decision to provide protection only to those people who fall outside of a “normal” range of abilities. But the breadth we give to the “normal” range is a value question, one that cannot be answered by even the most careful parsing of the words “significant” or “substantial.”

The definitional problem is not unique to the ADA. Rather, a long history of failed attempts to define “disability” demonstrates that the problem is inherent in any attempt to give meaning to the word. The dividing line between the “disabled” and the “nondisabled”—just like the dividing line between different races (and, indeed, the concept of “race” itself)⁴⁸—is plainly an artifact of the

most people.”); S. Rep. No. 101-116, at 23 (1989). This language has no counterpart in the pre-ADA Rehabilitation Act regulations. See 45 C.F.R. pt. 84, app. A, at 334 (1977) (explaining in an “Analysis of Final Regulation” that no definition of “substantially limits” was “possible at this time”).

⁴⁷ Nor do the EEOC regulations (the DOJ regulations have no counterpart on this point) make the test any more determinate when they include the following list of factors courts should “consider[]” in making the substantial limitation determination: “[t]he nature and severity of the impairment,” “[t]he duration or expected duration of the impairment,” and “[t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2) (1998). The broad wording of these unweighted considerations makes them more obvious than helpful. Cf. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *Yale L.J.* 65, 71 (1983) (“[S]uch laundry lists add relatively little transparency when both the meaning and relative weights of the enumerated terms remain unspecified.”).

⁴⁸ On the socially contingent nature of what is defined as “race,” see, for example, Ian F. Haney López, *White by Law: The Legal Construction of Race* 87–88 (1996) (observing that “class and caste, blood and birthplace, and even religion” played a role in judicial determination of the “race” of Subcontinental Indians); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* 45–46 (1990) [hereinafter *Minow, Making All the Difference*] (discussing the question whether Jews are a “race”). On the contingent nature of the dividing line drawn between “races,” see, for example, Martha Minow, *Not Only for Myself: Identity, Politics, and the Law* 41 (1997) [hereinafter *Minow, Not Only for Myself*] (describing different legal rules that defined “nonwhiteness”); Lopez, *supra*, passim. The point is hardly a novel one. See Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 *UCLA L. Rev.* 263, 305–06 (1995) [hereinafter *Karst, Myths of Identity*] (noting that Ashley Montagu made the same point in the 1940s).

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particular society drawing the line and the purposes for which the line is being drawn. The decision where to draw the line is a value question, not a determination of objective fact.⁴⁹

Even the Social Security disability insurance system, which ostensibly treats "disability" as an objective, clinical category limited to those whose impairments prevent them from working,⁵⁰ has not been able to avoid the value-laden nature of the disability definition. As Lance Liebman and others have demonstrated, a determination that an applicant is "disabled" under that system represents as much a judgment of policy as a finding of fact. When courts and administrative adjudicators purport to decide that an individual is incapable of working, they are in fact deciding that the severity of her impairments makes it unjust to require her to work. The "disability" definition thus "incorporates common expectations and shared values about what infirmities a person *ought* not to have to bear and keep working."⁵¹ The Social Security Act's definition of disability—objective as it purports to be—has not obviated the policy question of how much limitation is enough. It has simply delegated that question, *sub rosa*, to administrative law judges and reviewing courts.⁵²

⁴⁹ See, e.g., Simi Linton, *Claiming Disability: Knowledge and Identity* 22–25 (1998); Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* 15–16, 22–23 (1996). Again, the point is not novel. See Earl D. McBride, *Concept of Disability*, *Clinical Orthopaedics & Related Research*, Aug. 1987, at 3, 5 (originally published 1963) ("The terms '*normal*,' '*physically fit*,' and '*non-disabled*' do not denote statistical standards. They represent value judgments in which we use ourselves as the standard and the subject of our attentions as the deviation from that standard.")

⁵⁰ See 42 U.S.C. § 423(d)(1)(A) (1994) (requiring claimant to demonstrate "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment").

⁵¹ Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 *Harv. L. Rev.* 833, 853 (1976); see also Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 *Tex. L. Rev.* 1003, 1064 (1998) [hereinafter Diller, *Dissonant Disability Policies*] (observing that "SSA's disability determinations represent social judgments about who should be expected to work, rather than findings of medical fact"); Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 *UCLA L. Rev.* 361, 386 (1996) [hereinafter Diller, *Entitlement and Exclusion*] ("[D]isability status is an indication that an individual is deemed excused from the work force, rather than a judgment that the individual is actually incapable of working productively.")

⁵² See Liebman, *supra* note 51, at 834.

If anything, the problem is likely to be even more vexing under the ADA, where a “disability” determination does not trigger a binary “must work/needn’t work” judgment but instead entitles an individual to demand a wide range of accommodations from a wide range of institutions: employers, government agencies of all kinds, and public accommodations. It is therefore unfortunate that the Court has not confronted the questions of value that inhere in the attempt to define “disability” under the statute. Even though the statutory definition defies mechanical application, the Court has acted as if its decisions were dictated by the statutory text. The decision in *Bragdon v. Abbott*⁵³ provides a good example. The plaintiff, Sydney Abbott, was infected with HIV, though her condition was still in its “asymptomatic” stage. Because she had HIV, the defendant, Randon Bragdon, refused to fill her cavity in his dental office.⁵⁴ In her suit challenging that exclusion as unlawful discrimination, Abbott argued that her HIV infection, although not yet symptomatic, nonetheless substantially limited her major life activity of “reproduction.”⁵⁵ In an opinion by Justice Kennedy, the Court agreed.⁵⁶ Because reproduction “could not be regarded as any less important than working and learning,” the Court reasoned that it must constitute a major life activity.⁵⁷ Moreover, although women with HIV are physically capable of conceiving, bearing, and begetting children, the Court concluded that Abbott was “substantially limit[ed]” in reproduction because she could engage in those activities only by placing her sexual partner and potential child at

⁵³ 524 U.S. 624 (1998).

⁵⁴ See *id.* at 628–29.

⁵⁵ *Id.* at 637. Justice Ginsburg, who joined the *Bragdon* opinion, filed a separate opinion that considered a broader array of major life activities. See *id.* at 656 (Ginsburg, J., concurring) (stating that HIV infection substantially limits, or is perceived as substantially limiting, major life activities “including the afflicted individual’s family relations, employment potential, and ability to care for herself”).

⁵⁶ See *id.* at 655. The Court thus affirmed the First Circuit’s holding that Abbott had a statutory “disability.” See *id.* It remanded, however, for further consideration of whether Bragdon could properly decline to treat her on the ground that treating her in his office would “pose[] a direct threat to the health or safety of others.” *Bragdon*, 524 U.S. at 655 (quoting 42 U.S.C. § 12182(b)(3) (1994)). On remand, the First Circuit reaffirmed its earlier conclusion that treatment of Abbott would not have posed a “direct threat.” *Abbott v. Bragdon*, 163 F.3d 87, 90 (1st Cir. 1998), cert. denied, 119 S. Ct. 1805 (1999).

⁵⁷ *Bragdon*, 524 U.S. at 638–39 (citing illustrative list of major life activities in 45 C.F.R. § 84.3(j)(2)(ii) (1977)).

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ties only by placing her sexual partner and potential child at risk of contracting the infection.⁵⁸

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented on the "disability" question.⁵⁹ Referring, like the Court, to the regulatory list of major life activities, the Chief Justice argued that reproduction is not "a major life activity in the same sense that 'caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working' are."⁶⁰ Unlike "the series of activities leading to the birth of a child," the Chief Justice concluded, the acts listed in the regulation "are repetitively performed and essential in the day-to-day existence of a normally functioning individual."⁶¹ He added that Abbott's infection did not "substantially limit" her ability to reproduce in any event: Although she "may choose not to engage in these activities," he said, "[a]symptomatic HIV does not presently limit [her] ability to perform any of the tasks necessary to bear or raise a child."⁶²

In my (hardly disinterested) view,⁶³ the result in *Bragdon* is eminently correct. (I discuss the merits of *Bragdon* in detail below.⁶⁴)

⁵⁸ Id. at 639–41. In particular, the Court cited studies "indicat[ing] that 20% of male partners of women with HIV become HIV-positive themselves," id. at 639, and that pregnant women with HIV face a risk of between 8% (if antiretroviral therapy is administered to the mother) and 25% (if not) of transmitting the virus to the fetus, see id. at 640. The Court stated that even the smallest of these risks might constitute a "substantial limitation." Id. at 641 ("It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction.").

⁵⁹ See id. at 657–64 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice O'Connor filed a separate opinion, in which she also dissented on the disability question. See id. at 664–65 (O'Connor, J., concurring in the judgment in part and dissenting in part).

⁶⁰ Id. at 659 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

⁶¹ Id. at 660 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Without elaboration, Justice O'Connor adopted a very similar view. See id. at 664–65 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("[T]he act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons . . . listed in regulations relevant to the . . . [ADA].").

⁶² Id. at 661 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). For a more complete argument to this effect, see Gary Lawson, AIDS, Astrology and *Arline*: Towards a Causal Interpretation of Section 504, 17 Hofstra L. Rev. 237, 287–88 (1989).

⁶³ As an attorney in the Civil Rights Division of the United States Department of Justice, I served as counsel for the United States in the court of appeals in *Bragdon*.

But note the woodenness of analysis in both the majority and dissenting opinions.⁶⁵ In his opinion for the Court, Justice Kennedy relied on the asserted “plain meaning” of the word “major” as denoting “comparative importance.”⁶⁶ The dictionary surely supports such a qualitative construction of “major.”⁶⁷ But as the Chief Justice made clear, the dictionary provides a quantitative definition as well: “greater in quantity, number, or extent.”⁶⁸ Choosing between the two definitions requires justification: Why should the statute be read to cover (or not to cover) people whose impairments limit activities that are of fundamental importance to their lives but are not performed daily? Neither Justice Kennedy nor the Chief Justice offered any such justification. Instead, each treated his favored definition as if it flowed necessarily from the statutory language.

So, too, with the Court’s treatment of “substantial limitation.” Justice Kennedy treated it as evident that a woman is “substantially limited” in reproducing if she cannot engage in that activity without incurring economic costs and posing health risks to herself, her partner, and her unborn child.⁶⁹ The Chief Justice treated it as equally evident that the attendant costs and risks cannot be described as a “limitation” at all, much less a “substantial” limitation.⁷⁰ But neither justice sought to articulate a theory that would explain

In addition, I was a law clerk to Justice Ruth Bader Ginsburg when *Bragdon* was heard and decided by the Supreme Court but had no involvement with the case in that forum. It should go without saying that all views expressed in this Article are my own.

⁶⁴ See *infra* notes 330–371 and accompanying text.

⁶⁵ For a similar discussion, see Crossley, *supra* note 6, at 644 (arguing that *Bragdon* “is devoid of any broader conceptual understanding of who should be considered disabled for purposes of the ADA or of any theoretical framework for addressing that question”).

⁶⁶ *Bragdon*, 524 U.S. at 638 (internal quotation marks omitted).

⁶⁷ Webster’s New Collegiate Dictionary 702 (10th ed. 1994) (first definition) (“greater in dignity, rank, importance, or interest”). The First Circuit’s opinion, which Justice Kennedy’s majority opinion quoted for this point, relied on the identical definition from the Ninth Edition of Webster’s. See *Abbott v. Bragdon*, 107 F.3d 934, 939–40 (1st Cir. 1997), *aff’d*, 524 U.S. 624 (1998).

⁶⁸ *Bragdon*, 524 U.S. at 660 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting Webster’s New Collegiate Dictionary 702 (10th ed. 1994)).

⁶⁹ See *id.* at 639–41.

⁷⁰ See *id.* at 660–61 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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why those conditions on reproduction should (or should not) be deemed a "substantial limitation."

Whatever the arguments in favor of "judicial minimalism" on the Supreme Court,⁷¹ the reasoning in *Bragdon* is hard to justify. For not only did the Court decline to decide more than the case required, it also declined to offer any explanation for some of the key decisions it *did* make—even when those decisions, like the Court's interpretations of "substantially limits" and "major life activity," were challenged by the Chief Justice's dissent.⁷² Assertions of "plain meaning" simply will not do when interpreting statutory language that is as vague as the ADA's "disability" definition. As I demonstrate in Part IV, *Bragdon* is far from the only case in which a single "plain meaning" of that definition is hard to come by; *Sutton* and *Murphy* illustrate the point as well. Indeed, the terms "substantially" limit and "major" life activity are sufficiently open-ended that there is a serious question about their application in an extraordinary number of cases.⁷³

What, then, is a court to do? If the text, implementing regulations, and legislative history all fail to provide guidance regarding the definition of "disability," how can a court decide that question—which is a threshold question in *every* case alleging discrimination under the ADA?⁷⁴ Unless courts are simply to rely on their own intuitions, they need to develop a mediating principle that will give content to the statutory definition. If such a principle

⁷¹ For an extended argument for "judicial minimalism," see Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) [hereinafter Sunstein, *One Case*].

⁷² In my view, then, *Bragdon* is an example of what Sunstein calls "subminimalism," a trait that, at the very least, "violate[s] norms associated with legal craft." *Id.* at 16. Given the frequency with which issues concerning the definition of "disability" arise, a "subminimalist" approach may have been particularly unjustifiable in *Bragdon*. *Cf. id.* at 48 (arguing that even "minimalism" is inappropriate where a minimalist decision will "lead to very high aggregate decision costs" as "litigants and district courts . . . struggle with [the] issue in subsequent cases").

⁷³ Lance Liebman made a very similar point when discussing the *sub rosa* delegation of policymaking authority to administrative law judges and reviewing courts under the Social Security Act. See Liebman, *supra* note 51, at 834 ("In the absence of legislative guidance, however, such delegation is bound to produce inconsistent results since agencies and courts have no generally accepted theoretical assumptions by which to structure the boundaries of social welfare protection.").

⁷⁴ Even more, the parties whose primary conduct is governed by the statute need such a principle to help order their affairs.

accords with the basic values that underlie the statute, it will provide the basis for a candid engagement with the value questions that inhere in any interpretation of the term “disability.”⁷⁵ In the remainder of this Article, I explore one such principle.

II. “DISABILITY” AS A SUBORDINATED GROUP STATUS

In this Part, I attempt to shed light on the proper interpretation of the ADA’s “disability” category by developing a particular conception of the problem to which the ADA should be seen as responding. Drawing on the congressional findings in the text of the ADA, as well as the writings of a number of disability studies scholars, I suggest that the statute can be seen as responding to a problem of impairment-based subordination: Through prejudice, stereotypes, and widespread neglect, society’s attitudes and practices attach systematic disadvantage to particular impairments. By so doing, disability rights scholars have persuasively argued, society in fact creates an identifiable class of “people with disabilities.” Disability rights law can therefore be seen as providing members of that subordinated class with the means (antidiscrimination and reasonable-accommodation requirements) to challenge the practices that enact and enforce their subordinated status.

My task in this Part is primarily descriptive. I aim to show what a subordination-based understanding of disability rights law might look like. I also aim to show how that understanding can be seen as connecting with various elements of the ADA’s statutory findings and of the goals of the disability rights movement. The principal normative defense of my understanding appears in the next Part. By focusing on the statutory findings, I do not mean to suggest that my understanding of disability rights law is “compelled” by the text or congressional intent; the findings are phrased far too generally

⁷⁵ Cf. David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 736–38 (1987) (making “the case for candor”). On the value of candor in statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 362–83 (1990). Scott Altman argues that judges should be candid, but not introspective, because even a false belief in the existence of legal constraints will induce both candor and constraint. See Scott Altman, Beyond Candor, 89 Mich. L. Rev. 296, 297–99 (1990). For what it is worth, Altman’s suggestion would seem to have particularly little bearing on an issue like interpretation of the ADA’s “disability” definition, which inevitably implicates policy questions that should be apparent to all but the most ostrich-like observer.

to support such a claim. Nor do I mean to suggest that my rendering of the goals of the disability rights movement fully accounts for the range of views held by disability rights activists at the time the ADA was passed or subsequently. And I should not be misunderstood as contending that the views of an interest group that obtained passage of a statute would be controlling even if all members of that interest group agreed on what the statute should mean. My objectives in reading the statutory findings and the disability rights movement's ideology are more modest ones: to suggest that my proposed reading of the "disability" definition would address the general problem that provoked passage of the statute; and to lay the groundwork for my response, in Parts III and IV, to the argument of many disability rights lawyers that the Supreme Court has disregarded the aims of the disability rights movement by confining statutory coverage to a protected class. I contend that a protected-class understanding of the statute can be read as flowing naturally from the goals of the disability rights movement and of disability rights law, even as articulated by its chief advocates.

A. The Problem of Disability Discrimination

1. The Statutory Findings

The ADA's text provides important clues regarding the nature of the problem the statute targets. In particular, "[t]he congressional findings in 42 U.S.C. § 12101 . . . serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned."⁷⁶ Those findings state that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political power-

⁷⁶ *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176, 2193 (1999) (Kennedy, J., concurring in the judgment); see also the majority opinion, *id.* at 2187 (relying on congressional findings to conclude that "unjustified 'segregation' of persons with disabilities [is] a 'for[m] of discrimination'") (quoting 42 U.S.C. § 12101(a)(2) (1994)); *Sutton*, 119 S. Ct. at 2147 (1999) (relying on congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities" to reject a reading of the statute that would deem over 100,000,000 Americans disabled) (quoting 42 U.S.C. § 12101(a)(1)); *id.* at 2152 (Ginsburg, J., concurring) (stating that legislative findings provide "[t]he strongest clues to Congress' perception of the domain of the Americans with Disabilities Act").

lessness in our society.”⁷⁷ Although it is implausible to speak of people with disabilities as a “discrete” or “insular” group in a physical or geographic sense,⁷⁸ the statute plainly uses those terms as constitutional code words to designate an identifiable group of people who experience a common set of obstacles to participation in public and private life. The accompanying findings list those obstacles in unusual detail. Taken together, they fully support the notion that disability is a condition marked by the kind of subordination and second-class citizenship that many scholars have taken to be the appropriate target of civil rights laws.⁷⁹ According to the statutory findings, people with disabilities have historically faced discrimination: “[H]istorically, society has tended to isolate and segregate individuals with disabilities.”⁸⁰ They face continuing discrimination: “[S]uch forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”⁸¹ And that discrimination occurs across a wide spectrum of economic, social, and political activities: “[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”⁸² The result, documented by “census data, national polls, and other studies,” is that “people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.”⁸³

Statistics compiled since the enactment of the ADA tell a similar story, although the difficulty in defining “disability” makes them valuable only as broad strokes. The Census Bureau estimates that

⁷⁷ 42 U.S.C. § 12101(a)(7).

⁷⁸ See Michelle T. Friedland, Note, Not Disabled Enough: The ADA’s “Major Life Activity” Definition of Disability, 52 *Stan. L. Rev.* 171, 186–88 (1999).

⁷⁹ See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *N.Y.U. L. Rev.* 1003, 1007–10 (1986) [hereinafter Colker, *Anti-Subordination Above All*]; Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Aff.* 107, 154–55 (1976) [hereinafter Fiss, *Groups*]; Kenneth L. Karst, *Why Equality Matters*, 17 *Ga. L. Rev.* 245, 247–49 (1983) [hereinafter Karst, *Why Equality Matters*].

⁸⁰ 42 U.S.C. § 12101(a)(2).

⁸¹ *Id.*

⁸² *Id.* § 12101(a)(3).

⁸³ *Id.* § 12101(a)(6).

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people with disabilities make up just over 20% of the population,⁸⁴ but almost 37% of people in America's jails report a disability.⁸⁵ A comprehensive longitudinal study performed by the Department of Education showed that schoolchildren whose teachers identified them as having disabilities were more than three times as likely to drop out after the ninth grade than were those who were not so identified.⁸⁶ The same study showed that children identified by their teachers as disabled were nearly 40% less likely than their classmates to take the SAT.⁸⁷ People with disabilities have a lower rate of employment than people without them: More than 80% of people of working age without disabilities are employed, compared to just over 50% of working-age people with disabilities.⁸⁸ They also have significantly lower family incomes: 30.4% of working-age

⁸⁴ See Bureau of the Census, U.S. Dep't of Commerce, 1997 Population Profile of the United States 32 (1998) [hereinafter 1997 Population Profile] (stating that in late 1994 and early 1995, 53.9 million Americans had a disability).

⁸⁵ See Bureau of Justice Statistics, U.S. Dep't of Justice, Profile of Jail Inmates 1996, at 11 (1998). Note that because this figure relies on self-reporting data and a different definition of disability, it is not strictly comparable with the Census Bureau's 20% statistic. Even when definitions and methodologies are held constant, however, the Bureau of Justice Statistics' figures show a significantly higher percentage of people with disabilities in jail than in the general population. See *id.* (noting that only 26% of the population overall reported a disability).

⁸⁶ See National Ctr. for Educ. Statistics, U.S. Dep't of Educ., Profiles of Students with Disabilities as Identified in NELLS:88, at 52-53 & tbl. 5.7 (1997) (showing that 19.5% of students identified by their teachers as disabled dropped out, compared with 6.2% of students not so identified).

⁸⁷ See *id.* at 51-52 & tbl. 5.6 (showing that 30.1% of students identified by teachers as disabled took or planned to take the SAT, compared with 49.7% of students not so identified).

⁸⁸ See 1997 Population Profile, *supra* note 84, at 33 ("The employment rate was 82.1 percent among the 119.9 million people with no disability, 76.9 percent among the 15.2 million people with a nonsevere disability, and 26.1 percent among the 14.2 million people with a severe disability."). The Census Bureau's Survey of Income and Program Participation (SIPP), which is the basis for the census data I cite, counts people as having "severe" disabilities if they meet at least one of the following conditions: They (i) are unable to perform a functional activity; (ii) need personal assistance with activities of daily living such as bathing and dressing or with instrumental activities of daily living such as going out of the home, doing housework, or preparing meals; (iii) use a wheelchair or are long-term users of a cane, crutches, or a walker; (iv) have a developmental disability or Alzheimer's disease; (v) are "receiving federal [disability] benefits" or (vi) are "16 to 67 years old" and unable to work. John M. McNeil, U.S. Dep't of Commerce, Current Population Reports: Americans with Disabilities: 1994-95, at 1 (1997). The SIPP's definition of "disability" roughly—but only roughly—tracks that in the ADA. *Id.*

people with any disability, and 42.2% of working-age people with a “severe” disability, have what the Census Bureau refers to as a “low” relative income; the comparable figure for working-age people without disabilities is 13.3%.⁸⁹ As a result, people with disabilities live in poverty at nearly twice the rate of the general population.⁹⁰

The evidence thus seems to confirm the statutory findings’ description of people with disabilities as an identifiable and disadvantaged class. Crucially, however, the statutory findings do not treat the systematic disadvantage attached to “disability” as inherent in the disabled person’s biological condition. Rather, they point to several societal practices that are the source of that disadvantage. One can identify in those findings three mechanisms by which disability-based disadvantage is transmitted: prejudice, stereotypes, and neglect. Although it is not my purpose here to canvass all of the evidence that supports the congressional findings, some illustration of these three mechanisms will be useful in describing the problem that the statute should be understood as targeting. As to the first means—what the findings call “unfair . . . prejudice”⁹¹—Congress heard numerous examples of people being denied opportunities for reasons of sheer animus. Four illustrative examples, culled from the legislative history, appear in an article by Robert Burgdorf, who helped to draft an early version of the ADA as a staffer for (what was then known as) the National Council on the Handicapped:

(1) Operators of an auction house attempted to remove a woman who used a wheelchair . . . because she was deemed to be “disgusting to look at” . . . ;

(2) A New Jersey zoo keeper refused to admit children with Down’s syndrome because he feared they would upset the chimpanzees;

(3) A woman disabled by arthritis was denied a job at a college, not because of doubts that she could perform the job, but because

⁸⁹ See 1997 Population Profile, *supra* note 84, at 32.

⁹⁰ According to 1990 census numbers, 18.3% of the disabled population lived below the poverty line, compared to 9.9% of the general population. See Michele Adler, *Conditions and Impairments Among the Working-Age Population with Disabilities 1995*, at tbl. 4 (visited June 30, 1999) <<http://aspe.os.dhhs.gov/daltcp/reports/conimpwa.htm>>.

⁹¹ 42 U.S.C. § 12101(a)(9) (1994).

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the college trustees believed that "normal students shouldn't see her";

(4) A child with cerebral palsy was excluded from public school, although he was academically competitive and his condition was not actually physically disruptive, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates.⁹²

More systematic studies presented to Congress demonstrated that these were not isolated anecdotes; rather, those studies showed animus and prejudice to be a frequent experience in the lives of people with disabilities.⁹³

Even absent animus-based prejudice, people with disabilities may be deprived of opportunities because of stereotypes—overbroad generalizations about the limiting effects of their impairments. Individuals with physical and mental impairments frequently experience a "spread effect," in which people assume that an impairment that affects particular life functions also indicates a more general disability.⁹⁴ Thus, "[p]eople with disabilities often report that people will raise their voice to speak to someone in a wheelchair, or who is blind—even though there is no obvious reason for

⁹² 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, 418–19 (1991) [hereinafter *Burgdorf, Analysis and Implications*] (citations omitted).

⁹³ For examples of works collecting such studies, see U.S. Comm'n on Civil Rights, *supra* note 22, at 42–43; Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 *Temp. L. Rev.* 393, 408–09 (1991); see also Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 *Buff. L. Rev.* 123, 131–32 (1998) (collecting pre- and post-ADA studies to this effect).

⁹⁴ U.S. Comm'n on Civil Rights, *supra* note 22, at 25; see, e.g., Gliedman & Roth, *supra* note 21, at 23 ("The stigma of handicap . . . hampers its bearer's ability to assume virtually *any* positive social persona."); Wendell, *supra* note 49, at 4 ("People without disabilities tend to assume that a person with a disability is unable to participate in most of the life activities they consider important."). An example of the "spread effect" can be seen in the "neuropathic taint" theory of the American eugenicist Charles Davenport. Davenport believed that people with mental disabilities ranging from alcoholism to manic depression to "feeble-mindedness" had "often inherited 'a general nervous weakness—a neuropathic taint—showing itself now in one form of psychosis and now in another.'" Daniel J. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* 46 (1985).

doing so.”⁹⁵ Researchers have pointed to a particularly striking example of this effect in the school context, where educators not uncommonly assume that *any* child with a disability (even a child who has nothing more than a mobility impairment) also has difficulty learning.⁹⁶ And even when people do not assume that an impairment that affects one bodily function extends to others, they frequently overstate the limiting effects of (and safety risks attendant to) the impairment.⁹⁷ These stereotypes may frequently be so overbroad as to be an irrational basis for action by employers, store owners, and government agencies.⁹⁸ But even when they are rational (in the sense that a reasonable person would find it more efficient to act on such a generalization than to make an individualized inquiry),⁹⁹ they contribute substantially to the systematic

⁹⁵ Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 Wis. L. Rev. 1237, 1308.

⁹⁶ See, e.g., Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 Ohio St. L.J. 1, 57 n.201 (1995) (discussing a common assumption that all schoolchildren with disabilities are “retarded or stupid”); David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 185 (discussing educators’ treatment of schoolchildren with physical disabilities as if they were mentally impaired: “The assumption appears to be that a child can be *either* intelligent *or* ‘handicapped’ but is rarely—if ever—both”).

⁹⁷ See *School Bd. v. Arline*, 480 U.S. 273, 284 (1987). See generally *Americans with Disabilities Act: Hearing Before the House Committee on Small Business*, 101st Cong. 126–39 (1990) [hereinafter *Small Business Hearing*] (statement of Arlene Mayerson) (collecting studies); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 353 (“Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity.”). For one author’s illustration of erroneous generalizations employed to deny opportunities to individuals with learning disabilities, see Andrew Weis, *Jumping to Conclusions in “Jumping the Queue,”* 51 Stan. L. Rev. 183, 203–07 (1998) (book review).

⁹⁸ Cf. Minow, *Making All the Difference*, *supra* note 48, at 321 (noting that the historical record is one of underestimating the potential of people labeled as having disabilities).

⁹⁹ See, e.g., Gliedman & Roth, *supra* note 21, at 288 (stating that “a significant portion of this underutilization [of the talents of individuals with disabilities] is perfectly rational given the special margin of uncertainty in the information currently available to employers about the economic value of disabled job applicants and disabled job holders—the extra margin of ‘noise’ in their formal and informal credentials and records”); Cass R. Sunstein, *Why Markets Don’t Stop Discrimination*, *in* *Free Markets and Social Justice* 151, 156 (1997) [hereinafter *Sunstein, Why Markets Don’t*] (suggesting that much disability-based discrimination is rational in this sense).

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disadvantage experienced by people with disabilities. Such rational stereotypes do more than just deprive individuals of particular opportunities they would be fully capable of performing. They have a systemic effect as well, for the same characteristics that make it rational for a given employer, business, or government agency to discriminate against people with particular impairments will likely make it rational for other entities to engage in similar discrimination.¹⁰⁰ Congress referred to such overbroad stereotypes when it found that individuals with disabilities experience "restrictions and limitations" based on "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."¹⁰¹

But the exclusion of people with disabilities operates in a more subtle—and even more pervasive—way as well. Exclusion is literally built into our physical and social environment. As I discuss below, a key tenet of the disability rights movement holds that much of society is designed without regard for the needs of people with various impairments. The ADA's findings reflect that view. Listing the "various forms of discrimination" encountered by people with disabilities, the findings point, *inter alia*, to "the discriminatory effects of architectural, transportation, and communication barriers," and the "failure to make modifications to existing facilities and practices."¹⁰² Those findings echo the statements of the sponsors of the ADA's direct ancestor, Section 504 of the Rehabilitation Act of 1973. As the Supreme Court explained in *Alexander v. Choate*,¹⁰³ Section 504's sponsors viewed the problem of disability discrimination as largely a problem "of thoughtlessness and indifference—of benign neglect."¹⁰⁴

¹⁰⁰ See Gliedman & Roth, *supra* note 21, at 288 (suggesting that the factors that make it rational for one unprejudiced employer to discriminate against people with disabilities will make it rational for many employers to do so); cf. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *Geo. L.J.* 1619, 1627–28 (1991) (noting the widely-held intuition that statistical race discrimination is likely to entrench the second-class economic status of African-Americans).

¹⁰¹ 42 U.S.C. § 12101(a)(7) (1994).

¹⁰² 42 U.S.C. § 12101(a)(5).

¹⁰³ 469 U.S. 287 (1985).

¹⁰⁴ *Id.* at 295; see also *id.* at 296 (quoting references in Section 504's legislative history to "'shameful oversights,' which caused the handicapped to live among society

2. *The Goals of the Disability Rights Movement*

The statutory findings therefore support an understanding of people with disabilities as an identifiable group. That group, moreover, shares a common experience of systematic prejudice, stereotypes, and neglect. To use Justice Ginsburg's language from her concurring opinion in *Sutton*, the findings treat people with disabilities as "a confined, and historically disadvantaged, class."¹⁰⁵ Given the role of the disability rights movement in securing passage of the statute,¹⁰⁶ there should be little surprise that those findings are consistent with a reading of the basic tenets of disability rights ideology. As I shall describe it, the disability rights movement started with the observation that people with disabilities share a common experience of systematic exclusion, but it took the point a step further. It added the insight that the very notion of "disability" depends crucially on the social practices that create that shared experience. To most disability rights advocates, "disability" is not an inherent trait of the "disabled" person. Rather, it is a condition that results from the interaction between some physical or mental characteristic labeled an "impairment" and the contingent decisions that have made physical and social structures inaccessible to people with that condition. The proper remedy for disability-based disadvantage, in this view, is civil rights legislation to eliminate the attitudes and practices that exclude people with actual, past, or perceived impairments from opportunities to participate in public and private life.¹⁰⁷

'shunted aside, hidden, and ignored'; to "the invisibility of the handicapped in America"; to "previous societal neglect"; and to "'glaring neglect' of the handicapped").

¹⁰⁵ *Sutton*, 119 S. Ct. at 2152 (Ginsburg, J., concurring).

¹⁰⁶ For accounts of the influence of the disability rights movement on the passage of the ADA, see Shapiro, *supra* note 22, at 105-41; Sara D. Watson, A Study in Legislative Strategy: The Passage of the ADA, *in* *Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans* 25, 27-33 (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

¹⁰⁷ It bears emphasizing that I do not mean to imply that my reading is the only possible understanding of the tenets of the disability rights movement. To the contrary, that movement has embraced numerous people of vastly different backgrounds and perspectives. As I note below, there is an alternative reading of the goals of the disability rights movement that is far less group-based than the one I develop here. I argue only that the understanding I articulate has broad and deep roots in the work of disability rights advocates and that, for reasons I develop in the remainder of the

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The disability rights movement arose in the 1970s as a response to this country's then-prevalent approach to disability, which focused on medical treatment, physical rehabilitation, charity, and public assistance.¹⁰⁸ Indeed, virtually the entire ideology of the modern disability rights movement can be seen as a reaction to that "medical/pathological paradigm" of disability.¹⁰⁹ Activists with disabilities believed the dominant approach inappropriate because it treated disability as an inherent personal characteristic that should ideally be fixed, rather than as a characteristic that draws its meaning from social context. Where disability is treated as a medical condition or functional deficit, it is readily seen as a "personal tragedy"—"some terrible chance event which occurs at random to unfortunate individuals."¹¹⁰ Such a view encourages dependence on doctors, rehabilitation professionals, and charity.¹¹¹ It also stigmatizes people with disabilities, by defining them as something less than normal, and directs them into confining social roles in which they can enter society only "*on the terms* of the able-bodied major-

Article (namely its coherence with diverse justifications for the civil rights laws and its consistence with the statutory language), it is an attractive understanding.

¹⁰⁸ It is not my purpose here to give a general account of the development of the disability rights movement. For such accounts, see, for example, Berkowitz, *supra* note 21, at 184–224; Olson, *Clients & Lawyers*, *supra* note 24, at 42–56; Shapiro, *supra* note 22, *passim*. A disability rights movement arose in Britain in the 1970s as well, and it developed a set of goals and principles strikingly similar to those of the movement in the United States. For a description of the British movement, see, for example, Oliver, *supra* note 31, at 19–29.

¹⁰⁹ Claire H. Liachowitz, *Disability as a Social Construct: Legislative Roots* 11 (1988); see, e.g., Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda*, *in* *Images of the Disabled, Disabling Images* 181, 183–84 (Alan Gartner & Tom Joe eds., 1987) [hereinafter Hahn, *Foundation*]; Jonathan C. Drimmer, *Comment, Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 *UCLA L. Rev.* 1341, 1346–51 (1993). Harlan Hahn refers to this model as the "'functional limitations' paradigm." Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 *S. Cal. Rev. L. & Women's Stud.* 97, 101 (1994) [hereinafter Hahn, *Feminist Perspectives*].

¹¹⁰ Oliver, *supra* note 31, at 32; see also Linton, *supra* note 49, at 11 (noting that the medical definition of disability "casts human variation as deviance from the norm . . . as an individual burden and personal tragedy").

¹¹¹ See Oliver, *supra* note 31, at 36–37; Len Barton, *Sociology, Disability Studies and Education: Some Observations*, *in* *The Disability Reader: Social Science Perspectives* 53, 59 (Tom Shakespeare ed., 1998); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 *Cal. L. Rev.* 809, 809–10 (1966).

ity.”¹¹² Perhaps most significant, the view of disability as a personal tragedy obscures the social practices that exclude “the disabled” from the opportunity to participate fully in society.¹¹³

For these reasons, most disability rights activists have recoiled against approaches that “locate[] the ‘problem’ of disability within the [disabled] individual.”¹¹⁴ In their place, they have embraced significant parts of what Martha Minow calls the “social-relations approach”¹¹⁵ to difference. That approach treats human differences as constructed by, and residing in, social relationships.¹¹⁶ British scholar/activists were the first to elaborate this approach (which they called the “social model”).¹¹⁷ Their thinking soon spread across the Atlantic to the United States. Adherents to the social model argue that disability should not be considered to be the unmediated product of limitations imposed by a physical or mental impairment. To them, such a view erroneously regards existing social arrangements as a neutral baseline. The social model instead treats disability as the interaction between societal barriers (both physical and otherwise) and the impairment.¹¹⁸ “From this perspec-

¹¹² Liachowitz, *supra* note 109, at 11; see, e.g., Alan Gartner & Tom Joe, Introduction to Images of the Disabled, *Disabling Images*, *supra* note 109, at 1, 4 [hereinafter Gartner & Joe, Introduction]; Gliedman & Roth, *supra* note 21, at 35; Drimmer, *supra* note 109, at 1350–55; Robert Funk, Disability Rights: From Caste to Class in the Context of Civil Rights, *in* *Images of the Disabled, Disabling Images*, *supra* note 109, at 7, 12.

¹¹³ See Linton, *supra* note 49, at 11; Hahn, *Feminist Perspectives*, *supra* note 109, at 105; see also Wendell, *supra* note 49, at 40 (“The more a society regards disability as a private matter, and people with disabilities as belonging in the private sphere, the more disability it creates by failing to make the public sphere accessible to a wide range of people.”). This point is not limited to disability. The social choices that construct difference in general, Martha Minow has persuasively argued, will be obscured if we treat differences as residing within the person labeled “different.” See Minow, *Making All the Difference*, *supra* note 48, at 75.

¹¹⁴ Oliver, *supra* note 31, at 32.

¹¹⁵ Minow, *Making All the Difference*, *supra* note 48, at 110–14 (describing the social-relations approach).

¹¹⁶ See *id.* at 110–14.

¹¹⁷ For a discussion of the origins and fundamental tenets of the British “social model,” see Oliver, *supra* note 31, at 19–42.

¹¹⁸ My summary necessarily glosses over many details of the rich literature involving this understanding of disability. A good introduction to the various strands (albeit one weighted almost chauvinistically in favor of the early British formulation of the “social model”) appears in Colin Barnes, *The Social Model of Disability: A Sociological Phenomenon Ignored by Sociologists?*, *in* *The Disability Reader: Social Science Perspectives*, *supra* note 111, at 65.

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tive, disability is attributed primarily to a disabling environment instead of bodily defects or deficiencies."¹¹⁹

Consider, for example, a person with paralysis that prevents her from walking. If workplace entrances are accessible only by stairs, or they are too narrow to accommodate a wheelchair, then she cannot work. If the bus route that runs by her apartment does not employ buses equipped with wheelchair lifts, then she may not be able to shop, worship communally, or engage in recreational activities. And if the sidewalk around her building does not have curb cuts, then she may not even be able to leave her block. Such a person's paralysis is very real. But in each of these examples, the social relations model posits, it is not her physical impairment that has disabled her: What has disabled her is the set of social choices that has created a built environment that confines wheelchair users to their homes.¹²⁰ The point can readily be extended to other physical structures: subway platforms that are unsafe for people with visual impairments because they are built without raised bumps at the edges, elevators with buttons that are too high for wheelchair users to press, and so forth. It also can be extended to more intangible social practices: "inflexible work arrangements that exclude part-time work or rest periods,"¹²¹ television programs that are not captioned for people with hearing impairments, and telephone systems that lack relay operators to allow users of telecommunications devices for the deaf (TDDs) to communicate with users of standard telephones. Indeed, one of the most "disabling" aspects of the en-

¹¹⁹ Hahn, *Feminist Perspectives*, supra note 109, at 101; see also Oliver, supra note 31, at 33 ("[D]isability, according to the social model, is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on."); Hahn, *Foundation*, supra note 109, at 182 ("A comprehensive understanding of disability requires an examination of the architectural, institutional, and attitudinal environment encountered by disabled persons."); Silvers, *Reprising Women's Disability*, supra note 23, at 105 ("Because it attributes the dysfunctions of people with physical, sensory, and cognitive impairments to their being situated in hostilely built and organized environments, the [social] model construes the isolation of people with disabilities as the correctable product of how such individuals interact with stigmatizing social values and debilitating social arrangements rather than as the unavoidable outcome of their impairments.").

¹²⁰ For discussion of this point in the legal literature, see, for example, Minow, *Making All the Difference*, supra note 48, at 12, 70; Minow, *Not Only for Myself*, supra note 48, at 17; Sunstein, *Why Markets Don't*, supra note 99, at 162.

¹²¹ Wendell, supra note 49, at 40.

vironment is also the most intangible—the prevalence of stereotypes and prejudiced attitudes that exclude people with particular impairments from valuable opportunities.¹²²

Once one thinks of disability as arising primarily from the human environment, rather than from anything inherent in an individual's physical or mental condition, it "becomes a problem of social choice and meaning, a problem for which all onlookers are responsible."¹²³ Rather than providing charity or public assistance—an approach that both stigmatizes its recipients and leaves the disabling aspects of the environment in place¹²⁴—most disability rights activists insist that society as a whole has a responsibility to eliminate the social and physical structures that deny people with "disabilities" access to opportunities and thereby create "disability." Disability rights theorist Susan Wendell, for example, argues for a "fully accessible society," which would rest on a "universal recognition that all structures have to be built and all activities have to be organized for the widest practical range of human abilities":

In such a society, a person who cannot walk would not be disabled, because every major kind of activity that is accessible to someone who can walk would be accessible to someone who cannot, and likewise with seeing, hearing, speaking, moving one's arms, working for long stretches of time without rest, and many other physical and mental functions.¹²⁵

Wendell and other disability rights theorists emphasize that physical impairments would be very real even in such a society. Stated in its most sympathetic form, the disability rights argument

¹²² See, e.g., Hahn, *Foundation*, supra note 109, at 187; tenBroek, supra note 24, at 842.

¹²³ Minow, *Making All the Difference*, supra note 48, at 119.

¹²⁴ See, e.g., Gartner & Joe, *Introduction*, supra note 112, at 4; Minow, *Making All the Difference*, supra note 48, at 93; Silvers, *Reprising Women's Disability*, supra note 23, at 106.

¹²⁵ Wendell, supra note 49, at 55. See Harlan Hahn, *Disability Policy and the Problem of Discrimination*, 28 *Am. Behav. Scientist* 293, 303 (1985) (arguing for "an environment designed to meet the needs of everyone, that does not contain any implicit prerequisite concerning the capacities necessary to survive or to engage in social life"); Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 *Behav. Sci. & L.* 41, 45-46 (1996) (same) [hereinafter Hahn, *Antidiscrimination Laws*].

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is not that disability is *entirely* a social creation, only that it must be understood as the result of an interaction between biological restrictions and the broader physical and social environment—and that the greater part of the disadvantage attached to “disability” is best addressed through attempts to change the environment.¹²⁶

Even stated in the more modulated form, the disability rights vision seems almost strikingly utopian. But there is some precedent for Wendell’s “fully accessible society,” if only on a limited scale. Consider Nora Groce’s account of the extraordinary extent to which deaf residents were integrated into society on the island of Martha’s Vineyard in the eighteenth and nineteenth centuries.¹²⁷ Although the absolute number of deaf Vineyarders was not large (Groce identified 72 in 300 years), they represented a far greater proportion of the Vineyard population (1 in 155) than of the American population in general during that time (1 in 5,728).¹²⁸ In the town where most of the deaf Vineyarders lived, everyone—even those who had no deaf relatives—spoke an indigenous sign language. Deaf people participated freely in discussions, and hearing people would occasionally lapse into sign language even when no deaf people were around.¹²⁹ Apparently because no language

¹²⁶ See, e.g., Wendell, *supra* note 49, at 45 (“We need to acknowledge that social justice and cultural change can eliminate a great deal of disability while recognizing that there may be much suffering and limitation that they cannot fix.”); *id.* at 154 (“Many people with disabilities, even those with the strongest social-constructionist perspective, admit that there are often heavy personal burdens associated with the physical and mental consequences of disabling physical conditions—such as pain, illness, frustration, and unwanted limitation—that no amount of accessibility and social justice could eliminate.”); Carol J. Gill, Questioning Continuum, *in* *The Ragged Edge: The Disability Experience from the Pages of the First Fifteen Years of the Disability Rag* 42, 44 (Barrett Shaw ed., 1994) (“Many people who are considered disabled now would still have an experience of ‘differentness’ in a more accessible and socially accommodating world.”). Disability rights theorists’ understanding of “disability” has much in common with David Morris’s notion of “biocultural” illness, see David B. Morris, *Illness and Culture in the Postmodern Age* 73, 75 (1998) (arguing that “our illnesses arise from innumerable interactions with an environment where the social and the biological constantly intermingle”), an idea whose roots trace at least to John Dewey. See generally Glenn McGee, *The Perfect Baby: A Pragmatic Approach to Genetics* 68–74 (1997) (drawing extensively on Dewey’s writings to support such a notion).

¹²⁷ See Nora Ellen Groce, *Everyone Here Spoke Sign Language: Hereditary Deafness on Martha’s Vineyard* 3 (1985).

¹²⁸ See *id.*

¹²⁹ See *id.* at 53–67.

barrier separated deaf from hearing Vineyarders, no social barrier seems to have separated them, either. In a book whose impressive research overcomes many doubts that it presents an overly romanticized picture, Groce describes what appears to be an almost complete integration of deaf Vineyarders in the social, economic, and political areas of island life.¹³⁰ “The most striking fact about these men and women,” she concludes, “is that they were *not* handicapped, because no one perceived their deafness as a handicap.”¹³¹ Similar results, though on a smaller scale, have been seen in “other isolated communities with a high incidence of deafness”,¹³² in cities like Fremont, California, with high concentrations of deaf people;¹³³ and in schools where deaf and hearing children are taught together in both English and sign language.¹³⁴ Many disability rights activists seek to apply a similar model more generally, to remake society to *eliminate* “disability” as a disadvantaged group status. They seek this result not through the medical means of eliminating physical impairments, nor through the eugenic means of eliminating people with disabilities, but through the means of civil rights law: by changing the social structures and practices that make particular conditions “disabling.”¹³⁵

¹³⁰ See *id.* at 75–94.

¹³¹ *Id.* at 110.

¹³² Oliver Sacks, *Seeing Voices: A Journey Into the World of the Deaf* 33 n.* (1989).

¹³³ See *id.* at 34 n.*

¹³⁴ See Linton, *supra* note 49, at 61 (describing the results of one such program in Burbank, California); Irma Heller et al., *Let's All Sign! Enhancing Language Development in an Inclusive Preschool*, *Teaching Exceptional Children*, Jan.–Feb. 1998, at 50–53 (discussing results of such a program in a Louisiana nursery school). Similar results can be achieved even when a class is not formally structured in a bilingual manner. When Amy Rowley, the unsuccessful plaintiff in *Board of Education v. Rowley*, 458 U.S. 176 (1982), moved to a school district that provided her a sign language interpreter, many of the hearing students in her class picked up a great deal of sign language as if by osmosis. See R.C. Smith, *A Case About Amy 190–92* (1996). For a “Deaf Culture” perspective critical of teaching deaf children in inclusive classrooms, see Harlan Lane et al., *A Journey into the Deaf-World* 250–56 (1996).

¹³⁵ Calls for a fully accessible society can be read in two ways. One, which takes the approach Iris Young has labeled a “transformational ideal of assimilation,” would argue that there should no longer be any socially salient difference between now-“disabled” people and others in such a society. Iris Marion Young, *Justice and the Politics of Difference* 165–66 (1990). On another, nonassimilationist reading, disability rights activists can be seen as suggesting that group-identifying characteristics would remain socially and individually salient but “would not be devalued.” Gill, *supra* note

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Some aspects of the ADA plainly reflect the notion that disability is something defined by society's exclusionary practices. The statute incorporates that insight explicitly in its "regarded as" provision, which defines "disability" to include the status of being perceived by others as disabled.¹³⁶ The Supreme Court recognized this point when it first interpreted the Rehabilitation Act definition that Congress later incorporated in the ADA: By protecting people who are "regarded as" disabled, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."¹³⁷ A similar idea underlies the ADA's "record" provision: A person with "a record of" an impairment that amounts to a "disability" remains an individual with a disability for the purposes of the statute even after all of the medical effects of the impairment have disappeared.¹³⁸ Both the "regarded as" and "record" prongs of the statutory "disability" definition recognize that social practices and structures result in many people being classified as "disabled" even if they have no biological impairment or limitation whatsoever.

Indeed, much of the statute can be seen as implementing disability rights activists' attempt to eliminate "disability" as a disadvantaged group status by eliminating the physical, social, and attitudinal structures that make particular physical or mental conditions generally disadvantageous. The statute's operative provisions target each of the three means by which society imposes "disability"-related disadvantage—the three means by which, in the view of many disability rights activists, society creates "disability" in the first place. The ADA's basic antidiscrimination provisions directly target prejudice and stereotypes.¹³⁹ And other provisions address society-wide neglect. Thus, every newly constructed or renovated commercial facility or place of public accommodation must now meet a strict code of universal design to be "readily accessible to and usable by individuals

126, at 44–45. There is an important distinction between these two readings, but one that makes little difference for purposes of interpreting the ADA. For further discussion, see *infra* note 205.

¹³⁶ See 42 U.S.C. § 12102(2)(C) (1994).

¹³⁷ *School Bd. v. Arline*, 480 U.S. 273, 284 (1987).

¹³⁸ See 42 U.S.C. § 12102(2)(B).

¹³⁹ See *id.* §§ 12112(a), 12132, 12182(a).

with disabilities.”¹⁴⁰ Existing facilities must be modified to remove obstacles to access to the extent that such modifications are “readily achievable.”¹⁴¹ State and local government facilities, including public transit facilities, are subject to similar universal access standards.¹⁴² All newly-purchased public transit vehicles must be accessible to individuals with disabilities (including wheelchair users) as well.¹⁴³ And the Act requires nationwide telecommunications relay services, so people with hearing impairments can communicate by phone with people who do not own TDDs.¹⁴⁴

The ADA supplements these universal access requirements, which aim at removing barriers that impede access by the most numerous classes of people with “disabilities,” with a general requirement that *all* people with “disabilities” receive *individualized* treatment. It requires that such individuals receive “reasonable accommodations” from their employers,¹⁴⁵ and that governments and public accommodations make “reasonable modifications” in policies, practices, and procedures to allow them to benefit from programs and services.¹⁴⁶ Moreover, although the statute recognizes that some physical or mental conditions may pose safety risks, it specifically prohibits employers, state and local government agencies, and public accommodations from making any blanket decision that a given condition inherently poses an undue risk.¹⁴⁷ Those entities must instead make an individualized, objective determination that the condition, as experienced by the plaintiff, would present a significant safety risk that cannot be reduced to acceptable levels

¹⁴⁰ Id. § 12183(a); see also 28 C.F.R. § 36.406(a) (1998) (requiring entities subject to this requirement to comply with the Americans with Disabilities Act Accessibility Guidelines, a comprehensive and detailed code of accessible design practices).

¹⁴¹ 42 U.S.C. § 12182(b)(2)(A)(iv) (1994).

¹⁴² See id. §§ 12146, 12147; 28 C.F.R. §§ 35.150, 35.151 (1998).

¹⁴³ See 42 U.S.C. § 12142 (1994).

¹⁴⁴ See 47 U.S.C. § 225 (1994) (added by Title IV of the ADA).

¹⁴⁵ 42 U.S.C. § 12112(b)(5)(A) (1994).

¹⁴⁶ Id. § 12182(b)(2)(A)(ii); 28 C.F.R. § 35.130(b)(7) (1998).

¹⁴⁷ *Albertsons* suggests one narrow qualification to the broad statement in the text: Where a federal agency with authority to issue legislative rules governing a safety issue determines that a condition is inherently incompatible with the safe performance of a particular activity, entities covered by the ADA are entitled to rely on that determination. See *Albertsons*, 119 S. Ct. at 2172–74. This aspect of *Albertsons* is extremely problematic, but discussion of it is beyond the scope of this Article.

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with a reasonable accommodation.¹⁴⁸ By requiring individualized accommodation, these provisions—like the more specifically prescriptive (and more class-based) universal access rules—remove socially contingent barriers to the full integration of people with physical and mental impairments.¹⁴⁹

It is possible to view these provisions as purely redistributive. On one story, they simply identify a particularly disadvantaged group and require employers, government agencies, and public accommodations to make special efforts on their behalf. But when viewed in the light of the disability rights movement's goals as I have described them, the statute can be seen as something more. It can be seen as an effort to remake society's baselines and to eliminate the practices that combine with physical and mental conditions to create what we call "disability."¹⁵⁰ The society-wide universal access rules serve this function on the macro level, and the requirements of individualized accommodation and modification fill in the gaps on the micro level.¹⁵¹

¹⁴⁸ See 42 U.S.C. § 12113(b) (1994) (affording a defense where the employee "would pose a direct threat to the health or safety of other individuals"); id. § 12182(b)(3) (setting forth a "direct threat" provision applicable to public accommodations); 29 C.F.R. § 1630.2(r) (1998) (stating that "direct threat" determination requires an "individualized assessment" that "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence"); *Bragdon*, 524 U.S. at 649–50 (stating that "direct threat" determination "must be based on medical or other objective evidence," and "the views of public health authorities" bear "special weight and authority"); *Arline*, 480 U.S. at 287–88 (stating that a "direct threat" determination under § 504 of the Rehabilitation Act requires individualized inquiry based on current medical evidence and that "courts normally should defer to the reasonable medical judgments of public health officials").

¹⁴⁹ See, e.g., U.S. Comm'n on Civil Rights, *supra* note 22, at 97–101; Burgdorf, "Substantially Limited" Protection, *supra* note 8, at 522–24.

¹⁵⁰ See, e.g., Diller, *Dissonant Disability Policies*, *supra* note 51, at 1028 (arguing that the ADA "seeks to prohibit the attribution of characteristics to persons with disabilities based on the assumption that disability is a fixed status" and that it "also requires changes in social norms in order to alter the significance of a medical impairment"); Jerry L. Mashaw, *In Search of the Disabled Under the Americans with Disabilities Act*, *in* *Disability and Work: Incentives, Rights, and Opportunities* 61, 70 (Carolyn L. Weaver ed., 1991) [hereinafter Mashaw, *In Search of the Disabled*] (arguing that the ADA is "an attempt to reshape the public consciousness with respect to disabled persons and to promote a process of accommodation that better integrates such persons into a number of areas of public life, including employment").

¹⁵¹ See, e.g., Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 *Harv. L. Rev.* 1560, 1574

To be sure, the ADA does not promise to eliminate “disabling” social practices entirely. The accessibility requirements imposed on new facilities are far more stringent than those imposed on existing facilities; such a regulatory regime may not be the most effective way of assuring a quick transition to universal access. And even the “reasonable accommodation” and “reasonable modification” requirements are limited ones.¹⁵² But in its basic outlines, the statute is quite consistent with disability rights activists’ view that “disability” is in significant part a creation of society, and that society should aim toward eliminating the practices that create it. As I will explain, that view points the way to a principle that can guide understanding and interpretation of the ADA’s “disability” definition.

B. Stigma as a Key Concept

To summarize the discussion up to this point: The ADA’s statutory findings state that people with disabilities constitute an identifiable group of people who experience similar, systematic obstacles to participation in a range of activities in public and private life; those obstacles result from society’s prejudices, stereotyping, and neglect. The disability rights movement—in my rendering of its basic principles—adds to this account by urging that the very social practices that attach systematic disadvantage to particular impairments are what *create* the category of people with disabilities.

On first view, however, the three means by which society attaches systematic disadvantage to particular impairments seem quite different. Prejudice seems like a problem of aversive and demeaning attitudes; stereotyping seems like a problem of information costs and cognitive shortcuts; and neglect seems like a failure of empathy. I want to suggest, however, that these three seemingly

n.98 (1998) [hereinafter Note, *Toward Reasonable Equality*] (“[W]hen the Act is understood to contemplate structural change involving a massive rebuilding of the man-made environment, accommodations, whether physical or intellectual, seem less like special perks and more like part of the planned process of structural reform.”) (citation and internal quotation marks omitted); Mattzie, *supra* note 30, at 211–12 (similar).

¹⁵² See, e.g., 42 U.S.C. § 12112(b)(5)(A) (1994) (stating that reasonable accommodation is not required where it “would impose an undue hardship on the operation of the business”); *id.* § 12182(b)(2)(A)(ii) (stating that reasonable modification is not required where it “would fundamentally alter the nature of [the] goods, services, facilities, privileges, advantages, or accommodations” provided by the defendant).

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disparate problems are related: people who differ too much from a socially defined "norm" are likely to experience all of them. Understanding the ways in which these problems are connected may provide assistance in identifying which impairments are likely to be so systematically disadvantaged as to constitute "disabilities."

Erving Goffman's notion of stigma is a useful tool here. Although "stigma" refers colloquially to animus and prejudice, Goffman used the term to refer to a broader problem. He described the condition as an "undesired differentness" from what society deems to be "normal" or expected.¹⁵³ Under Goffman's approach, the core aspect of stigma occurs when prevailing social practices treat particular "undesirable" traits as universally discrediting. As Goffman emphasized, those who deal with stigmatized persons "tend to impute a wide range of imperfections on the basis of the original one."¹⁵⁴ As a result, people with stigmatized traits are not considered to be among the "normals" for whom society, and its institutions, are designed.¹⁵⁵ This stigma is as much about so-

¹⁵³ Goffman, *supra* note 23, at 5. Goffman himself identified disability as among the classic types of stigma. See, e.g., *id.* at 4 (listing, *inter alia*, "abominations of the body" and "mental disorder" as basic types of stigma); see also Myron G. Eisenberg, *Disability as Stigma*, in *Disabled People as Second-Class Citizens* 3 (Myron G. Eisenberg et al. eds., 1982) (discussing disability as a stigma under Goffman's approach). Goffman's represents "one of the most widely used theoretical approaches" to the study of the social interactions of people with disabilities, Linton, *supra* note 49, at 101, although it has been criticized by some disability studies scholars for assuming that disabling impairments are necessarily stigmatizing or undesirable, see *id.*; Wendell, *supra* note 49, at 57-60. See generally Stephen C. Ainlay et al., *Stigma Reconsidered*, in *The Dilemma of Difference: A Multidisciplinary View of Stigma* 1, 3 (Stephen C. Ainlay et al. eds., 1986) (observing that "nearly all students of stigma accept the basic components of Goffman's definition of the phenomenon").

¹⁵⁴ Goffman, *supra* note 23, at 5 (citation omitted); see also Lerita M. Coleman, *Stigma: An Enigma Demystified*, in *The Dilemma of Difference: A Multidisciplinary View of Stigma*, *supra* note 153, at 211, 219 ("Perceptually, stigma becomes the master status, the attribute that colors the perception of the entire person. All other aspects of the person are ignored except those that fit the stereotype associated with the stigma.") (citation omitted).

¹⁵⁵ See Karst, *Myths of Identity*, *supra* note 48, at 286 ("The harm of stigma is that a single perceived characteristic is seen as 'disqualifying' the whole person, excluding him or her from membership in the community that calls itself the 'normals.'"); Karst, *Why Equality Matters*, *supra* note 79, at 248-49 ("[S]tigmatization is a process by which we (the so-called 'normals') differentiate them (the stigmatized) from us, setting them apart and treating them as not quite human. Stigma dissolves the human ties we call 'acceptance' and excludes the stigmatized from 'belonging' as equals.")

cial attitudes as about the traits themselves; even if an individual can “cure” a stigmatized trait, she may still not be accepted in the community of “normals.”¹⁵⁶

Goffman’s construct of “stigma” provides a useful tool in giving content to my subordination-based understanding of disability rights law for at least two reasons. First, Goffman’s analysis strongly influenced the thoughts of many of the disability rights activists on whose work I rely.¹⁵⁷ Second, that analysis provides a way of connecting the animus- and stereotype-based discrimination experienced by many people with disabilities with their more systemic neglect in the design of the environment. It therefore provides a way of treating the three basic manifestations of disability discrimination under a single rubric, and it provides a way of predicting *which* types of impairments are likely to be associated with systematic deprivation of opportunities. Because Goffman wrote primarily about individual interactions between “the normals” and “the stigmatized,” his notion of stigma most directly helps to describe the prejudice and stereotypes people with disabilities experience in such interactions.¹⁵⁸ It is especially useful in explaining the “spread effect,” under which an impairment to a particular life function is seen as universally disabling.¹⁵⁹ But Goffman’s analysis of stigma helps to describe the society-wide neglect of people with disabilities as well.¹⁶⁰ In particular, it helps to explain

(citation omitted); cf. Goffman, *supra* note 23, at 5 (“By definition, of course, we believe the person with a stigma is not quite human.”).

¹⁵⁶ See Goffman, *supra* note 23, at 9 (“Where such repair is possible, what often results is not the acquisition of fully normal status, but a transformation of self from someone with a particular blemish into someone with a record of having corrected a particular blemish.”). Notice the link between Goffman’s comment and the ADA’s protection of people with “a record of” a disability.

¹⁵⁷ Just for example, two of the most important statements of the legal and policy approach of the disability rights movement—the Carnegie Council on Children’s book *The Unexpected Minority*, and the U.S. Civil Rights Commission’s monograph *Accommodating the Spectrum of Individual Abilities*—were strongly influenced by Goffman. See, e.g., U.S. Comm’n on Civil Rights, *supra* note 22, at 26; Gliedman & Roth, *supra* note 21, at 24.

¹⁵⁸ See Goffman, *supra* note 23, at 5 (discussing animus); see also Coleman, *supra* note 154, at 227 (calling stereotyping the “primary cognitive component” of stigma); *id.* at 219 (“Stigma appears to be a special and insidious kind of social categorization or, as Martin explains, a process of generalizing from a single experience. People are treated categorically rather than individually, and in the process are devalued.”); Irving Kenneth Zola, *Self, Identity and the Naming Question: Reflections on the Language of Disability*, 36 *Soc. Sci. & Med.* 167, 169 (1993) (similar).

¹⁵⁹ See *supra* notes 94–101 and accompanying text.

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people with disabilities as well.¹⁶⁰ In particular, it helps to explain why people with some impairments are likely to be systematically neglected by social decisions, and why those people are likely to be the same people as those who experience animus and stereotyping.¹⁶¹ If stigma means that an individual is not considered to be one of "the normals," then people with stigmatized impairments are likely not to be a part of the social "norm" considered by those who design the social and physical environment. Even if the environment's "designers" do not harbor prejudiced or stereotyped thoughts about people with stigmatized conditions, they are likely not to consider their needs in the same way that they consider the needs of those who are "normal."

Disability rights advocates have long made this precise point about "disability."¹⁶² They have argued that "the entire physical and social organization of life" is frequently structured as though everyone were physically strong, as though all bodies were shaped

¹⁶⁰ See Goffman, *supra* note 23, at 5 (observing that "we effectively, if often unthinkingly, reduce [the] life chances" of a person with a stigma).

¹⁶¹ See Mark C. Stafford & Richard R. Scott, *Stigma, Deviance, and Social Control: Some Conceptual Issues*, in *The Dilemma of Difference: A Multidisciplinary View of Stigma*, *supra* note 153, at 77, 80 ("Persons who are disvalued by one member of a social unit will also tend to be disvalued by other members."); *id.* at 85 ("[I]n any given social unit, there is likely to be a high degree of consensus about what is considered a stigma."); cf. Goffman, *supra* note 23, at 138 ("The lifelong attributes of a particular individual may cause him to be type-cast; he may have to play the stigmatized role in almost all of his social situations, making it natural to refer to him, as I have done, as a stigmatized person whose life-situation places him in opposition to normals.").

¹⁶² See, e.g., U.S. Comm'n on Civil Rights, *supra* note 22, at 97 ("The assumption that handicapped people are fundamentally different and inherently restricted in their ability to participate becomes self-fulfilling as handicapped people are excluded from education, employment, and other aspects of society by these consequences of the handicapped-normal dichotomy."); Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, in *Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans* 35, 36 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) ("[B]arriers to people with disabilities have been established because members of society have not historically viewed people with disabilities as part of the *societal norm*. Thus, no effort has been made to ensure that barriers to people with disabilities are not built into the structural frameworks of society."); Hahn, *Foundation*, *supra* note 109, at 184 (arguing that "all aspects of the external world—including architecture, communications, and social organizations—are shaped by public policy and that policies are a reflection of pervasive cultural values and attitudes," specifically attitudes "of widespread aversion to the presence of disabled individuals").

the same, as though everyone could walk, hear, and see well, as though everyone could work and play at a pace that is not compatible with any kind of illness or pain, as though no one were ever dizzy or incontinent or simply needed to sit or lie down.¹⁶³

This phenomenon is most obvious in the built environment. Architects design structures with a model of the “normal” user in mind, and that model has typically been a person without any discernible impairments.¹⁶⁴ This “assumption of able-bodiedness as the norm”¹⁶⁵ can be seen in buildings with unnecessary stairs, doorways that are too narrow to accommodate wheelchairs, and entrances that fail to provide any detectable warning for people with visual impairments. But the phenomenon of neglect extends beyond the decisions that have constructed our physical architecture. It affects our patterns of social organization as well. Among other things, it affects the structure of jobs and the means by which businesses and governments deliver services.¹⁶⁶

Why have those who constructed our social and physical environment failed to consider people with disabilities as among the “normal” users? One explanation might look to the very history of

¹⁶³ Wendell, *supra* note 49, at 39.

¹⁶⁴ See, e.g., George A. Covington & Bruce Hannah, *Access by Design* 15 (1997) (“Designers have been very exclusive about who they design for, the statistical ‘norm’; Joe & Josephine Smith, both perfect in their entirety. Joe & Josephine never aged, never got fat, never tired, never varied in their daily discipline.”); see also Wendell, *supra* note 49, at 40 (“Much architecture has been planned with a young adult, non-disabled male paradigm of humanity in mind.”). As Wendell’s comment indicates, prevailing design practices can lead to gender-based, as well as disability-based, exclusion. For general treatment of this point, see Leslie Kanés Weisman, *Discrimination by Design: A Feminist Critique of the Man-Made Environment* (1992).

¹⁶⁵ Minow, *Making All the Difference*, *supra* note 48, at 59.

¹⁶⁶ See, e.g., Wendell, *supra* note 49, at 48 (“People with disabilities are often forced to work less than they could, or at less creative and demanding jobs than they are capable of doing, because of inflexible workplaces.”); Burgdorf, “Substantially Limited” Protection, *supra* note 8, at 530 (“[I]n fashioning their facilities and devising their practices, policies and procedures, public agencies, employers and businesses make assumptions about the characteristics of their workers, customers, clients and visitors. These assumptions are based upon a person with so-called ‘normal’ physical and mental abilities—the ‘ideal user.’”); see also U.S. Comm’n on Civil Rights, *supra* note 22, at 93 (“Structuring society’s tasks and activities on the basis of assumptions about the normal ways of doing things reflects the idea that there are ‘normal’ people who can participate and there are people with physical and mental handicaps who cannot.”).

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prejudice and stereotypes noted by Congress. For much of our history, people with a variety of physical and mental disabilities were "shunted aside, hidden, and ignored."¹⁶⁷ People with impairments ranging from epilepsy to blindness to mental retardation were segregated from the community in a collection of congregate institutions.¹⁶⁸ Such segregation "perpetuate[d] unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."¹⁶⁹ Even among those who were not institutionalized, people with disabilities frequently did not work, patronize businesses, or use government services outside of the home.¹⁷⁰ (In some cases, they were required by law to stay at home; as late as 1974, some major American jurisdictions still maintained "ugly laws" that prohibited "unsightly" people—a category that encompassed people with disabilities—from appearing in public.¹⁷¹) A person designing a particular building, production process, or job description could thus be forgiven for failing to think of people with disabilities as potential customers or workers. The designer might have had no particular negative attitudes toward "the disabled." Indeed, it might never have entered her mind that people with disabilities might wish to use her building or work in her business; she might simply have had no available model of people with disabilities as ordinary people with ordinary needs and tastes.¹⁷² Al-

¹⁶⁷ *Alexander v. Choate*, 469 U.S. 287, 296 (1985) (quoting 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik, introducing the predecessor bill to § 504 of the Rehabilitation Act)).

¹⁶⁸ See, e.g., Cook, *supra* note 93, at 399–407; Funk, *supra* note 112, at 10–11.

¹⁶⁹ *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176, 2187 (1999).

¹⁷⁰ See, e.g., H.R. Rep. No. 101-485, pt. 2, at 34–35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 316–17.

¹⁷¹ Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 Harv. L. Rev. 2035, 2035 n.2 (1987). For a discussion of the role of notions of ugliness in constructing the public's understanding of disability, see Martin S. Pernick, *Defining the Defective: Eugenics, Aesthetics, and Mass Culture in Early-Twentieth-Century America*, in *The Body and Physical Difference: Discourses of Disability* 89, 91–97 (David T. Mitchell & Sharon L. Snyder eds., 1997). For an argument that all of the major forms of group-based subordination—including "racism, sexism, homophobia, ageism, and ableism"—reflect notions of "despised, ugly, or fearful bodies," see Young, *supra* note 135, at 122–55.

¹⁷² See, e.g., U.S. Comm'n on Civil Rights, *supra* note 22, at 97 n.27 ("Our buildings, communications technologies, modes of transportation, and other programs were developed to meet the needs of people who lived in the community; disabled individuals, who did not, were not considered in the planning of these facilities and

though people with disabilities have become more and more integrated into society at large in the last two decades, the history of exclusion may have a particularly long “tail.” Buildings and processes designed without people with disabilities in mind may be used for many years to come. And prejudice and stereotypes—which have themselves been fed by the absence of people with disabilities from the larger community¹⁷³—may linger even longer.¹⁷⁴

The historic exclusion of people with disabilities from “normal” society has interacted in complex and reciprocal ways with broader ideological currents. Lennard Davis has argued that the notion of “norms” dates only to the development of a science of statistics in the early nineteenth century.¹⁷⁵ Until then, Davis contends, the place now occupied by the “norm” was held by the notion of an “ideal,” which was understood to be unattainable by any human.¹⁷⁶ But the

services.”) (quoting Frank Bowe); Funk, *supra* note 112, at 25–26 (arguing that “the vast majority of environmental and policy barriers have a direct connection to a tradition of exclusion of disabled people from organized society” which has led many facilities and institutions—like multi-storied educational facilities—to be “designed on the assumption that disabled individuals will not participate in the offered . . . services”). For a poignant, if perhaps apocryphal, story of the self-perpetuating nature of design features that exclude people with disabilities, see Shapiro, *supra* note 22, at 142 (“The postmaster in a small town was told that he would have to make his post office building accessible to people in wheelchairs. There were twenty formidable steps leading to the only public entrance, and the revolving door there was too narrow for even the smallest wheelchair. The postmaster objected to any renovation for disabled patrons. He sputtered in protest, ‘I’ve been here for thirty-five years and in all that time I’ve yet to see a single customer come in here in a wheelchair.’”).

¹⁷³ See, e.g., Martha A. Field, *Killing “the Handicapped”—Before and After Birth*, 16 *Harv. Women’s L.J.* 79, 117 (1993) (“One reason many people are so fearful of—even repulsed by—persons with handicaps, and so unaware of their humanity, is that they have never known such persons and have not seen them functioning in the community.”); see also Cook, *supra* note 93, at 441–42 & nn.336–38 (collecting studies showing that segregation of people with disabilities from society at large increases prejudice against them).

¹⁷⁴ See, e.g., Ainlay et al., *supra* note 153, at 5 (describing the stubborn persistence of stigma); cf. Andrew Koppelman, *Antidiscrimination Law and Social Equality* 60 (1996) (“Stigma is the means by which process defect begets process defect: the exclusion of blacks was problematic not only because it was the product of a contaminated decision-making process, but also because it in turn reinforced racism and thereby increased the likelihood that blacks would not receive fair treatment in the courts.”).

¹⁷⁵ See Lennard J. Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* 24, 26–27 (1995) (discussing the importance nineteenth century statistician Adolphe Quetelet placed on the concept of the normal or average man).

¹⁷⁶ See *id.* at 24–25.

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newfound "concept of a norm, unlike that of an ideal, implie[d] that the majority of the population must or should somehow be part of the norm."¹⁷⁷ Early statisticians made this point expressly: They argued that social institutions should be built around the broad middle group of persons who fit the social norm.¹⁷⁸ As Davis demonstrates, their arguments both provided justification for, and drew strength from, an ideology that accorded a morally privileged position to the middle class.¹⁷⁹ More darkly, they fed the eugenic ideology that led to the institutionalization and sterilization of many people whom we now label "disabled."¹⁸⁰

The nineteenth-century notion that institutions should be designed for the "norm" persists. But our vision of "normal" human attributes has become increasingly idealized, as the eugenics movement (which sought "to norm the nonstandard"¹⁸¹) may have been the first to demonstrate. Rob Imrie's account of modernist architecture points out the effect that such an ideology of the "norm" has had on our built environment. In seeking to make form follow function, and to "tie buildings back to the scale of the human being," modernists harbored a particularly able-bodied vision of who "the human being" was.¹⁸² Imrie illustrates this vision by pointing to Le Corbusier's "Modular," which "utilized the proportions of the (able) body to enable the architect to create the built spaces."¹⁸³ The "Modular," a diagram of a muscular six-foot tall man, was "the person for whom functionality in building design and form was being defined."¹⁸⁴ Many inaccessible features of today's buildings, Imrie argues, trace directly to modernism's exclusion of people with disabilities from its idealized version of the "norm."¹⁸⁵

¹⁷⁷ Id. at 29.

¹⁷⁸ See id. at 26–30.

¹⁷⁹ See id. at 26–27.

¹⁸⁰ See id. at 30. For a history of the eugenics movement, see Kevles, *supra* note 94, *passim*.

¹⁸¹ Davis, *supra* note 175, at 30.

¹⁸² Rob Imrie, *Disability and the City: International Perspectives* 80–87 (1996).

¹⁸³ Id. at 82.

¹⁸⁴ Id.

¹⁸⁵ See, e.g., id. at 84 ("[T]he minimalism influencing much modernist design does little to differentiate between walls, floors or furniture, while stairs (notorious barriers to mobility and access) have often been given symbolic roles."). I should note that Imrie finds postmodern architecture no better, and possibly worse, in providing accessibility. See id. at 87–91.

As we move to a new millennium, we seem to believe as strongly as ever that everyone should fit an “ideal” body type. Although there are surely a variety of reasons for this development, the most notable are a consumer/advertising culture that idealizes beauty and a widespread belief in the ability of modern medicine to enhance our mental and physical lives.¹⁸⁶ As a result, the ideological currents that exclude people with disabilities from our notion of the “norm” stubbornly remain with us.

The stigma attached to “disability” thus both represents the legacy of a history of exclusion and reflects a series of broader ideological developments. Whatever the underlying reason for its persistence, however, that stigma can help us to understand the means by which disability-based subordination is transmitted. More importantly, stigma can serve an evidentiary function: It can help us identify cases where impairments are likely to be associated with systematic deprivation of opportunities. Seen in this light, the “disability” category embraces those people who experience impairment-based stigma—that is, those people who, because of present, past, or perceived impairments, are considered by society to be outside of the “norm.” As Carol Gill puts it, “disability is a marginalized status that society assigns to people who are different enough from majority cultural standards to be judged abnormal or defective in mind or body.”¹⁸⁷ Although I would argue that stigma identifies and explains—but does not necessarily define—disability-based subordination, Gill’s analysis substantially overlaps my own.

In this view, “disability” is a group status, but it is not one defined by anything inherent in the members of the group. Rather, the attitudes and practices that exclude people with “disabilities” from many opportunities to participate in society are the very ones that create the “disability” category. Although individuals em-

¹⁸⁶ See, e.g., Morris, *supra* note 126, at 135–63; Wendell, *supra* note 49, at 85–109; Harlan Hahn, Advertising the Acceptably Employable Image: Disability and Capitalism, *in* *The Disability Studies Reader*, *supra* note 26, at 172, 176–84; Melvin J. Konner, One Pill Makes You Larger: The Ethics of Enhancement, *Am. Prospect*, Jan.–Feb. 1999 at 56.

¹⁸⁷ Gill, *supra* note 126, at 44. Both my approach and Gill’s approach have much in common with the approach of Professors Scotch and Schriner. They propose to define “disability” as “an extension of the variability in physical and mental attributes beyond the present—but not the potential—ability of social institutions to routinely respond.” Scotch & Schriner, *supra* note 24, at 155.

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braced by the category have vastly different impairments and limitations (indeed, some have no impairment or limitation at all), what is crucial is that *society* treats them as essentially similar.¹⁸⁸ In Wendell's words, "[w]idespread perceptions that people with disabilities are similar in very significant ways create the category, 'people with disabilities.'"¹⁸⁹ The widespread acts of "discrimination, segregation, and denial of equal opportunity" directed at people with disabilities have effectively marked that group as a "dependent caste."¹⁹⁰

III. A SUBORDINATION-FOCUSED APPROACH TO THE ADA

A. A General Framework

1. *Defining the Approach*

How might we use this understanding of disability as subordination to inform interpretation of the ADA's "disability" definition? The foregoing discussion should suggest one polestar: The statutory "disability" category should embrace those actual, past, and perceived impairments that subject people to systematic disadvantages in society. And the concept of stigma should play an important evidentiary role. Impairments that are stigmatized—that type people who have them as "abnormal or defective in mind or body"¹⁹¹—are particularly likely to meet the systematic disadvantage standard. This basic orientation can help to develop a

¹⁸⁸ See, e.g., Funk, *supra* note 112, at 22; cf. Linton, *supra* note 49, at 4 ("We are all bound together, not by this list of our collective symptoms but by the social and political circumstances that have forged us as a group. We have found one another and found a voice to express not despair at our fate but outrage at our social positioning."); Leonard Kriegel, Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro, 38 *Am. Scholar* 412, 421 (1969) ("But while ['the cripple's'] physical condition is not imposed from outside, the way in which he exists in the world is. His relationship to the community is, by and large, dependent upon the special sufferance the community accords him. And whether he wishes to or not, the cripple must view himself as part of an undefined community within the larger community.").

¹⁸⁹ Wendell, *supra* note 49, at 31. For a similar argument, though one nominally limited to the deaf, see Michael J. Piore, *Beyond Individualism* 43–44 (1995) (arguing that the social structures that have bound up deaf persons' identities with their hearing impairments have "ma[de] the deaf a cohesive social group").

¹⁹⁰ Funk, *supra* note 112, at 8.

¹⁹¹ Gill, *supra* note 126, at 44.

principled framework to guide interpretation of the ADA's ambiguous definition of its protected class.

Consider the statute's definition of what I have called "actual" disability: an impairment that "substantially limits one or more . . . major life activities."¹⁹² At first glance, the phrases "substantially limits" and "major life activities" are ambiguous. But interpreting these phrases in light of the notions of stigma and systematic disadvantage provides significant guidance in resolving the ambiguity. "Major" life activities can be seen as those activities that are sufficiently important that being able to perform them is critical to being "normal." People who cannot perform those activities are likely to be stigmatized as deviant, to suffer prejudice, stereotypes, and neglect, and thus to experience systematic disadvantage. "Substantial limitation" can be seen as embracing three different conditions: (1) the complete inability to perform such a major life activity, (2) the inability to perform the activity to a sufficient degree to overcome the stigma that follows from being unable to perform it, or (3) the ability to perform the activity only under conditions that are themselves stigmatized. (These are somewhat abstract formulations; examination of the specific factual settings discussed in Part IV will help to make them more specific). Individuals with such conditions are likely to be deemed outside of the "norm" for which social institutions and physical structures are designed. To safeguard their access to opportunities, they are therefore likely to need the ADA's protection against discrimination and its requirement of accommodation.

My proposed approach would thus use the insight underlying the "regarded as" and "record" provisions to inform interpretation of the statute's "actual disability" prong. But the approach also has an effect on the "regarded as" analysis itself. Under current practice, lower courts in "regarded as" cases typically focus exclusively on the plaintiff-defendant relationship: The plaintiff is "regarded as having" a disability if and only if the *defendant* regards her as having a substantially limiting impairment.¹⁹³ There is every reason to

¹⁹² 42 U.S.C. § 12102(2)(A) (1994).

¹⁹³ See, e.g., *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998) ("[W]hether an individual is 'regarded as' having a disability 'turns on the employer's perception of the employee,' and is therefore 'a question of intent, not whether the employee has a disability.'" (quoting *Francis v. City of Meriden*, 129 F.3d 281, 284

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find the "regarded as" prong satisfied if the defendant has such a perception. The plaintiff in such a case is "regarded [by the defendant] as having" a substantially limiting impairment. If the plaintiff is "otherwise qualified"—that is, if the defendant is wrong about the nature or limiting effects of the plaintiff's impairment—it seems quite likely that the misperception rests on the kind of "stereotypic assumptions"¹⁹⁴ that are characteristic of stigma.

There is nothing in the statutory text that requires courts to look *exclusively* at the defendant's perception, however. The text simply states that "disability" includes the status of "being regarded as having [a substantially limiting] impairment"; it does not state that any particular person must be doing the "regarding."¹⁹⁵ For example, imagine a restaurant owner who has a regular customer with a disfiguring skin disease. The owner may believe, correctly, that the customer's skin disease does not limit any of her life activities at all. But if other customers erroneously believe that her condition is both debilitating and contagious, they may threaten to withhold their business unless she is excluded. Does the restaurant owner "regard" the regular customer as having an impairment that substantially limits a major life activity? No. But she is plainly "regarded as having such an impairment," for she is so regarded by the other customers. If the owner bars her from the restaurant because of the other customers' complaints, she should have a good claim under the ADA (just as an African-American who is refused service because of bigoted customers' complaints has a good claim under the

(2d Cir. 1997)), cert. denied, 119 S. Ct. 1253 (1999); *Deas v. River West, L.P.*, 152 F.3d 471, 481 (5th Cir. 1998) ("Because Dr. Dixon is the one who decided to discharge Deas, Peggy Miller's perception of Deas is irrelevant to Deas's ['regarded as'] argument."), cert. denied, 119 S. Ct. 2411 (1999). For a particularly powerful example, see *EEOC v. General Elec. Co.*, 17 F. Supp. 2d 824, 830–31 (N.D. Ind. 1998) (holding that employer's perception that plaintiff had HIV was not enough to show that plaintiff was "regarded as" disabled; plaintiff had to show that the employer believed HIV to be substantially limiting, and "expert testimony and articles" showing that the "general public" believes HIV to be substantially limiting were irrelevant). Although it did not address the question of whose perception counts, the *Sutton* Court used language that at least suggests that it did not entertain the possibility that the perceptions of anyone but the defendant could affect the "regarded as" analysis. See *Sutton*, 119 S. Ct. at 2149–50 (listing "two apparent ways in which individuals may fall within" the "regarded as" prong, and noting that "[i]n both cases, it is necessary that a covered entity entertain misperceptions about the individual").

¹⁹⁴ 42 U.S.C. § 12101(a)(7) (1994).

¹⁹⁵ *Id.* § 12102(2)(C).

Civil Rights Act of 1964). She has been excluded “by reason of” a “disability”¹⁹⁶—the status of “being regarded [by the customers] as having” a substantially limiting impairment.¹⁹⁷

The point can be extended. The important role of stigma in constructing impairment-based subordination suggests that an individual should also be protected under the “regarded as” prong when she experiences discrimination on the basis of an (actual, past, or perceived) impairment that is “regarded” *by society in general* as substantially limiting. As the Court said in *School Board v. Arline*,¹⁹⁸ Congress included the “regarded as” provision in the Rehabilitation Act (and now the ADA) precisely to protect people disadvantaged because of “society’s accumulated myths and fears about disability and disease.”¹⁹⁹ When an impairment provokes such widespread myths and fears, people with that impairment are likely to experience systematic disadvantage as a result. The rationale for extending the ADA’s protections thus fully applies. When a plaintiff can prove that her impairment is the subject of broad societal stigma, she should be held to be protected under the “regarded as” prong.²⁰⁰

¹⁹⁶ *Id.* § 12132.

¹⁹⁷ *Id.* § 12102(2)(C); see, e.g., H.R. Rep. No. 101-485, pt. 2, at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 335–36 (“[I]f an employer refuses to hire someone because of a fear of the ‘negative reactions’ of others to the individual . . . that person is covered under the third prong of the definition of disability.”); H.R. Rep. No. 101-485, pt. 3, at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452 (“A person would be covered under this [“regarded as”] test if an employer refused to hire, or a restaurant refused to serve, that person because of a fear of ‘negative reactions’ of others to that person.”); S. Rep. No. 101-116, at 24 (1989) (employing virtually identical language as H.R. Rep. No. 101-485, pt. 2, at 53 *supra*).

¹⁹⁸ 480 U.S. 273 (1987).

¹⁹⁹ *Id.* at 284.

²⁰⁰ One might say that such a plaintiff has an “actual” disability—an impairment that is substantially limiting only because of others’ prejudiced attitudes. That seems to me correct, but I treat this concept under the “regarded as” rubric for two reasons. First, such treatment most clearly calls attention to the fact that it is social attitudes—and not physical barriers or other social practices—that are disabling in this instance. Second, the regulations implementing the Rehabilitation Act, which were incorporated by reference in the ADA, see 42 U.S.C. § 12201(a) (1994), state that an individual is “regarded as having” a disability if she “has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.” 45 C.F.R. § 84.35(j)(2)(ii) (1977). Very little of substance turns on whether this concept is treated under the “actual disability” or “regarded as” prong, however.

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Such a strong emphasis on stigma and societal deprivation of opportunities necessarily raises two questions. The first is a temporal one: stigma or deprivation of opportunities as of when? History certainly provides one relevant baseline. People with impairments that have historically been deemed to be outside of the "norm" should be covered under the ADA's "disability" definition. The prejudice and stereotypes that have developed against such impairments are likely to have picked up substantial momentum, and people with such impairments are likely not to have been considered when physical structures and social institutions were designed. For reasons I have discussed, the lingering effects of such historical practices are likely to be extremely resilient.²⁰¹ Five decades of racial progress since *Brown v. Board of Education*²⁰² have not come close to eliminating our society's racial divide. It may take an equally lengthy period of accessible construction, consciousness-raising, and antidiscrimination enforcement before the status of being a wheelchair user or a person with blindness or mental retardation is as unlikely to be associated with systematic disadvantage as is the status of being a Capricorn. Until that day comes, individuals with those disadvantaging conditions should be entitled to the protection of the ADA's "reasonable accommodation" and antidiscrimination protections.

But ADA coverage should not be limited to people with historically stigmatized impairments. The open-ended nature of the statute's "disability" definition serves a crucial function: to assure that statutory protection expands as new conditions are discovered and become sources of disadvantage.²⁰³ Some new conditions may give rise to widespread prejudice and stereotypes. Consider HIV, which was unknown at the time the Rehabilitation Act was enacted in 1973. Others may be incompatible with existing physical facilities or social and workplace structures; people with such conditions may find their "normal" opportunities severely limited. Consider carpal tunnel syndrome and other musculoskeletal disorders, which have been increasingly recognized as a source of such disadvan-

²⁰¹ See *supra* notes 167-174 and accompanying text.

²⁰² 347 U.S. 483 (1954).

²⁰³ See H.R. Rep. No. 101-485, pt. 2, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333.

tage.²⁰⁴ And some long-known conditions may acquire a new and more stigmatizing significance. Hemophilia, which became associated with HIV in the early 1980s, may be an example of this phenomenon. Any subordination-focused approach should be attentive to new stigmas and should extend the ADA's coverage commensurately. (It is possible, however, that new stigmas may not be as resilient as old ones, if only because they have not had as much time to become reflected in more permanent physical and social structures; a subordination-focused approach should be attentive to that possibility).

Some might object to this dynamic vision of the "disability" category. In theory at least, my argument suggests that even the most traditional of the "traditional disabilities" may one day be denied ADA protection. That prospect should not be troubling. Because stigma is resilient, one should be hesitant to conclude that the disadvantage that has historically attached to particular impairments or functional limitations has disappeared. Before determining that the inability to walk is no longer associated with systematic disadvantage, for example, we should assure ourselves not only that prejudiced and stereotyped attitudes about the condition have been universally eliminated, but also that the physical environment, job descriptions, and other social structures have universally been designed to accommodate the needs of people who cannot walk. We should also make certain that these developments are stable rather than transient features of our society. It strikes me that such a task will not be achieved in my lifetime, if ever. (The prospects for achieving such a society depend crucially on technological developments, for no society will move to true universal accessibility if it can be realized only at exorbitant cost). If it is achieved, however, and the inability to walk is just as "normal" as the ability to walk is today, there will no longer be any need to require employers to individually accommodate wheelchair users; because the inability to walk will be considered "normal," such accommodations will be provided as a matter of course. We will, in

²⁰⁴ The Occupational Safety and Health Administration has recently recognized the limiting effect of such conditions and proposed regulations that would, *inter alia*, require employers to accommodate employees with musculoskeletal disorders and restructure jobs to prevent those conditions from arising. See Ergonomics Program, 64 Fed. Reg. 65768 (Nov. 23, 1999) (to be codified at 29 C.F.R. pt. 1910).

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essence, be living in the "fully accessible society" envisioned by disability rights theorists.²⁰⁵ Whether or not one agrees that ADA protection could wither away in such a society, however, a stigma-focused approach has substantial value in interpreting the statute today. A fully accessible society seems so far off that speculation about the role of the ADA in such a world should have little bearing on how we read the statute in our decidedly inaccessible time.²⁰⁶

The second question implicated by my emphasis on stigma is the "by whom" question: Whose stigmatizing actions count? As I have suggested in my discussion of the "regarded as" prong, ADA coverage should certainly be responsive to prejudice and stereotypes held by those who had a role in the decision to deny an opportunity to the plaintiff. Where they believe the plaintiff has an impairment that removes her from the community of "normals," and that belief results in the denial of an opportunity, the plaintiff should be

²⁰⁵ Even if the "disability" *basis for ADA protection* can wither away, that does not mean that there would no longer be any basis for identifying a socially significant "disability" *category*. (The category might, for example, embrace people who have conditions that were once subject to stigma and systematic disadvantage). Such a category might promote the existence of a "disability culture." See Will Kymlicka, *Liberalism, Community, and Culture* 190 (1989) (arguing that collective rights to preserve minority cultures are not temporary expedients but must be stable parts of the political landscape); cf. Linton, *supra* note 49, at 5 (identifying the importance of the disabled community's "cultural narrative"); Gill, *supra* note 126, at 45 (arguing for protecting "disability culture"). It might be particularly important to preserve disability culture in such a society, if only to ensure that the distinctive history and experiences of people once labeled "disabled" are not submerged in assimilation to the dominant culture. See Young, *supra* note 135, at 164–167. It is not clear, however, that the ADA, with its focus on integration and accommodation by the nondisabled majority, is the best vehicle for protecting a separate "disability culture." (The political mobilization that attended the passage of the ADA, by contrast, seems to have been a quite effective means of encouraging the development of such a culture). Indeed, the integrationist nature of the ADA may account for some of the ambivalence that exponents of "Deaf Culture" have toward that law. See, e.g., Lane et al., *supra* note 134, at 250 (arguing that while many children with disabilities appropriately seek "real integration in school," such "full inclusion" programs are "a disaster" for the deaf). See generally *id.* at 232, 446–47 (noting the "dilemma" that disability rights laws like the ADA pose for the deaf: To obtain important rights against discrimination, the deaf must accept a construction of themselves as having "disabilities," which subsumes and denies their self-understanding as a linguistic minority).

²⁰⁶ Cf. Young, *supra* note 135, at 163 ("Whether eliminating social group difference is possible or desirable in the long run . . . is an academic issue. Today and for the foreseeable future societies are certainly structured by groups, and some are privileged while others are oppressed.").

deemed as having a statutory “disability.” But the attitudes and practices of broader groups in society should count as well. Under the “actual disability” analysis, those attitudes and practices should help to determine what life activities are “major” and what functional limitations are stigmatized and hence “substantial.” And under the “regarded as” analysis, social attitudes might result in a “disability” finding even if the defendant did not entertain them. Attitudes and practices may differ across subcultures and economic sectors, however. Thus, plaintiffs should not be required to show that their condition or limitation is *universally* stigmatized. Rather, it should be sufficient for plaintiffs to demonstrate that prejudiced and stereotyped attitudes are widely enough held (by those with power to act on them)—and exclusionary practices widely enough implemented—to deprive the plaintiffs of a significant slice of opportunities that are generally open in our society. (Again, consideration of specific factual settings may help to clarify this abstract formulation).

2. Defending the Approach

My proposed approach embraces the core insights of the disability rights movement as I have described them above: First, that “disability” is a product of social attitudes and choices rather than anything inherent in the “disabled” person, and second, that those social attitudes and choices have the systemic effect of creating an identifiable *group* of people with “disabilities.” Rather than treating the statute as providing all-purpose protection against irrational or arbitrary conduct that is taken on the basis of a physical or mental condition, my approach ties the ADA’s reasonable accommodation and antidiscrimination protections directly to the circumstances that justify them—circumstances where members of a subordinated group challenge the practices that enact and enforce their subordinated status.

By reading the ADA as extending its protections only to members of a particular socially subordinated group, I draw on the work of scholars who have articulated an antisubordination theory as both a description and defense of civil rights law. (Although those writers have focused particularly on the constitutional guarantee of equal protection, their normative arguments would also apply to legislation crafted to enforce that guarantee). Despite dif-

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ferences among them, those scholars have converged on two key points: (1) that civil rights law should be understood as aiming primarily at eliminating practices that maintain systems of group-based subordination,²⁰⁷ and (2) that achieving this aim may frequently require giving members of subordinated groups remedies that others do not enjoy.²⁰⁸ Although it is not my purpose to rehearse all of the arguments that have been adduced in favor of an antisubordinationist understanding of civil rights law, no sustained application of those arguments to the area of disability discrimination has appeared in the legal literature. Accordingly, some discussion of the antisubordinationist position may help to elucidate the normative justifications for my reading of the ADA.

One powerful set of arguments for an antisubordinationist approach draws on constitutional theory and history. In constructing a narrative of American constitutional history, a powerful lesson can be seen as emerging from the Union's victory in the Civil War and the subsequent adoption of the Fourteenth Amendment: "There is no caste here."²⁰⁹ Where social practices ensure that members of a

²⁰⁷ For four particularly prominent examples, see Colker, *Anti-Subordination Above All*, supra note 79, at 1014–1015; Fiss, *Groups*, supra note 79, at 157; Karst, *Why Equality Matters*, supra note 79, at 251; and Cass R. Sunstein, *The Anticaste Principle*, 92 *Mich. L. Rev.* 2410, 2428–33 (1994) [hereinafter Sunstein, *Anticaste Principle*].

²⁰⁸ See, e.g., Colker, *Anti-Subordination Above All*, supra note 79, at 1015 (arguing that it should "be permissible for a state actor to use facially differentiating policies to redress subordination"); Fiss, *Groups*, supra note 79, at 136 (arguing that "preferential and exclusionary policies should be viewed quite differently"); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 *N.C. L. Rev.* 303, 338 (1986) [hereinafter Karst, *Paths to Belonging*] ("If the subordination of a group is a constitutional wrong, there is nothing unorthodox in the suggestion that group remedies may be appropriate."); cf. Sunstein, *Anticaste Principle*, supra note 207, at 2452, 2454 (stating that "[i]f a basic goal is opposition to caste, affirmative action policies are ordinarily permissible," but arguing for "a presumption in favor of race- and gender-neutral policies").

²⁰⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). For examples of scholars relying on such historical arguments, see Fiss, *Groups*, supra note 79, at 147; Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1, 11–21 (1977) [hereinafter Karst, *Equal Citizenship*]; Sunstein, *Anticaste Principle*, supra note 207, at 2435–36; cf. Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 *Harv. L. Rev.* 29, 100–01 (1999) (arguing that constitutionalism involves "recurrently reconstruct[ing] a narrative of national unity, thereby connecting ourselves to those who preceded us," and that a promising candidate for such a narrative is a

particular, socially salient group have systematically less opportunity to participate in a range of activities in public and private life, the result may bear all too close a resemblance to the racial caste system that this nation has committed itself to rejecting.²¹⁰

In the default case, we might expect markets (economic and political) to root out irrationality and preserve social mobility. We might therefore expect that most inequalities that result from the system will either come out in the wash or redound to everyone's benefit. But when inequalities consistently reproduce themselves along socially salient group lines, they create a threat to democracy and social peace. Persistent group-based inequality feeds a stigma that both imposes psychic harm on members of stigmatized groups²¹¹ and justifies (in the minds of policymakers and the public at large) a continuing failure to treat them with equal consideration.²¹² Intervention is therefore necessary to eliminate the practices that create and perpetuate that subordinating outcome.

This argument does not justify providing a remedy to all people who experience disadvantage based on a personal characteristic. We may wish to deem some characteristics "morally relevant" bases for distributing benefits and burdens. They may, for example, fall toward the "achievement" end of the ascription/achievement spectrum.²¹³ Alternatively, they may be characteristics that, when attached to inequalities, benefit all of society.²¹⁴ And when a char-

"Lincolnian" one that "describes the United States as a nation 'dedicated to the proposition that all men are created equal.'")

²¹⁰ Cf. Karst, *Myths of Identity*, supra note 48, at 331 ("The archetype is the Jim Crow system, which denied all manner of participation in the public life of the community to individuals because they were socially defined as black. Voting was the classic case of exclusion, but in many other areas of life black people were simply not to be seen, except in segregated group environments: schools; churches; theaters, hotels, restaurants, railroad cars, and other places of public accommodation; and most desirable kinds of employment, both governmental and private. In sum, of course, these patterned exclusions added up to one huge group-centered pattern of white supremacy, and that was the point.").

²¹¹ See, e.g., Koppelman, supra note 174, at 60-63; Sunstein, *Anticaste Principle*, supra note 207, at 2430-31.

²¹² See, e.g., Koppelman, supra note 174, at 60; Karst, *Why Equality Matters*, supra note 79, at 268.

²¹³ Cf. Koppelman, supra note 174, at 64 (arguing that the ascriptive nature of a characteristic is "strong evidence" that there is no morally relevant reason for attaching inequality to it).

²¹⁴ Cf. Sunstein, *Anticaste Principle*, supra note 207, at 2438 ("The use of factors that ordinarily underlie markets is at least sometimes, though of course not always, in the

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acteristic results in individual but not group disadvantage, the societal costs of administering a regime to eliminate the disadvantage may far outweigh the benefits of doing so.²¹⁵ Any comprehensive definition of "morally relevant" bases for inequality raises some of the most difficult issues in constitutional theory and distributive justice; those issues are well beyond the scope of this Article. But disadvantage based on disability, as I have defined it, seems clearly to implicate the constitutionalist antisubordination argument: Disability is a socially salient group status, based on characteristics currently outside of the control of group members, that results in systematic disadvantage. At least where the disability can be "reasonably accommodated," moreover, inequalities based on that status cannot be said to benefit everyone.²¹⁶

In addition to the constitutionalist arguments for reading the ADA as targeting the practices that contribute to the subordinated status of an identifiable group of people with disabilities, there is a coherentist argument as well.²¹⁷ An antisubordinationist approach offers the normatively best explanation of our nation's body of statutory civil rights law as enacted and interpreted. To be sure, the orthodox account of civil rights law appears inconsistent with my protected-class reading of the ADA. That account treats civil rights law as aiming at eliminating individualized irrationality and ensur-

interest of the most disadvantaged, certainly in the sense that lower prices and higher employment are especially valuable to the poor. When this is so, any government initiative that would bar use of those factors—intelligence, production of socially valued goods, and so forth—seems perverse.”).

²¹⁵ Cf. *id.* (“[A] principle that would override all morally irrelevant factors would impose extraordinary costs on society, both in its implementation and administrative expense and in its infliction of losses on a wide range of people.”).

²¹⁶ See *id.* Sunstein argues that an antisubordinationist understanding has “greatest appeal in discrete contexts in which gains from current practice to the least well-off are hard to imagine; in which second-class citizenship is systemic and occurs in multiple spheres and along easily identifiable and sharply defined lines; in which the morally irrelevant characteristic is highly visible; in which there will be no major threat to a market economy; and in which the costs of implementation are most unlikely to be terribly high.” *Id.* As I have defined it, “disability” meets all of these criteria except the limitation to “highly visible” characteristics. I criticize that limitation below. See *infra* notes 356–366 and accompanying text.

²¹⁷ Cf. Ronald Dworkin, *Law's Empire* 225 (1986) (arguing that courts should apply an “adjudicative principle of integrity,” which “instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness”).

ing that all candidates for positions are treated on the basis of individual merit.²¹⁸ Such an individualized orientation does not readily support limiting the rights of nondiscrimination and accommodation to a class of people whose conditions are attached to sufficient disadvantage to warrant the label “disability.” Instead, it would seem to justify a regime I reject below: a universal rule that anyone is entitled to protection against discrimination on the basis of his or her physical or mental characteristics,²¹⁹ and that anyone is entitled to demand that employers, places of public accommodation, and government agencies provide reasonable accommodation for those characteristics.

Although full discussion of the point is beyond the scope of this Article, the orthodox individual-rationality/individual-merit approach cannot explain our civil rights laws as enacted and applied.²²⁰ Our civil rights laws impose no general requirement that covered entities (employers, public accommodations, government agencies) treat people on the basis of their individual merits. Nor do they prohibit all exclusions that are “irrational” or “arbitrary.” They prohibit discriminatory conduct only when it is taken on the basis of a class status—like race or gender—that is associated with the systematic disadvantage of certain subclasses.

It is tempting to think of the forbidden classifications targeted by civil rights law as the ones that are almost inevitably irrational

²¹⁸ See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 *Calif. L. Rev.* 1, 16 (2000) (calling this “the dominant conception of American antidiscrimination law” and proceeding to criticize it on positive and normative grounds).

²¹⁹ See, e.g., *id.* at 16–17 (observing that the “dominant conception” logically implies protection against any appearance-based discrimination).

²²⁰ For a recent discussion of this point, see *id.* at 31 (arguing that “the dominant conception offers an implausible story about the actual shape of antidiscrimination law”); see also Mark Kelman, (Why) Does Gender *Equity* in College Athletics Entail Gender *Equality*?, 7 *S. Cal. Rev. L. & Women’s Stud.* 63, 91 (1997) (“[E]ven the conventional antidiscrimination norm is significantly designed to protect against the stigma imposed on subordinated group members, and is therefore not purely individualistic as a matter of theory as well as of administrative practice. It is not simply the case that we care less, in designing a legal regime, about the person denied a job for the illegitimate reason that he reminded the employer of the employer’s hated stepfather because we believe that person will get another job. It is also the case that the decision not to hire in such a case does not confirm traditional status-based social hierarchies, express the social power of one group over another or contribute to ambivalent self-loathing.”).

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bases for drawing distinctions among individuals.²²¹ But the temptation should be resisted. First, discrimination on the basis of the forbidden classifications is frequently rational for the discriminator,²²² but the civil rights laws prohibit it anyway.²²³ Such a prohibition is best understood as reflecting a moral judgment that discrimination on the basis of the forbidden classifications, however rational in the short run, intolerably entrenches the group-based subordination of certain disadvantaged classes.²²⁴ Second, many civil rights doctrines on their face invoke notions of group-based subordination rather than individual irrationality or individual merit. Examples include Title VII's acceptance of properly tailored "affirmative action plan[s] voluntarily adopted by private parties to eliminate traditional patterns of racial segregation,"²²⁵ and its prohibition of practices that have a disparate impact on particular racial or gender groups.²²⁶ These group-based elements of the law have come under political and judicial attack in recent years, but they remain an entrenched part of the civil rights landscape.

The foregoing discussion suggests that the ADA may be understood as implementing a mild regime of affirmative action. The statute's core nondiscrimination provisions protect only people with "disabilities," because discrimination against them—unlike discrimination against Capricorns²²⁷ or people with non-stigmatized

²²¹ See, e.g., Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 241–42 (1971).

²²² See, e.g., David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 Harv. C.R.-C.L. L. Rev. 57, 63–66 (1998); Sunstein, *Why Markets Don't*, supra note 99, at 155–61.

²²³ See, e.g., *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707–11 (1978) (holding that requiring female employees to make higher contributions than male employees to a pension fund violates Title VII even though women live longer and thus withdraw more from the fund on average than do men).

²²⁴ See David A. Strauss, *The Myth of Colorblindness*, 1986 Sup. Ct. Rev. 99, 108–30; Sunstein, *Anticaste Principle*, supra note 207, at 2413–38.

²²⁵ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201 (1979); see also *Johnson v. Transportation Agency*, 480 U.S. 616, 641–42 (1987) (extending *Weber* to gender-based affirmative action).

²²⁶ See, e.g., 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (reasoning that an effects test implements the statute's purpose to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

²²⁷ Cf. *Lawson*, supra note 62, at 267 (explaining that the Rehabilitation Act does not prohibit astrology-based discrimination: "Section 504 is a prohibition on discrimination

impairments—is likely to lead to systematic disadvantage and subordination. As David Strauss has persuasively argued, the nondiscrimination rules in our civil rights laws are best justified in such terms—terms that are quite similar to the justifications that support affirmative action.²²⁸ To the core nondiscrimination requirement, the ADA adds the mandate of “reasonable accommodation” or “reasonable modification,” which serves a very similar purpose. Like an affirmative action policy, that mandate singles out members of a particular group (here, the socially defined group of people with “disabilities”), and gives them a benefit that nonmembers lack (here, the right to individualized accommodation).²²⁹ Like an affirmative action program, it serves remedial, prophylactic, and inclusionary functions.²³⁰ “Reasonable accommodation” serves the remedial function of stanching the lingering effects of past discrimination against people whose impairments led them to be defined as outside of the “norm,” for those effects are literally built into our workplaces, schools, and shopping centers. It serves the prophylactic function of preventing ongoing prejudices and stereotypes from continuing to limit the opportunities of people with “disabilities.” And it serves the inclusionary function of promoting integration of people with “disabilities” in our workplaces, shopping malls, places of recreation, and, not least, government facilities.

against individuals with handicaps by reason of their handicaps. It is not a general requirement of rational decision-making.”).

²²⁸ See Strauss, *supra* note 224, at 130 (noting “fundamental similarities between nondiscrimination and affirmative action”).

²²⁹ See, e.g., Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 *Duke L.J.* 1, 14 (1996) (“Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual’s disabilities and to provide special treatment to him for that reason.”); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities* (Nov. 22, 1999) (unpublished manuscript on file with the *Virginia Law Review*) (arguing that reasonable accommodation is a form of affirmative action). Note that the ADA does not actually require the employer to “provide special treatment” to employees with disabilities; nothing in the statute prohibits them from giving the same accommodations to nondisabled employees as well. But the statute does give employees with disabilities, unlike those without them, a legally enforceable right to such accommodations.

²³⁰ See, e.g., Christopher Edley, Jr., *Not All Black and White: Affirmative Action, Race, and American Values* 78–80 (1996) (describing these three basic functions of affirmative action).

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Affirmative action is a concept that embraces a broad array of inclusionary programs, from aggressive outreach to strict numerical quotas. Although reasonable accommodation serves many of the functions of affirmative action, it avoids some of the most controversial features of some affirmative action programs. It does not, for example, impose numerical hiring goals or set-asides.²³¹ Nor does it require employers to grant people with disabilities special treatment; employers are free to give the same type of accommodation to nondisabled workers. In contrast to the more controversial forms of affirmative action, the ADA imposes only the mild requirement that job applicants with disabilities receive a close look. If an applicant's disability seems to prevent her from performing a particular position, the employer must nonetheless conduct a careful examination of both her abilities and the requirements of the job to determine whether any aspect of the job could reasonably be rearranged to permit her to perform its "essential functions."²³² Even if the applicant's impairment can be reasonably accommodated, however, the employer is not required to hire her if she is not "qualified"—that is, if she cannot meet the employer's standards for performing the job's essential functions. Indeed, the employer is free to reject her unless she is the "most qualified" candidate (that is, the candidate best able to perform the job's essential functions).²³³ As a regime of affirmative action, then, the ADA is extraordinarily mild. But when the statute is understood as

²³¹ Japan and many European countries impose quotas for the hiring of workers with disabilities. Employers must comply or suffer a financial penalty. See, e.g., Richard V. Burkhauser, *Lessons from the West German Approach to Disability Policy*, in *Disability and Work: Incentives, Rights, and Opportunities* 85, 86 (Carolyn L. Weaver ed., 1991) (describing the German quota system); Weber, *supra* note 93, at 169–70 (surveying quota systems in Austria, France, Germany, Luxembourg, Spain, the United Kingdom, and Japan).

²³² See 42 U.S.C. § 12111(8) (1994) (indicating that an individual is not a "qualified individual with a disability" entitled to sue unless she can perform the "essential functions" of the job at issue with or without reasonable accommodation).

²³³ See, e.g., S. Rep. No. 101-126, at 26 (1989) ("[A]n employer is still free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability. For example, suppose an employer has an opening for a typist and two persons apply for the job, one being an individual with a disability who types 50 words per minute and the other being an individual without a disability who types 75 words per minute, the employer is permitted to choose the applicant with the higher typing speed.").

such a regime, it fits the most compelling justifications for the civil rights laws as enacted and interpreted.

My approach to the ADA also finds support in broader normative theories. It is, for example, very much in line with works in democratic theory that emphasize the elimination of domination and oppression and that urge the presumptive illegitimacy of hierarchy.²³⁴ Iris Marion Young has provided the most exhaustive elaboration of such a theory in the context of civil rights policy. She starts from the premise that social justice requires society to provide institutional support for “the values that constitute the good life,” two of which she sees as most basic: “(1) developing and exercising one’s capacities and expressing one’s experience, and (2) participating in determining one’s action and the conditions of one’s action.”²³⁵ She argues that one major threat to the ability to develop and express one’s capacities consists in structural “oppression”: “the vast and deep injustices some groups suffer as a consequence of often unconscious assumptions and reactions of well-meaning people in ordinary interactions, media and cultural stereotypes, and structural features of bureaucratic hierarchies and market mechanisms.”²³⁶ Young therefore sees oppression as a fundamentally group-based phenomenon. Although there is nothing “natural” about group identification—“groups are fluid; they come into being and may fade away,” and any given individual has multiple, cross-cutting group affiliations²³⁷—socially defined group differences can have a major impact on people’s lives.²³⁸ Oppression occurs, in Young’s view, when groups of people are “close[d] . . . out” of the

²³⁴ See Ian Shapiro, *Democratic Justice* 41–42 (1999); Young, *supra* note 135, at 39. Unlike Shapiro’s, and particularly Young’s, work, Michael Walzer’s work is not entirely consistent with the antisubordinationist approach to civil rights law on which I have drawn. But my argument—that disability rights law should be seen as targeted at the group of people who would experience systematic disadvantage without it—resonates with Walzer’s basic notion of a “complex egalitarian society” where “there will be many small inequalities,” but inequality will not “be summed across different goods.” Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 17 (1983).

²³⁵ Young, *supra* note 135, at 37 (citations omitted).

²³⁶ *Id.* at 41.

²³⁷ *Id.* at 47–48.

²³⁸ See *id.* at 46–48. Antisubordinationist legal theorists have demonstrated a similar understanding of the importance of socially defined group identities in people’s lives. See, e.g. Karst, *Myths of Identity*, *supra* note 48, at 311–12.

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"contexts of organized social cooperation" in which "[m]ost of our society's productive and recognized activities take place."²³⁹ It also occurs when "the dominant meanings of a society render the particular perspective of one's own group invisible at the same time as they stereotype one's group and mark it out as the Other."²⁴⁰

Because oppression occurs on a group basis, Young argues that a group-based response—consisting of remedies limited to group members²⁴¹—may be necessary.²⁴² She specifically identifies the group of people with disabilities as one of the paradigmatic examples on which she builds her theory.²⁴³ By treating the ADA as affording protection to the group of people who because of their impairments are most likely to experience what Young would call "oppression," my approach to defining disability substantially tracks her argument.

The approach I have sketched also accords with the most prominent liberal theories of distributive justice. Norman Daniels argues, for example, that the ADA's employment provisions can best be understood as implementing John Rawls's principle of fair equality of opportunity, under which social and economic inequalities must be attached to offices and positions open on a fair basis to all.²⁴⁴ Daniels contends that most people in a given society have access to a "fair share" of that society's "normal opportunity range."²⁴⁵ People with disabilities, however, lack access to their "fair share." By giving a remedy to that group of people, the ADA directly ad-

²³⁹ Young, *supra* note 135, at 55. As Koppelman notes, Young's account cannot plausibly be read as condemning all group-based disadvantage; rather, it necessarily targets group-based disadvantage imposed for unjustifiable reasons. See Koppelman, *supra* note 174, at 87-88; see also *supra* notes 213-216 and accompanying text (discussing characteristics that are "morally irrelevant").

²⁴⁰ Young, *supra* note 135, at 58-59.

²⁴¹ See *id.* at 195-98.

²⁴² See *id.* at 174 ("[S]ome of the disadvantages that oppressed groups suffer can be remedied in policy only by an affirmative acknowledgement of the group's specificity.").

²⁴³ See, e.g., *id.* at 40.

²⁴⁴ See Daniels, *supra* note 31, at 282-87. For Rawls's description of the fair opportunity principle, see John Rawls, *A Theory of Justice* 83-90 (1971) [hereinafter Rawls, *Theory*]; John Rawls, *Political Liberalism* 6, 291 (1993). Rawls treats the fair opportunity principle as distinct from the difference principle, which requires that inequalities operate to the benefit of the least advantaged. As I discuss below, it is not appropriate to see the ADA as implementing Rawls's difference principle in any direct way. See *infra* notes 272-273 and accompanying text.

²⁴⁵ Daniels, *supra* note 31, at 286.

vances the interest in equality of opportunity: “A commitment to equality of opportunity leads us to accept somewhat greater costs to protect the range of opportunities of those who are most impaired as compared to those who already enjoy more of their fair shares of opportunity.”²⁴⁶ In a slightly different vein, Pamela Karlan and George Rutherglen contend that the right to accommodation implements Ronald Dworkin’s principle of equality of resources by serving as a form of in-kind social insurance for those who are born with or acquire “disabling” conditions.²⁴⁷ Dworkin argues that the demands of distributive justice can be understood through the metaphor of a “hypothetical insurance market”: If people in an “original position” would insure themselves against particular inequalities, then society is bound to provide redistribution to compensate for those inequalities.²⁴⁸ Although Dworkin’s main task is to justify a significant redistribution of income across the board in society,²⁴⁹ he reasons from the case of disability insurance. He argues that people in an “original position” would insure themselves against disabilities that made them unemployable or significantly underemployed.²⁵⁰

My proposed approach is consistent with both Daniels’s Rawlsian justification for the ADA and Karlan and Rutherglen’s Dworkinian justification for the statute. By extending the ADA’s protections to people who, because of their impairments, are likely to experience systemic deprivations of opportunity, my approach would target the statute at (in Daniels’s terms) a group of people who lack a “fair share” of society’s “normal opportunity range.” It would also target the statute at (in Dworkinian terms) a group of people who have conditions that lead to the kind of disadvantage people would likely insure against in an “original position.”

My argument also accords with more utilitarian justifications for the ADA. In an important paper addressing the employment title of the statute, Rip Verkerke has argued that the social benefits of

²⁴⁶ *Id.*

²⁴⁷ See Karlan & Rutherglen, *supra* note 229, at 26–27 & n.86 (citing Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 *Phil. & Pub. Aff.* 283 (1981)).

²⁴⁸ See Dworkin, *supra* note 247, at 292–304.

²⁴⁹ See *id.* at 314–23.

²⁵⁰ See *id.* at 297–303, 314–21.

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ADA-required accommodations outweigh the private costs to individual employers in at least two ways. First, bringing people with disabilities into the workforce avoids the very significant social costs of dependency. On balance, Verkerke suggests, those costs can be expected to outweigh the costs of providing "reasonable" accommodations.²⁵¹ Second, the ADA protects against inefficient labor-market "churning" of people with "hidden" disabilities.²⁵² (Churning occurs when employees with hidden conditions experience repeated cycles of being hired by unknowing employers, discharged when their conditions are discovered, and then hired again by different unknowing employers. Churning is inefficient because it creates friction in the labor market without improving the quality of match between employers and employees²⁵³). My approach to defining disability can be seen as tying ADA coverage to these justifications through a form of rule utilitarianism. People with conditions that are stigmatized or attached to systematic disadvantage are most likely to experience "churning"—or to have their talents significantly underutilized—in the absence of reasonable accommodation.

To be sure, my approach excludes some plaintiffs whom it would be socially beneficial to accommodate: Someone may have a wide range of opportunities without accommodation but would gain uniquely enormous utility from access to a particular opportunity if a very tiny accommodation were made. In such a case, accommodation would be socially efficient. But it seems doubtful that ADA coverage should be read so broadly as to reach such (presumably

²⁵¹ See J. Hoult Verkerke, *An Economic Defense of Disability Discrimination Law* at 24 (University of Virginia School of Law Legal Studies Working Paper No. 99-14, June 1999) (available through the Social Science Research Network Electronic Library at <<http://papers.ssrn.com>>). Stewart Schwab and Steven Willborn suggest that this avoiding-dependency analysis slights the more dignitary justifications for the ADA; those justifications, they argue, may appropriately require a socially inefficient degree of accommodation. See Schwab & Willborn, *supra* note 229. As my discussion of antisubordination theory should suggest, I have substantial sympathy for that view. But the question remains: Who should be entitled to demand accommodation? Both dignitary and economic analyses suggest that the accommodation right should be targeted at people who would experience systematic disadvantage without it.

²⁵² See Verkerke, *supra* note 251, at 24-26.

²⁵³ See *id.* at 10-20. For an earlier discussion of the problem, see J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 *U. Chi. L. Rev.* 115, 140-47 (1998).

quite rare) cases. To guarantee a right to accommodation in such cases, courts would have to give every person who had been deprived of even a single opportunity the chance to litigate the costs and benefits of her proposed accommodation. Such a rule would impose significant administrative costs for questionable gains.

Finally, my argument finds support in one of the most powerful economic arguments for antidiscrimination laws generally: Discrimination against members of a particular group can be self-perpetuating because it deprives group members of incentives to invest in their human capital; those diminished incentives reinforce the rationality of statistical discrimination against members of that group, which in turn reinforces the lack of incentive to invest in human capital.²⁵⁴ Antidiscrimination laws are necessary to break this vicious cycle.

Given the importance of rational statistical discrimination in maintaining the disadvantaged status of people with disabilities,²⁵⁵ this human-capital argument has substantial force as a justification for the ADA. It also provides a sound basis for tying the statute's protections to the group of people who are most likely to be deprived of a range of opportunities. Isolated and idiosyncratic acts of irrational exclusion do not impose any *special* disincentive to invest in human capital; only where I know that I will be deprived of substantial opportunities because of my group membership will it make sense for me to invest less in developing my skills than my neighbor invests in developing hers. The approach to defining disability I sketch in this paper targets that problem quite directly.

²⁵⁴ For statements of this point, see, for example, Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 *Am. Econ. Rev.* 340, 342–45 (1983); Sunstein, *Why Markets Don't*, *supra* note 99, at 157–59. For an application of this point to the distinctive context of “high-level” employment, see Charny & Gulati, *supra* note 222, at 64–66, 78–83.

²⁵⁵ See *supra* note 100 and accompanying text. The wide diversity among disabilities, the fact that disabilities often directly affect job skills, and the fact that employers will frequently lack reliable information regarding how serious that effect is, all suggest that label-based statistical discrimination—and the attendant human capital effects—may be even more likely in the disability context than in the race context. Cf. John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 *Geo. L.J.* 1713, 1725–26 (1991) (arguing that statistical discrimination and attendant effects on human capital investment are likely to be small in the race context because employers can readily “identify degrees of ability within racial groups”).

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My approach to ADA coverage is similar to, but slightly more generous to plaintiffs than, the approach Mark Kelman and Gillian Lester appear to regard as ideal.²⁵⁶ Kelman and Lester suggest that civil rights protections should be afforded only to those groups that have experienced stereotypes or "aversive prejudice"; in the disability context, they would appear to limit this class to people with physical disabilities (though their analysis would seem to apply to people with mental illness as well).²⁵⁷ They thus give too little weight, in my view, to the effect of society-wide neglect in imposing systematic disadvantage on a group.²⁵⁸ I have argued that there are strong normative reasons to give members of socially subordinated groups a tool to challenge the practices that enforce their subordination. Kelman has recognized a similar point elsewhere.²⁵⁹ The same justifications for allowing challenges to such practices apply whether or not subordination is enforced through aversive prejudice, unfair stereotypes, or systematic neglect.

Kelman and Lester appear to be principally moved by the resource-allocation concerns raised by challenges to society-wide neglect. Kelman and Lester's concern may flow to some extent from their focus on disability accommodations in public education—an area where public funds are expended on everyone and the diversion of resources to people with disabilities may be particularly overt.²⁶⁰ As they rightly point out, some practices that have the effect of imposing disadvantage on people with disabilities may

²⁵⁶ See Mark Kelman & Gillian Lester, *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities* 211–12 (1997) (stating that "historically stigmatized" groups may legitimately make group-based claims).

²⁵⁷ *Id.* at 183, 197, 216, 218–20.

²⁵⁸ See, e.g., *id.* at 183–84, 220 (arguing that the notion of prejudice or stereotype is incoherent, and that antidiscrimination protection is therefore inappropriate, where the decisionmaker is unaware of the characteristic against which she supposedly holds prejudices or stereotypes).

²⁵⁹ See Kelman, *supra* note 220, at 79 n.40, 117–20 (criticizing "the 'antisubordination' principle as generally articulated" as "either too vague to guide policy, or, where made more explicit, unacceptable," but agreeing that impermissible discrimination might appropriately be defined as encompassing those social practices that "instantiate[] and thus reinforce[] a cultural practice that we deem not just detrimental to the historically subordinated group, but significantly 'definitional' of the group's second-class status").

²⁶⁰ I thank Martha Minow for pointing out to me this possible source of Kelman and Lester's concern.

be entirely justified from a societal standpoint.²⁶¹ But those resource-allocation questions are best addressed in the “reasonable accommodation” stage of the ADA inquiry—a stage that on its face requires courts to answer the normative question of how much society should invest to eliminate the practices that contribute to the systematic disadvantage that society attaches to particular impairments. Where people experience such disadvantage because of their impairments, however, they should not be denied the right to demand that the disadvantage be justified.²⁶²

B. Two Alternatives

My subordination-based approach is not the only way one could give meaning to the ADA’s “disability” definition. In particular, two other approaches to interpreting that definition have been proposed. One approach, which is probably the dominant one in the lower courts, would narrowly limit the ADA’s coverage to people with biologically severe impairments. The other, which represents the position of many disability rights lawyers (including several who were involved in the ADA drafting and lobbying process), would broadly extend coverage to any person who has been deprived of even a single opportunity on the basis of a physical or mental impairment—whether or not that impairment is limiting or stigmatizing. Consideration of those alternatives bolsters the case for my proposed approach.

1. Covering Only the “Truly Disabled”

Robert Burgdorf has described the dominant trend in the lower courts in great detail. He argues that those courts have tended to interpret the ADA’s “disability” definition as limited to a narrow group of individuals with medically or biologically severe impairments. The courts frequently refer to this group as the “truly

²⁶¹ See Kelman & Lester, *supra* note 256, at 154, 212, 221–24.

²⁶² Cf. Amartya Sen, *Inequality Reexamined* 108 (1992) (“The first step is to *diagnose* deprivation, and related to that, to determine what we *should* do *if* we had the means. And then the next step is to make actual policy choices in line with our means.”); *id.* at 146 (“A significant inequality has to be acknowledged first, before it is examined as to whether it is justified or not.”).

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disabled."²⁶³ As it has evolved in the lower courts, the "truly disabled" approach is more of an inclination than a doctrine. Several doctrinal tendencies can be identified, however: (1) hesitation to recognize "major life activities" other than the ones listed in the regulations;²⁶⁴ (2) refusal to find a "substantial limitation" in major life activities other than "working" except where the plaintiff almost entirely lacks the capacity to perform the activity;²⁶⁵ and (3) insistence that plaintiffs claiming "substantial limitation" in the ability to work establish that their impairments make them unable to perform a very large percentage of the jobs available to them.²⁶⁶ The "truly disabled" inclination has led to a narrow interpretation of the "disability" definition in "regarded as" cases as well.²⁶⁷

It is difficult to construct a persuasive argument in favor of the narrow "truly disabled" approach. At least one court and one commentator have suggested that such an approach is mandated by

²⁶³ See Burgdorf, "Substantially Limited" Protection, *supra* note 8, at 536–59.

²⁶⁴ See, e.g., *Deas v. River West, L.P.*, 152 F.3d 471, 479 n.18 (5th Cir. 1998) (holding that "awareness" is not a major life activity and plaintiff's uncontrolled seizure disorder therefore was not a disability), cert. denied, 119 S. Ct. 2411 (1999); *Reeves v. Johnson Controls World Servs.*, 140 F.3d 144, 147 (2d Cir. 1998) (holding that "everyday mobility" is not a major life activity and plaintiff's agoraphobia therefore was not a disability).

²⁶⁵ See, e.g., *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871–72 (2d Cir. 1998) (holding that permanent ulcerative colitis—which, when symptomatic, required the plaintiff always to be near a restroom, and at times caused her to soil herself—does not substantially limit the major life activity of caring for oneself, and noting that "even when her colitis is symptomatic, [plaintiff] is still able to get dressed, groom herself and make her way to work"); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 n.2 (5th Cir. 1996) (finding that asbestosis that reduced plaintiff's lung capacity to less than 50% of normal capacity did not substantially limit the major life activity of breathing), cert. denied, 520 U.S. 1228 (1997).

²⁶⁶ For particularly extreme statements of this principle, see *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 49 (D. Me. 1996) ("If [plaintiff] is in fact capable of performing other jobs, then he is not substantially limited in his ability to work and thus not disabled under the ADA."), aff'd, 105 F.3d 12, 15 n.1 (1st Cir. 1997) (noting that plaintiff did not assert on appeal a claim of substantial limitation in working, but that the claim "would fail" in any event "because he has not shown he is unable to work"); *Kotlowski v. Eastman Kodak Co.*, 922 F. Supp. 790, 797 (W.D.N.Y. 1996) ("Because she claims that her depression prevented her from working, [plaintiff] must demonstrate that it substantially limited her ability to work at not only her then existing job, but any job.").

²⁶⁷ For discussions of the influence of the "truly disabled" approach on "regarded as" cases, see Burgdorf, "Substantially Limited" Protection, *supra* note 8, at 456–57, 459–60; Mayerson, *supra* note 6, *passim*.

the plain text of the statute. In their view, “truly disabled” courts have “consistently interpreted ‘substantially’ to mean just that—a limitation that is substantial.”²⁶⁸ That point is too facile. The word “substantial” can bear a generous or a parsimonious construction.²⁶⁹ Choosing between those constructions requires justification.

One might seek to justify the narrow “truly disabled” approach as limiting the ADA’s benefits to the class of people that “truly” needs them. Such a justification could draw on a notion that the ADA implements John Rawls’s difference principle by providing protection only to the “least advantaged.”²⁷⁰ Alternatively, it could draw on a more utilitarian understanding that people with the most severe conditions are the most likely to gain from a regime of mandated accommodation, and that the benefits of such a regime are likely to outweigh the costs *only* when the beneficiaries will realize the most substantial gains.²⁷¹

These arguments seem misplaced, even taken on their own terms, for they presume that the ADA mandates extensive accommodations. Rawls, after all, identifies the “least advantaged” as the class whose position should be *maximized*, not as the only class that may benefit from redistributive legislation, and the utilitarian argument for a narrow protected class posits that only a large benefit can outweigh the cost of accommodation. But the ADA does not mandate any such costly redistribution. The statute’s employment provisions require only “reasonable” accommodations that do not alter “essential” job functions or impose “undue” hardship,

²⁶⁸ *Holland v. A.T. Kearney, Inc.*, 1999 WL 172327, at *3 (N.D. Tex. 1999); see Elizabeth A. Crawford, Comment, *The Courts’ Interpretations of a Disability Under the Americans with Disabilities Act: Are They Keeping Our Promise to the Disabled?*, 35 *Hous. L. Rev.* 1207, 1232 (1998).

²⁶⁹ See *supra* note 32–36 and accompanying text.

²⁷⁰ See Rawls, *Theory*, *supra* note 244, at 75–80. Jerry Mashaw has sketched a Rawlsian justification of the ADA that rests on the premise that people with disabilities are the “least advantaged.” See Jerry L. Mashaw, *Against First Principles*, 31 *San Diego L. Rev.* 211, 220 (1994). He has not endorsed the “truly disabled” approach, however. To the contrary, he has suggested that a far more generous construction of the “disability” definition is appropriate. See Mashaw, *In Search of the Disabled*, *supra* note 150, at 66–67.

²⁷¹ In his argument for repeal of the ADA, Richard Epstein contends that the statute is inefficient redistributive legislation that creates costs that exceed its benefits. See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 480–94 (1992). Though he would go much farther, his argument tends in the same direction as the “truly disabled” approach.

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and similar limitations apply in the public services and public accommodations contexts.²⁷² Available empirical evidence indicates that most required workplace accommodations have little or no direct cost, and the overwhelming majority have costs less than \$500. Many accommodations also have significant countervailing benefits to the employer and coworkers.²⁷³ It is therefore hard to view the ADA as implementing Rawls's difference principle in any direct way. From a utilitarian perspective, it is similarly hard to justify confining the ADA's coverage to the narrow class of individuals likely to draw the greatest benefits from accommodations.²⁷⁴

The lower courts' use of the term *truly* disabled suggests that something else is at work—a fear of falsification. As Deborah Stone's history shows, efforts to distinguish "genuine" from "artificial" disability date back at least to the English Poor Laws, which beginning in 1388 exempted people deemed unable to work (because they were members of categories such as "the sick," "the insane," "defectives," and "the aged and infirm") from vagrancy laws, work requirements, and the like.²⁷⁵ The fear that people

²⁷² See 42 U.S.C. §§ 12111(8), 12112(b)(5), 12181(9), 12182(b)(2)(A)(ii), 12182(b)(2)(A)(iv) (1994); 28 C.F.R. § 35.130(b)(7) (1999). At least one commentator has criticized the ADA from a Rawlsian perspective precisely because these limitations reflect a failure to maximize the position of people with disabilities. See W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. Rev. 295, 330–33. (1992). As I have suggested above, the ADA may be better understood from a Rawlsian perspective as implementing the principle of fair equality of opportunity rather than the difference principle. Application of Rawls's difference principle to people with disabilities implicates a contentious philosophical literature, discussion of which is beyond the scope of this Article. For a recent contribution that summarizes much of the debate, see Mark S. Stein, *Rawls on Redistribution to the Disabled*, 6 Geo. Mason L. Rev. 997 (1998).

²⁷³ See Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DePaul L. Rev. 877, 902–03 (1997). Some of the ADA's general accessibility requirements are likely to be more costly—particularly the requirement to retrofit renovated facilities to make them universally accessible. See 42 U.S.C. § 12183(a)(2) (1994). But the persons who benefit from such retrofitting are likely to meet anyone's test of the "truly disabled" in any event. The cost of such large-scale changes ought not limit access to the ADA's more confined requirement of individualized accommodation.

²⁷⁴ That does not mean that the ADA's coverage should be unlimited; I have argued throughout this Article that it should not be. But there is no basis for limiting the statute's protections to people with the most medically severe impairments.

²⁷⁵ Stone, *supra* note 22, at 29–55.

would feign disability to obtain the charity of others, Stone argues, played a crucial role in forming the first set of collective understandings of the “disability” category.²⁷⁶ In keeping with that tradition, lower court cases invoking the concept of the “truly disabled” frequently seem motivated by the concern that plaintiffs are opportunistically invoking their minor physical conditions to obtain unjustified benefits through the mechanism of “reasonable accommodation.”²⁷⁷ Whether or not that concern is accurate, limitation of the ADA’s protected class to people with medically severe impairments seems a particularly inappropriate response. Even people whose conditions have no ongoing medical significance may experience the prejudice, stereotypes, and neglect that make up disability-based disadvantage—consider a person with a severe facial disfigurement. That is the basic insight reflected in the “regarded as” and “record” prongs. People with stigmatized but not severe conditions are likely to need government assistance to be included in the “norm,” but the “truly disabled” approach leaves them out in the cold.

Although I am not aware of any court that has justified the position in the following terms, the “truly disabled” approach might be regarded as a narrow interpretation of interest-group legislation. That is, courts may view “people with disabilities” as just another rent-seeking interest group who should not be allowed to obtain the slightest bit more than they bargained for in the legislative process.²⁷⁸ Complete analysis of that justification would require

²⁷⁶ See *id.* at 32.

²⁷⁷ See, e.g., *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1460 (7th Cir. 1995) (affirming denial of relief to medical resident who sought to be excused from working long shifts as an accommodation for his strabismus (crossed eyes) and explaining that the court would not “allow[] an individual with marginal impairment to use disability laws as bargaining chips to gain a competitive advantage”); cf. *Bonnie*, *supra* note 30, at 5 (“Special exemptions from generally applicable requirements for people with disabilities can evoke resentments similar to those that have plagued race-based affirmative action programs. From this perspective, claiming that one is ‘disabled’ can be interpreted as a manipulative effort to gain unwarranted advantage.”). Lennard Davis has argued that many cases denying relief to ADA plaintiffs reflect a view that the plaintiffs narcissistically believe themselves entitled to specially advantageous treatment. See Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 *Berkeley J. Emp. & Lab. L.* 193, 196–99 (2000).

²⁷⁸ Although they differ in many respects, both Judge Easterbrook’s “bargains” approach and Jonathan Macey’s “public-regarding” approach share the basic inclination toward narrow construction of statutes to prevent interest-group rent-

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close examination of the interest-group efforts that went into the drafting of the ADA, as well as the incidence of the statute's benefits and burdens.²⁷⁹ That effort is beyond the scope of this paper.²⁸⁰ Even taken on its own terms, however, the interest-group/narrow-construction view would not appear to justify a parsimonious interpretation of the ADA's open-ended "disability" definition. As Judge Easterbrook argues, such broadly worded statutes are most likely to be "general-interest legislation," for which a narrow search for the terms of the statutory "bargain" is not appropriate; general-interest legislation is "designed to vest discretion in courts."²⁸¹ And the fact that a public-regarding purpose for the ADA can be identified—guaranteeing a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and protecting society against the loss of valuable talents—suggests that the statute is not purely interest-group legislation.

Taken on their own terms, then, the possible justifications for a narrow "truly disabled" approach are unpersuasive. But the prob-

seeking. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 540–51 (1983) [hereinafter Easterbrook, *Statutes' Domains*]; Frank H. Easterbrook, *The Supreme Court, 1983 Term: Foreword—The Court and the Economic System*, 98 Harv. L. Rev. 4, 14–18, 42–58 (1984) [hereinafter Easterbrook, *Economic System*]; Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 261–62 (1986); see also Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 640 (1995) (describing this commonality between the Easterbrook and Macey approaches).

²⁷⁹ See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 298–99 (1988) (arguing that the desirability of Easterbrook's and Macey's approaches turns crucially on whether the classes benefited and burdened by the statute at issue are concentrated or diffuse).

²⁸⁰ For some initial thoughts in that direction, which suggest that the ADA ought not too quickly be understood as rent-seeking by a concentrated interest at the expense of a diffuse public, see Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 Nw. U. L. Rev. 351, 363–70 (1999).

²⁸¹ Easterbrook, *Economic System*, supra note 278, at 16; see Easterbrook, *Statutes' Domains*, supra note 278, at 544 (recognizing that broadly worded statutes like the Sherman Act "effectively authorize courts to create new lines of common law"); see also William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1063 (1989) ("Frequently the Court has no choice but to go beyond the four corners of the statute and its legislative history to answer an interpretive question, because the statute's open texture (the open-endedness of the statutory language and indeterminacy of legislative history) forecloses determinate answers and makes judicial policymaking inevitable.").

lems go deeper than that. The “truly disabled” focus on medical severity seems an inappropriate response to the problem of disability discrimination targeted by the ADA, for it ignores the fundamental insight of the disability rights movement: Disability is a product of social practices and choices; it is not something inherent in the “disabled” person. Under a “truly disabled” approach, “[t]he [plaintiff’s] ‘abnormality’ still holds center stage, rather than the structure of institutions or the social response to the impairment.”²⁸² Under my proposed approach, by contrast, the “disability” inquiry focuses directly on the social structures that attach systematic disadvantage to particular impairments.

The “truly disabled” approach may in fact exacerbate the stigmatizing effects of “disabling” impairments. If ADA plaintiffs must begin each case by proving that they experience inherent biological limitations, they may come to believe that those limitations cannot be surmounted. A similar effect has been identified in the operation of the Social Security disability programs. Claimants cannot receive benefits under those programs unless they prove that they are generally incapable of working. Students of Social Security disability benefits have concluded that “[t]he very process by which disabled applicants become eligible for benefits leads to learned states of helplessness.”²⁸³ Such an effect seems particularly inconsistent with the declared purposes of the ADA: “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for individuals with disabilities.²⁸⁴ A statute that aims at the empowerment of individuals with disabilities ought not require them to undergo such a *disempowering* exercise as a threshold requirement to obtaining protection against discrimina-

²⁸² Diller, *Dissonant Disability Politics*, *supra* note 51, at 1058.

²⁸³ Cheryl Rogers, *The Employment Dilemma for Disabled Persons*, in *Images of the Disabled, Disabling Images* 117, 122 (Alan Gartner & Tom Joe eds., 1987); see also Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 *N.Y.U. Rev. L. & Soc. Change* 535, 555 (1987-88) (“The [Social Security Act’s] definition of disability is in many ways a negation of self-empowerment.”); cf. Burkhauser, *supra* note 231, at 85 (“[I]f the goal of government policy is to encourage people who have health conditions to remain in the work force, then it is very bad strategy to intervene after an individual has begun receiving disability benefits. This is simply too late to be effective, since by this time major investments in being totally disabled have already been made.”).

²⁸⁴ 42 U.S.C. § 12101(a)(8) (1994).

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tion.²⁸⁵ My proposed approach, which would require the plaintiff to prove only that she has an (actual, past, or perceived) impairment to which society's choices are likely to attach systematic disadvantage, seems far preferable to a regime where the plaintiff must prove that her impairment is inherently limiting.

2. *Eliminating the Protected-Class Limitation*

A more promising alternative has been articulated by a variety of disability rights lawyers. Anyone who has been treated unfairly on the basis of a physical or mental characteristic, they say, should be entitled to the ADA's protection. Robert Burgdorf has provided the fullest (and broadest) expression of that view. He argues that the key to the ADA's "qualified individual with a disability" provision is the word "qualified," not the phrase "with a disability." That provision, he argues, was intended "not to establish a limited class of persons eligible for protection, but to make it imminently [*sic*] clear that people who cannot perform the essential functions of the job or activity do not have to be included anyway."²⁸⁶ Taking the position that "the classification 'individuals with disabilities'" does not demarcate a limited group of people entitled to "special protection," he contends that ADA analysis "should focus on the alleged discriminatory treatment meted out by the party charged with discriminating, not on the characteristics of the person allegedly subjected to such discrimination."²⁸⁷ In Burgdorf's view, anytime an employer, government agency, or public accommodation excludes an individual because of a physical or mental impairment, the courts should hold that the individual satisfies the "regarded as" prong of the "disability" definition, whether or not her impairment is in fact "substantially limit[ing]."²⁸⁸ And whenever

²⁸⁵ See Burgdorf, "Substantially Limited" Protection, *supra* note 8, at 570 (arguing that the threshold requirement that plaintiffs "prove how really disabled and disadvantaged they are in performing daily activities" presents "a very unwelcome task for a person with a disability who is striving to prove to oneself and to others that he or she can be capable, independent, and self-supporting").

²⁸⁶ *Id.* at 583. Burgdorf explains: "The protected-class phrasing of the provision is merely incidental to the primary goal of such wording, which was to make absolutely clear that the statute did not contemplate that exclusions of unqualified and unsafe persons would constitute unlawful acts of discrimination." *Id.* at 430.

²⁸⁷ *Id.* at 583-84.

²⁸⁸ *Id.* at 571-73.

a covered entity fails to provide necessary accommodation for an individual's impairment, Burgdorf would apparently conclude that the plaintiff has an "actual" disability.²⁸⁹ Thus, a person who has a sprained ankle that prevents her from climbing the steps to the corner convenience store would have a statutory "disability," even if her condition will heal fully in a few days.²⁹⁰ And a person rejected from a job because she is allergic to a chemical used in only one part of one workplace will have a "disability" as well, even if there are thousands of other similar places she can work.²⁹¹

Some disability rights advocates have articulated a more moderate version of this position. They would apparently limit the no-protected-class approach to disparate treatment cases. Whenever an employer rejects an individual with a physical or mental condition because it deems that condition disqualifying for the job, they would say that the employer "regarded" the plaintiff as disabled.²⁹² Absent such an interpretation, they contend, a person could be "disabled enough to be fired from a job but not disabled enough to challenge the firing."²⁹³

²⁸⁹ See *id.* at 573 (suggesting that an employer's refusal to provide an "adequate and effective" accommodation constitutes a "substantial limitation" on working, though acknowledging that an employer's refusal to provide an accommodation "that is the optimal first choice of the employee" would not constitute a "substantial limitation").

²⁹⁰ See *id.* at 481 n.376 (endorsing a Department of Transportation regulation that purportedly would cover even very short-term impairments: "Whether the traveler's cast comes off next week or two years from now, he or she needed accessible and nondiscriminatory transportation today").

²⁹¹ See *id.* at 545 (criticizing the "illogic" of the Second Circuit's decision in *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718 (2d Cir. 1994), cert. denied, 115 S. Ct. 1095 (1995), which held that a hospital worker transferred from an unventilated blood bank due to respiratory problems was not disabled because she was restricted in working in only one place in the hospital, the blood bank).

²⁹² See, e.g., Mayerson, *supra* note 6, at 597 (stating, pre-*Sutton/Murphy*: "If the employer refused to hire an individual based on an actual or perceived physical or mental impairment, it must be presumed that the employer regarded the plaintiff as disabled. . . . An employer should not be allowed to speak out of both sides of its mouth. The applicant is too impaired to get the job, but not impaired enough to have coverage as 'disabled' under the ADA.").

²⁹³ David G. Savage, High Court Reins In Disability Law's Scope, L.A. Times, June 23, 1999, at A1 (quoting Georgetown Law Professor Chai Feldblum's criticism of *Sutton* and *Murphy*). The same quote from Professor Feldblum appears in Joan Biskupic, Supreme Court Limits Meaning of Disability, Wash. Post, June 23, 1999, at A1, and in Linda Greenhouse, High Court Limits Who is Protected by Disability Law, N.Y. Times, June 23, 1999, at A1. A nationally syndicated column published a few days later included a very similar quote from Feldblum. See Ellen Goodman,

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There is much that is valuable in the broad no-protected-class approach. That approach, like my subordination-focused approach, follows directly from the disability rights movement's insight that "disability" is a product of social attitudes and choices, rather than an inherent characteristic of the person with a "disability." In effect, the no-protected-class approach treats "disability" as inhering in each discrete decision to deny an opportunity to a person because of an actual, past, or perceived impairment. By requiring the plaintiff to prove only that the defendant excluded her, it shields the ADA plaintiff from the disempowering search for her inherent biological limitations. A no-protected-class approach also avoids the need to create a separate category of people with "disabilities"—a labeling process that may reinforce the salience of what is a socially constructed category.²⁹⁴ If "disability" status entitles one to special benefits or exemptions, those who are not "disabled" may grow resentful and come to believe that people with "disabilities" need special treatment.²⁹⁵ And people might well hesitate to seek accommodation if the price is to suffer the stigma of being labeled "disabled."²⁹⁶ For these reasons, Burgdorf has argued that

Editorial, *The Court's Nearsightedness*, *Boston Globe*, June 27, 1999, at F7. The National Council on Disability took a similar position in the wake of *Sutton* and *Murphy*. See *Imparato*, *supra* note 11, at 3.

²⁹⁴ See, e.g., Burgdorf, "Substantially Limited" Protection, *supra* note 8, at 525 ("The classification and labeling of people with disabilities as a distinctive status group in society is not merely a cause of discrimination, it is the 'wellspring' and the 'essence' of discrimination on the basis of disability."); Silvers, *Reprising Women's Disability*, *supra* note 23, at 92 ("[D]esignating the class of individuals with physical, sensory, or cognitive impairments as 'the disabled' introduces the thought that they are ineligible to be equally protected by the law."); cf. Glennon, *supra* note 95, at 1301 ("While the dominant view is that government should avoid explicitly differential treatment on the basis of race, many believe that differential treatment often should be provided to people with disabilities. This special treatment comes at a cost, however, for it is only provided once an official government determination of disability is made—a determination that usually leads to reduced social status.").

²⁹⁵ See, e.g., Burgdorf, "Substantially Limited" Protection, *supra* note 8, at 525–26; Funk, *supra* note 112, at 9; Silvers, *Disability Rights*, *supra* note 21, at 788.

²⁹⁶ See, e.g., Minow, *Making All the Difference*, *supra* note 48, at 91; Wendell, *supra* note 49, at 25. But cf. Silvers, *Disability Rights*, *supra* note 21, at 784 ("Whether a person desires to be identified as disabled probably varies with whether she thinks other people will apply this characterization as an incentive for helping her or instead as an excuse to deny her opportunity."); Wendell, *supra* note 49, at 25 (arguing that some people—particularly those with "hidden" disabilities—might want to be identified as disabled, for such identification validates their experience of their bodies).

“singling out people with disabilities as a distinctive group needing special treatment” would be “perhaps even more injurious” to such individuals than a disability-blind approach that would offer no accommodations at all.²⁹⁷

Finally, a no-protected-class approach seems to accord with the orthodox account of how civil rights laws work. Everyone, whatever their race, is entitled to protection against race discrimination, so why shouldn't everyone, whether or not “disabled,” be entitled to protection against arbitrary and irrational treatment on the basis of their physical or mental condition? Along these lines, Burgdorf argues that limiting the ADA's antidiscrimination and reasonable accommodation protections to a specific class would be “antithetical to any nondiscrimination law and certainly to one prohibiting discrimination on the basis of disability—an area of the law that recognizes the dangers of differentiating and meting out disparate treatment for particular segments of society.”²⁹⁸

Notwithstanding the weighty arguments in favor of a no-protected-class approach, it ultimately provides an unpersuasive way of making sense of the ADA's “disability” category. The first reason is statutory: The no-protected-class approach essentially reads the “substantially limits” language out of the “disability” definition. Burgdorf's strong variant is particularly subject to challenge in this regard. It would cover anyone who experiences discrimination on the basis of a present, past, or perceived “impairment,” or who fails to receive reasonable accommodation for such an “impairment.”²⁹⁹ Even the more moderate version of the approach—which would apply only in disparate treatment cases—seems to fly in the face of the “substantially limits” qualifier. Whenever an employer rejects

²⁹⁷ Burgdorf, “Substantially Limited” Protection, *supra* note 8, at 525.

²⁹⁸ *Id.* at 572. Burgdorf's position might find some support in the fact that the ADEA—the other major civil rights statute that creates a protected class—may be the hardest of the civil rights statutes to justify in traditional civil rights terms. See George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 *J. Legal Stud.* 491, 521 (1995); cf. Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 *Tex. L. Rev.* 1813, 1846 (1996) (arguing that the ADEA can be justified as a “hands-tying device” that prevents employers from renegeing on an efficient regime of age-based wages and noting that such a justification “marks a departure from the distributional or rights-based focus of normative analysis under Title VII”).

²⁹⁹ See, e.g., Burgdorf, “Substantially Limited” Protection, *supra* note 8, at 481 n.376, 571–73.

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an individual for a single job because of a physical or mental impairment, that variant would treat the employer as "regarding" the condition as imposing a substantial limitation on major life activities. The cognitive effects of stigma provide strong reason to find that the plaintiff was "regarded as" disabled in *most* such cases.³⁰⁰ But if *every* act of impairment-based discrimination *ipso facto* results in a "regarded as" finding, it is difficult to see what work "substantially limits" is doing.

Disregarding the "substantially limits" language seems particularly unjustifiable, for the decision to qualify "impairment" with the substantial limitation requirement was a considered one. The original ADA bill introduced in 1988 omitted the "substantially limits" language and defined "handicap" (later changed to "disability") to mean an actual, past, or perceived impairment *simpliciter*.³⁰¹ That original proposal represented a conscious departure from the protected-class approach of the Rehabilitation Act. The National Council on the Handicapped, which drafted the language that formed the basis for the bills as originally introduced, expressly argued for such a departure in many of the same terms Burgdorf uses today.³⁰² But the Reagan administration objected to the breadth of the proposed "disability" definition.³⁰³ When Democratic legislators and the disability rights community prepared the bill for re-introduction in the new Congress in 1989, they acceded to the prior administration's objections and reverted to the Rehabilitation Act model, complete with its "substantially limits" language.³⁰⁴

³⁰⁰ See *infra* notes 475–478 and accompanying text.

³⁰¹ See S. 2345, 100th Cong. §§ 3(1), 4(a) (1988) (prohibiting discrimination "on the basis of handicap," and defining "on the basis of handicap" to mean "because of a physical or mental impairment, perceived impairment, or record of impairment"); H.R. 4498, 100th Cong. §§ 3(1), 4(a) (1988) (same).

³⁰² See National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons With Disabilities—With Legislative Recommendations* 19, A-22–A-25 (1986). Burgdorf, who worked on *Toward Independence*, discusses the National Council's recommendations in detail in *Analysis and Implications*, *supra* note 92, at 443–45, 448–49.

³⁰³ See National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act 82–83* (1997) [hereinafter National Council on Disability, *Equality of Opportunity*].

³⁰⁴ See S. 933, 101st Cong. § 3(2) (1989) (defining "disability" in the same terms ultimately enacted); H.R. 2273, 101st Cong. § 3(2) (1989) (same). See generally National Council on Disability, *Equality of Opportunity*, *supra* note 303, at 96–100 (discussing deliberations between disability rights activists and staffers for Senators

Burgdorf and his allies suggest that the decision to incorporate the “substantially limits” language was a Faustian bargain, one that fatally undermines the principle disability rights advocates sought to enshrine in the law. But when they argue that a protected-class construction of the ADA is “antithetical to any nondiscrimination law and certainly to one prohibiting discrimination on the basis of disability,”³⁰⁵ they rely on a contestable vision of disability rights law and of civil rights law more generally.

Consider first their vision of disability rights law. Burgdorf and his allies suggest that the essential problem with disability discrimination is its denial of opportunities to *individuals* for irrational reasons. Because disability is a social construct, they contend, it is meaningless to speak of a class of people with disabilities apart from the individual acts of stereotype-based exclusion that construct it.³⁰⁶ Accordingly, they argue that the proper remedy is a regime of radically individualized treatment: Anyone who loses out on a particular job because of a physical or mental condition (no matter how minor or non-stigmatized) is “disabled”; any such individual is entitled to an individualized determination whether any job requirements can be reasonably restructured so that she can perform the position’s “essential functions.”

But that argument ignores a powerful strand of disability rights activists’ thinking. As I have argued throughout this Article, many of those activists have recognized that disability subordination imposes a group-based harm, for which a group-based response may be necessary. As the United States Commission on Civil Rights said in *Accommodating the Spectrum of Individual Abilities*, a report that played a key role in the development of the legal theory of the disability rights movement: “It is appropriate to speak of a class of handicapped people when certain individuals have been singled out, designated handicapped, and treated poorly as a result.

Harkin and Kennedy, as well as their decision to use the Rehabilitation Act model in the 1989 ADA bill); Chai R. Feldblum, *The (R)evolution of Physical Disability Antidiscrimination Law: 1976–1996*, 20 *Mental & Physical Disability L. Rep.* 613, 617 (1996) (explaining that many disability rights advocates “did not expect [the National Council’s] version of the ADA to move forward, given its significant divergence from several section 504 regulations” and describing the pragmatic decision to “parrot[] the section 504 regulations” in the 1989 bill).

³⁰⁵ Burgdorf, “Substantially Limited” Protection, *supra* note 8, at 572.

³⁰⁶ See, e.g., Eichhorn, *supra* note 28, at 1469, 1473–74.

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To rectify this situation, legislative remedies have to focus on the disadvantaged class of handicapped persons.³⁰⁷ While every person at some point has some physical or mental condition that could be described as an impairment, and many may suffer isolated instances of poor treatment as a result, only a smaller group of people is "designated handicapped" in the process. That is the class of people who are likely to experience systematic disadvantage through the mechanisms of prejudice, stereotypes, and neglect. Discrimination against members of that socially defined group—precisely because they are members of that socially defined group—is not just individually irrational. It also entrenches a systemic second-class status. Because unfair discrimination against people with conditions defined as "disabilities" is not likely to be a one-time problem, there is a particular need for a legislative response to that conduct. And because people with those conditions are especially likely to be ignored when society's institutions are designed, there is a particular need to impose a universal requirement that they receive accommodation.

Indeed, many disability rights advocates themselves suggest that a requirement of accommodation ought not be extended to people whose impairments do not lead to stigma and social subordination. Consider Carol Gill's comments about people who claim "disability" by "trotting out their spectacles or trick knee or rheumatiz":

"Actually, we're all disabled in some way, aren't we?" they ask. "No!" I say. If the only time you "walk the walk" of disability is when it's convenient for you and you even admit your disability has little impact on your life and no one regards you as disabled, give me a break—you ain't one of us! You aren't in danger of the marginalization we experience or expect on a daily basis.³⁰⁸

Many people with minor or temporary impairments may lose out on discrete opportunities but not experience or expect social marginalization as a result. A person with a broken leg, for example, may not be able to enter a particular inaccessible building, but she

³⁰⁷ U.S. Comm'n on Civil Rights, *supra* note 22, at 96 n.22.

³⁰⁸ Gill, *supra* note 126, at 46.

can hardly be said to experience systematic disadvantage.³⁰⁹ In an attempt to evade the distinction between people with disabilities and “normals,” a no-protected-class approach would treat such a person as “disabled.” Many disability rights activists, however, are “not willing or interested in erasing the line between disabled and nondisabled people, as long as disabled people are devalued and discriminated against, and as long as naming the category serves to call attention to that treatment.”³¹⁰

Advocates of a no-protected-class approach fear that according legal recognition to the “disability” category will send the message that disability is both “natural” and an appropriate basis for distributing benefits and burdens in society. That is not an insubstantial fear.³¹¹ But the harm of *denying* the existence of a disability category seems much greater. There may be nothing “natural” about the category of people with disabilities, but the social practices that have attached systematic disadvantage to certain impairments have gone a long way toward creating such a category. For many people with conditions society defines as “disabilities,” their status as “people with disabilities” has an enormous effect on their lives. To deny that point is to deny their lived reality.³¹² “Disability” may be a social construct, but if so, the social attitudes and practices that have constructed the category have also assured that “disabled” people encounter barriers that “normal” people do not face (even “normal” people with some physical or mental impairments). To

³⁰⁹ See Gliedman & Roth, *supra* note 21, at 19–20 (noting that we perceive people who limp temporarily because of a skiing accident differently from the way we perceive those who walk with permanent limps: “Unlike temporary injuries, a handicap is considered by others to be integral—‘essential’—to the handicapped person’s social being”).

³¹⁰ Linton, *supra* note 49, at 13.

³¹¹ See, e.g., Minow, *Not Only for Myself*, *supra* note 48, at 94 (“If one of the problems behind identity politics is the assignment of individuals by government or powerful actors to groups beyond their own control or choice, renewed assignments to groups even for remedial purposes can reinstall the injury and the incoherence, constraint and mythology of forced group identity.”); cf. Goffman, *supra* note 23, at 114 (“[I]n drawing attention to the situation of his own kind he is in some respects consolidating a public image of his differentness as a real thing and of his fellow-stigmatized as constituting a real group.”).

³¹² See, e.g., Linton, *supra* note 49, at 13; Wendell, *supra* note 49, at 12; Gill, *supra* note 126, at 49. This is an example of the general “dilemma of difference” identified by Martha Minow. See, e.g., Minow, *Making All the Difference*, *supra* note 48, at 47–48.

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surmount those humanly created barriers, people with "disabilities" may need remedies that others do not receive. By using "disability" status as the trigger for its protections, the ADA assures that those special remedies are available.

By explicitly defining "disability" status as one created by *societal* attitudes, practices, and stigmas, my proposed approach would give members of a subordinated group a tool to challenge their continuing subordination while at the same time calling attention to the contingency of "disability"-based disadvantage. Indeed, calling society's attention to the ways in which its practices and institutions uniquely disadvantage an identifiable *group* of people with disabilities may be the only way to force a careful examination of the subordinating effects of those practices.³¹³ As Martha Minow has argued, the "regarded as" prong of the ADA's "disability" definition can help make explicit the degree to which society's decisions define "disability."³¹⁴ My proposal would take that point a step further by using the "regarded as" insight to inform interpretation of the statute's entire "disability" definition. Under the approach I advocate, plaintiffs would begin each ADA case by illustrating the ways in which society—through a variety of contingent decisions—stigmatizes and/or attaches systematic disadvantage to their particular impairments. Far from reinforcing the belief that the "disability" category embraces a "naturally" disadvantaged class of people, my approach would send a message to judges, jurors, and all interested observers that society plays a significant part in creating disability. It may therefore help to undermine belief in the naturalness of the "disability" category. Contrary to the argument of Burgdorf and others, such an approach has a strong pedigree in disability rights thought.

³¹³ See Young, *supra* note 135, at 169 ("Since ignoring group differences in public policy does not mean that people ignore them in everyday life and interaction, . . . oppression continues even when law and policy declare that all are equal. Thus I think for many groups and in many circumstances it is more empowering to affirm and acknowledge in political life the group differences that already exist in social life."); cf. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 Cal. L. Rev. 733, 737 (1995) (arguing that lawyers should be allowed overtly to address the racial overtones of their cases in arguments to criminal juries, because when people are confronted with their unconscious biases they are less likely to act on them).

³¹⁴ See Minow, *Not Only for Myself*, *supra* note 48, at 62–63, 80, 88.

As to civil rights law more generally, Burgdorf and his allies fail to appreciate the extent to which that body of law is *inconsistent* with the individual-merit/individual-rationality approach they favor. As I have argued above, both the basic purposes and the operative provisions of our civil rights laws are best understood as aiming to give subordinated groups the right to challenge practices that entrench their subordinated status.

Burgdorf's argument in particular is striking in the degree to which it relies on the contentions of opponents of race-conscious affirmative action. Affirmative action opponents typically argue that the practice entrenches the salience of race by putting the government's stamp behind racial categories,³¹⁵ that it provokes resentment from whites who are not members of the beneficiary class,³¹⁶ and that it stigmatizes its beneficiaries by sending the message that they lack the qualifications demanded of nonminorities who do not receive preferential treatment.³¹⁷ Each of these arguments has a direct parallel in Burgdorf's discussion. And the basic thrust of his approach—that everyone has a right to be considered on the basis of *individual* merit, cleansed of the artificial restrictions imposed by society—has a deep kinship with the individualistic theory that underlies much opposition to affirmative action.³¹⁸

³¹⁵ See, e.g., William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775, 809–10 (1979).

³¹⁶ See, e.g., Nathan Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy 200 (1975).

³¹⁷ See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

³¹⁸ For a concise expression of that individualized view, see Charles Fried, The Supreme Court, 1989 Term—Comment: *Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality, 104 Harv. L. Rev. 107 (1990). Burgdorf's approach hardly reflects the entire constellation of values usually associated with opposition to affirmative action. Those who challenge race-conscious affirmative action typically also believe that the law should prohibit discrimination only when it is intentional; they take as a "neutral" baseline the existing structure of the economy, the government, and the jobs, services, and programs within them. See, e.g., *id.* at 108–10 & n.15, 127 & n.115; see also Kingsley R. Browne, The Civil Rights Act of 1991: A "Quota Bill," a Codification of *Griggs*, a Partial Return to *Wards Cove*, or All of the Above?, 43 Case W. Res. L. Rev. 287 (1993) (arguing that much support for a strong prohibition on practices with a disparate impact derives from, and is equivalent to, support for affirmative action). The principal means by which civil rights law challenges those facially "neutral" practices, by contrast, occurs through the group-rights approach of the "effects test." Burgdorf shows that one can challenge existing baselines (by

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Burgdorf may endorse the arguments of affirmative action opponents,³¹⁹ but he is wrong to suggest that those arguments describe the mainstream of civil rights law.

Although Burgdorf and his allies do not explicitly draw the connection, their argument for a universal right to individualized job accommodation actually resonates more deeply with legal developments outside of the traditional compass of "civil rights law." In particular, their position can be seen as the final step in the erosion of the doctrine of employment at will. Although the decline of at-will employment has received widespread approval by commentators,³²⁰ that development hardly implies that the ADA's protections should be extended to all workers. One reason is institutional. For-cause restrictions on employment termination are most typically enforced in the relatively inexpensive and informal setting of labor arbitration.³²¹ A universal rule of accommodation under the ADA, by contrast, would likely be enforced in the federal courts—with attendant inefficiencies and error risks, as well as the inequities that result from the costs of maintaining a federal lawsuit.³²² These problems would be compounded by the way in which the ADA's accommodation requirement pushes beyond a requirement of "cause" for dismissal—which would presumably allow an employer to terminate an employee who could no longer do the job as currently designed—to a requirement that the employer justify the way in which it has designed the job at issue. They would also be compounded by the fact that the ADA covers both current *and* prospective workers, thereby substantially increasing the number of potential lawsuits. These points suggest that a universal rule of

demanding that employers restructure their current job requirements) without following that group-based model of civil rights remedies.

³¹⁹ Cf. Burgdorf, "Substantially Limited" Protection, *supra* note 8, at 412–14 (quoting both critics and defenders of affirmative action, but suggesting that absent "compelling remedial necessity," affirmative action "seems inherently un-American").

³²⁰ See, e.g., Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* 48–104 (1990); see also Shapiro, *supra* note 234, at 166–71 (defending a form of for-cause rule from the perspective of democratic theory).

³²¹ See, e.g., Weiler, *supra* note 320, at 56 (observing that scholars who advocate a universal for-cause standard typically "favor the administration of this standard (and the award of reinstatement as the normal remedy) by labor arbitrators, who are usually the same people who now deal with the nuances of just cause under collective agreements").

³²² See, e.g., *id.* at 80–83 (giving these reasons against a judicially enforceable for-cause standard).

individualized accommodation, enforced in the federal courts, would not be an appropriate extension of the salutary erosion of employment at will.³²³ The ADA is better understood as a civil rights law that accords a remedy to a subordinated group.

IV. APPLICATIONS

The foregoing discussion has proceeded on a very high level of generality. I have argued that the ADA's "disability" category may profitably be understood as referring to a subordinated group status defined by social practices. I have further argued that the concept of stigma may be a useful aid in identifying those "disabling" conditions that are likely to be attached to systematic disadvantage. For those abstract formulations to prove worthwhile, however, they must also provide useful guidance in analyzing concrete problems that arise under the statute. In this Part, I discuss several issues implicated by the Supreme Court's "disability" quartet. As I will demonstrate, the notion of disability as a subordinated group status and the related concept of stigma provide a useful way of approaching those issues.

In their bottom-line results at least the four cases might seem consistent with an antisubordination approach. That approach seems to explain the cases' mixed results far better than either a "truly disabled" approach (under which all of the plaintiffs would have lost) or a cover-everyone approach (under which all of the plaintiffs would have satisfied the "disability" definition). Each case involved a different impairment: asymptomatic HIV infection (*Bragdon*); 20/200 to 20/400 vision, correctable to 20/20 with eye-glasses (*Sutton*); high blood pressure (*Murphy*); and monocular vision (*Albertsons*). Of those four impairments, HIV is the one that

³²³ The Occupational Safety and Health Administration's proposed ergonomics standard, see *supra* note 204, does impose a general requirement that employers restructure jobs to the extent necessary to reduce the risk that those jobs will cause musculoskeletal disorders. It also imposes a requirement that employees with musculoskeletal disorders receive individualized accommodations in the form of reassignment or other work restrictions for up to six months. But these requirements are limited to one class of medical condition; they do not come close to imposing Burgdorf's desired regime of a universal requirement that employers individually accommodate everyone with every type of physical or mental impairment. In addition, they are enforced through OSHA's complex administrative scheme rather than through individual federal court lawsuits.

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is most widely stigmatized and subject to disadvantage, and the Court held that it was a "disability."³²⁴ Correctable vision impairments and high blood pressure, by contrast, are common conditions that are not generally subject to stigma or societal disadvantage, and the Court held that they were not "disabilities."³²⁵ Monocular vision seems to fall somewhere in between, and the Court issued an in-between ruling: Although it believed that "the Ninth Circuit was too quick to find a disability,"³²⁶ the Court did not decide as a matter of law that the plaintiff was *not* disabled, and it even stated "that people with monocular vision 'ordinarily' will meet the Act's definition of disability."³²⁷ The Court avoided the need to come to rest on the "disability" question by ruling that the plaintiff was not "qualified."³²⁸

On closer examination, however, the issue is more complex. A subordination-focused approach suggests that *Bragdon* was correct to hold that asymptomatic HIV is a "disability," but that the Court could have rested its ruling on firmer ground if it had not relied on the major life activity of reproduction. The notion of systematic disadvantage also supports the Court's holding in *Sutton* that the "disability" determination should not take account of any mitigating measures the plaintiff employs. It suggests, however, that the Court should have nonetheless held the plaintiff in *Murphy* protected by the ADA. Finally, a focus on stigma provides strong reason to reject the Court's suggestion in *Sutton*, *Murphy*, and to a lesser extent *Albertsons*, that no impairment can be a *per se* disability under the ADA. Both the courts and the agencies with rulemaking authority under the statute should retain the ability to identify classes of impairments that are invariably stigmatized and therefore likely to be disadvantaged.

³²⁴ See *Bragdon*, 524 U.S. at 631.

³²⁵ See *Sutton*, 119 S. Ct. at 2149, 2152 (correctable vision impairments); *Murphy*, 119 S. Ct. at 2137, 2139 (high blood pressure).

³²⁶ *Albertsons*, 119 S. Ct. at 2168.

³²⁷ *Id.* at 2169 (quoting Brief for the United States et al. as Amici Curiae at 11, *Albertsons Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999) (No. 98-591)).

³²⁸ See *id.* at 2169-74. The plaintiff was a truck driver who obtained a waiver from the Department of Transportation's requirement that drivers of commercial motor vehicles have binocular vision. See *id.* at 2166. The employer found the plaintiff's monocular vision disqualifying despite the waiver, see *id.*, and the Court upheld the employer's position, see *id.* at 2171, 2174.

*A. Bragdon Reconsidered**1. "Reproduction" as a Major Life Activity?*

The *Bragdon* majority held that asymptomatic HIV is a "disability" because it "substantially limits" the "major life activity" of reproduction.³²⁹ Under my analysis, which focuses on stigma as a way of identifying impairments that are likely to be systematically disadvantaged, that holding is certainly defensible in principle. As the Court observed, "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself,"³³⁰ and they are considered very important in society. People who cannot have children suffer some degree of social stigma: Consider the shame historically attached to being labeled a "barren woman" or a man who could not pass on his name.³³¹ And although a woman with HIV can reproduce, she can do so only by exposing her sexual partner and potential child to a deadly, progressively debilitating disease.³³² Exposing others to a dread disease is itself widely stigmatized,³³³ and exposing one's unborn child to such a disease particularly so.³³⁴ Thus, while the Chief Justice was correct that no physical obstacle prevented Sydney Abbott from having a child or made it more difficult for her to do so,³³⁵ and a "truly disabled" approach

³²⁹ *Bragdon*, 524 U.S. at 631.

³³⁰ *Id.* at 638.

³³¹ On infertility stigma, see, for example, Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* 29, 164, 206 (1993).

³³² See *Bragdon*, 524 U.S. at 639-40.

³³³ See, e.g., *School Bd. v. Arline*, 480 U.S. 273, 284-85 (1987) (collecting authority describing social stigma attached to contagion).

³³⁴ See Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 *Ohio St. L.J.* 1205, 1257-58 (1992). Indeed, even exposing one's unborn child to the risk of a relatively minor physical condition can be quite stigmatizing, as Bree Walker Lampley, the Los Angeles newscaster with ectrodactylism (a genetic condition in which the bones of the hands and feet are fused) learned when she got pregnant. For discussion of the public outcry that attended Lampley's pregnancy, see Shapiro, *supra* note 22, at 38-40; Field, *supra* note 173, at 120; Glennon, *supra* note 95, at 1308-09.

³³⁵ See *Bragdon*, 524 U.S. at 660-61 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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would find no disabling limitation in reproduction,³³⁶ Abbott was "substantially limited" in the ability to reproduce. She could have a child, but only under a condition that itself would have subjected her to stigma.³³⁷

The concept of stigma helps to explain one aspect of the Court's decision that may at first glance appear anomalous—the seeming lack of a nexus between the reason the Court considered Abbott disabled and the reason Bragdon excluded her from his office.³³⁸ The Court held that Abbott was a member of the ADA's protected class because she experienced a substantial limitation in the ability to reproduce, yet Bragdon's decision to exclude her obviously had nothing to do with reproduction; it had everything to do with fear

³³⁶ See, e.g., *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 172 (4th Cir. 1997) (holding that asymptomatic HIV is not a disability because it imposes no present biological impediment to any major life activity).

³³⁷ There is a more mechanical argument in favor of the Court's reproduction-based approach. Every court and administrative agency to have addressed the question under the Rehabilitation Act had concluded that asymptomatic HIV was a "handicap" (the pre-1990 equivalent of "disability"). See *Bragdon*, 524 U.S. at 643-44. Of particular note, the Justice Department's Office of Legal Counsel ("OLC") had issued a widely publicized opinion reaching that conclusion. See 12 Op. OLC, Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals 209, 264 (1988), reprinted in *Americans with Disabilities Act of 1989: Hearings Before the Senate Committee on Labor and Human Resources, 101st Cong.* 338 (1989). But see Lawson, *supra* note 62, at 279-91 (disagreeing with the OLC opinion). The committee reports specifically endorsed the OLC opinion's conclusion, as well as its analysis, that asymptomatic HIV is an impairment that substantially limits procreation and sexual relations. See H.R. Rep. No. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334; H.R. Rep. No. 101-485, pt. 3, at 28 n.18 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451 n.18; S. Rep. No. 101-116, at 22 (1989). I find the conclusion unassailable that when Congress chose to incorporate the Rehabilitation Act's "handicap" definition into the ADA without substantive change—and when it specifically endorsed prior administrative constructions of the Rehabilitation Act, see 42 U.S.C. § 12201(a) (1994)—it effectively adopted the consistent line of interpretation that deemed asymptomatic HIV to be a "handicap." See *Bragdon*, 524 U.S. at 645. See generally Wendy E. Parmet, *The Supreme Court Confronts HIV: Reflections on Bragdon v. Abbott*, 26 J.L. Med. & Ethics 225, 227 (1998) (noting widespread assumption among both supporters and opponents at the time of the ADA's passage that the statute prohibited discrimination on the basis of HIV infection). Congress's adoption of prior administrative constructions could be taken to incorporate by reference the OLC opinion's reproduction-based analysis as well as its bottom-line conclusion that HIV is a disability.

³³⁸ See Christiana M. Ajalat, Note, *Is HIV Really a "Disability"?: The Scope of the Americans with Disabilities Act after Bragdon v. Abbott*, 22 Harv. J.L. & Pub. Pol'y 751, 763-64 (1999) (criticizing the *Bragdon* result because of the lack of such a nexus).

of contagion. Shouldn't the Court's inquiry have looked to whether Bragdon discriminated on the basis of the precise limitation that gave Abbott a statutory "disability"? Not necessarily. Because people often view a stigmatized characteristic to be universally discrediting, individuals who experience stigma because of their inability to perform particular functions are likely to suffer discrimination and exclusion even from activities that have nothing at all to do with those functions.³³⁹ A person with Down's Syndrome may be substantially limited only in the major life activity of thinking, but she may be denied a job because the employer thinks she is clumsy, or simply because the employer finds her appearance unsightly.³⁴⁰ If the statute aims at preventing physical and mental impairments from becoming the basis for systematic societal disadvantage, it is proper for the ADA to prohibit all discrimination on the basis of an (actual, past, or perceived) *impairment* (here, Down's Syndrome) that substantially limits major life activities. The prohibition ought to extend beyond discrimination on the basis of the particular substantial limitation (here, slow thinking) the impairment imposes.

But this does not mean that the *Bragdon* Court was on entirely solid ground in focusing on the major life activity of reproduction. A number of commentators have pointed out at least one controversial implication of that reproduction-based approach: Every person with infertility may now have a statutory "disability."³⁴¹ After all, if an inability to have children without exposing one's partner and potential child to a small risk of a disease is a substantial limitation on reproduction, than an unconditional inability to have children would seem *a fortiori* to be a substantial limitation. That implication is significant, because infertility is a very widespread condition.³⁴² But is infertility really stigmatized in the same

³³⁹ See *supra* notes 94–101 and accompanying text (discussing "spread effect").

³⁴⁰ Congress heard numerous examples of similar behavior during its two-year consideration of the ADA. See *supra* note 92 and accompanying text.

³⁴¹ See, e.g., Parmet, *supra* note 337, at 236.

³⁴² See, e.g., Bartholet, *supra* note 331, at 29 ("Surveys indicate that in this country, close to five million women (or their partners) have 'impaired fecundity,' meaning that it is difficult, impossible, or dangerous for them to achieve pregnancy and childbirth. Roughly one in seven of all couples trying to conceive are unable to do so. Many say that these surveys underestimate the problem."). The 1995 figures from the National Center for Health Statistics report that over six million women have "impaired fecundity." See National Ctr. for Health Statistics, Centers for Disease

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way as HIV is? Stigma is relevant as a way of identifying those conditions that are likely to attach to systematic social disadvantage. The argument that "infertility" in all its myriad forms is so broadly discrediting in the eyes of society as to lead to such systematic disadvantage is questionable.

To be sure, "[i]n American society, parenthood is seen as an integral part of the transition to adult status. It is relatively easy to document that parenthood is regarded as normative and childlessness as deviant."³⁴³ Society's treatment of fertility and parenthood as "normal" provides reason to fear that people with infertility will suffer from prejudice and stereotypes and that social institutions and structures will (if only inadvertently) deny them opportunities. But those fears do not appear to be realized equally for all forms of "infertility." Many people with the condition do report that they experience it as a severe blow to their sense of self—an experience that no doubt flows directly from the social attitudes that treat parenthood as "normal."³⁴⁴ Many also report that they experience "stigma."³⁴⁵

And some kinds of infertility may well be stigmatizing in a way that is likely to lead to denial of opportunities. But analysis of whether they are in fact stigmatizing requires an approach that operates on a far more precise level of generality than the umbrella concept of "infertility." That term does not refer to a specific etiology. Rather, it is generally defined in terms of a result—the inability

Control, Number of Women 15–44 Years of Age and Percent Distribution by Fecundity Status, According to Selected Characteristics: United States, 1995 (visited June 30, 1999) <http://www.cdc.gov/nchswww/datawh/statab/pubd/2319_49.htm>. But cf. Elizabeth Heitman, *Infertility as a Public Health Problem: Why Assisted Reproductive Technologies Are Not the Answer*, 6 *Stan. L. & Pol'y Rev.* 89, 89, 92–93 & 98 n.1 (1995) (refuting sensationalized lay press reports but reporting numbers similar to the reports supra).

³⁴³ Arthur L. Greil, *Not Yet Pregnant: Infertile Couples in Contemporary America* 51 (1991) (citations omitted).

³⁴⁴ See, e.g., Bartholet, supra note 331, at 29, 182; Greil, supra note 343, at 54, 57. Particularly for women with the condition—who seem to bear the brunt of society's expectation of parenthood—"infertility" can feel very much like a disability. See, e.g., Bartholet, supra ("In a better world, women would not experience infertility as a devastating disfigurement and the destruction of sexual identity, but in this world, many do."); see also Greil, supra, at 57 ("Perhaps because they experienced infertility as a catastrophic role failure, most wives [interviewed] reported that infertility came to permeate every aspect of their lives. Infertility was something they always thought about and could never escape. Infertility, in other words, became a 'master status.'").

³⁴⁵ Bartholet, supra note 331, at 29, 182, 206; Greil, supra note 343, at 126–33.

of a couple to achieve a pregnancy after a year of unprotected intercourse.³⁴⁶ To determine whether a particular instance of “infertility” is sufficiently stigmatizing to constitute a “disability,” one would have to look carefully at its specific medical cause (in statutory terms, the “impairment”) and the measures that are likely to be necessary to overcome it. Some “infertile” couples³⁴⁷ can conceive through few months of a relatively nonintrusive process like intrauterine insemination (in which the man each month provides a sperm sample that is “washed” and injected directly into the woman’s uterus) during which time the woman receives oral drug treatment.³⁴⁸ The relatively short duration of the “infertility” in such cases will limit the psychic pain that the couple experiences, and the relatively unintrusive nature of the treatment will limit the risk that the couple will be forced to forego other opportunities to undergo it. Such a couple, it seems clear, would experience far less stigma—and a less substantial limitation on reproduction—than did Sidney Abbott, who could *never* conceive, bear, and beget a child without facing a significant risk of passing along a fatal and dread disease.

On the other hand, some “infertile” couples cannot get pregnant even after significantly longer periods of time,³⁴⁹ and they may require quite intrusive surgical techniques.³⁵⁰ They may also require therapeutic regimes that require daily self-injection of medication, constant monitoring, and frequent visits to the doctor. In such cases, the burden goes beyond psychic pain. Invasive surgical procedures and frequent administration of medication tangibly dramatize the couple’s dependence on their doctor.³⁵¹ And the fre-

³⁴⁶ See, e.g., Heitman, *supra* note 342, at 90.

³⁴⁷ Of course, the statutory inquiry will require identifying which partner has the impairment that makes the couple infertile; the statute protects “individuals” with disabilities, not couples with disabilities.

³⁴⁸ For a recent discussion of various infertility treatments, see Egbert R. te Velde & Bernard J. Cohen, *The Management of Infertility*, 340 *New Eng. J. Med.* 224 (1999).

³⁴⁹ See, e.g., Greil, *supra* note 343, at 48 (noting that the mean duration of treatment for the couples he studied was between 5.2 and 6.7 years).

³⁵⁰ See, e.g., *id.* at 49 (“Treatment for infertility is often expensive, time-consuming, and invasive.”); see also Bartholet, *supra* note 331, at 195–205 (describing invasive in vitro fertilization process).

³⁵¹ See, e.g., Bartholet, *supra* note 331, at 206 (noting that intrusive treatment “reinforces the stigma” associated with infertility); cf. Greil, *supra* note 343, at 60–61 (explaining that treatment regimes “often assume a central importance in the[] lives” of couples with infertility).

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quency of the required treatments increases the likelihood that they will clash with work schedules or other social obligations that were designed without infertility in mind.³⁵² In such a case, the condition of infertility, combined with the required treatment, can reasonably be seen as socially disadvantaging. A person who cannot have children except under such conditions may appropriately be treated as "substantially limited" in reproduction.

2. A More Straightforward Approach

Although the *Bragdon* Court's focus on the degree to which HIV actually limited Abbott's ability to reproduce can be defended, it raises issues that were more complex than the Court appeared to perceive. A more straightforward analysis would have looked directly to the stigma and systematic disadvantage experienced by people with HIV.³⁵³ In particular, an application of the societal-stigma "regarded as" analysis would provide a powerful way of rationalizing the *Bragdon* result. HIV infection, whether or not symptomatic, is widely stigmatized and feared, and it is frequently the object of discrimination and exclusion.³⁵⁴ If a person

³⁵² For an example of such a clash, see *Erickson v. Board of Governors*, 911 F. Supp. 316, 323 (N.D. Ill. 1995) (holding that a plaintiff who was terminated for excessive use of sick leave to take infertility treatments stated a claim under the ADA).

³⁵³ Cf. Hahn, *Antidiscrimination Laws*, supra note 125, at 46 (arguing that "debate about whether or not childbirth or the ability to have sexual relations constitute 'major life activities'" is "somewhat pointless" when the question is whether people with asymptomatic HIV should be protected against discrimination).

³⁵⁴ The committee reports accompanying the ADA concluded that "discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and for this nation's efforts to control the epidemic." H.R. Rep. No. 101-485, pt. 2, at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 313; S. Rep. No. 101-116 at 8 (1989). This conclusion was based on extensive hearing testimony on the subject. See, e.g., *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 101st Cong. 171 (1989) (statement of Rev. Scott Allen, member of the Nat'l Commission on AIDS) ("The subsequent act of irrational discrimination that occurs has been one of the unfortunate landmarks of our Nation's response to the HIV epidemic."); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong. 76-77 (1988) [hereinafter *House Oversight Hearing*] (statement of Nancy Durkin) ("People with AIDS have faced horrific incidences [sic] of discrimination. People have been run out of their homes, jobs, schools, and communities because of fear and misunderstanding. And, in many cases, people have been ridiculed and denied

experiences discrimination on the basis of her HIV infection, she should be able to invoke the statutory “regarded as” protection by presenting evidence establishing the existence of that society-wide stigma. There is no reason to require a more specific showing regarding what the defendant personally thought of her limitations.³⁵⁵

The example of HIV demonstrates the value of a societal-stigma “regarded as” approach. It also persuasively refutes the notion, advanced by some commentators, that “hidden” conditions are immune from stigma. Applying a stigma-focused approach, some have argued that “hidden” impairments should never be considered substantially limiting. Erica Worth Harris asserts, for example, that social disadvantage results only when disabilities have an “obvious effect on the daily activities of the individuals” with those conditions.³⁵⁶ Because people with “hidden” disabilities experience no “obvious” effect from their impairments, she argues that “[n]o social stigmas attach.”³⁵⁷ Speaking more generally, Cass Sunstein states that only people with “highly visible” conditions can experience the kind of stigma that leads to a systematically disadvantaged status.³⁵⁸ Precisely because they are so visible, he argues, “[h]ighly visible characteristics are especially likely to be a basis for statistical discrimination and to fuel prejudice from third parties.”³⁵⁹

There is strong evidence that people with “highly visible” disabilities are likely to experience “a deep and pervasive animus.”³⁶⁰ As HIV infection illustrates, however, people with “hidden” disabilities are hardly immune from the prejudice, stereotypes, and

services from the medical profession.”). For a more recent discussion, see Gregory M. Herek et al., *AIDS and Stigma: A Conceptual Framework and Research Agenda*, 13 *AIDS & Pub. Pol’y J.* 36 (1998). For a particularly vivid illustration of HIV stigma, which I thank David Shapiro for pointing out to me, see Tom Wolfe, *A Man in Full* 283–86 (Farrar, Straus and Giroux 1998).

³⁵⁵ The existence of society-wide stigma might well be a question of “legislative fact,” subject to judicial notice. Cf. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n.1 (1979) (holding that widespread race discrimination by craft unions is a proper subject of judicial notice).

³⁵⁶ Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of “Disability,”* 73 *Wash. L. Rev.* 575, 595 (1998).

³⁵⁷ *Id.*

³⁵⁸ See Sunstein, *Anticaste Principle*, *supra* note 207, at 2430–33.

³⁵⁹ *Id.* at 2432.

³⁶⁰ Hahn, *Antidiscrimination Laws*, *supra* note 125, at 50 (collecting studies); see also *supra* note 171 and accompanying text (discussing “ugly laws”).

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neglect that make up disability-based subordination.³⁶¹ Like Sydney Abbott, who had to reveal her HIV status to her dentist, or the job applicant who must reveal her hemophilia at a pre-employment medical examination,³⁶² people with "hidden" impairments cannot keep them hidden at all times. When their conditions are discovered, they can experience just as much stigma and disadvantage as do people whose impairments were obvious from the start.³⁶³ Indeed, "hidden" impairments may be particularly mysterious and thus particularly subject to fear and stereotypes.³⁶⁴ There is also strong reason to believe that people with "hidden" impairments are even more likely than people with "obvious" disabilities to be left out of social planning. If people with disabilities have not been considered in such planning because they have been hidden from mainstream society,³⁶⁵ then a policy of integration can provide visible daily reinforcement of the fact that they in fact *are* among the

³⁶¹ For a general argument against Sunstein's focus on "highly visible" characteristics, see Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 *Yale L.J.* 485, 519-38 (1998).

³⁶² The ADA permits an employer to require such a medical examination after making a conditional offer of employment, so long as such examinations are required of all entering employees and the results are kept confidential and not used to discriminate. See 42 U.S.C. § 12112(d)(3) (1994).

³⁶³ See, e.g., Gill, *supra* note 126, at 46 ("You know you have a 'real' disability when you know society will label and marginalize you once your difference shows."). Goffman refers to those whose stigmatizing characteristics are hidden as "discreditable"; such persons are hardly free from the harmful effects of stigma. Goffman, *supra* note 23, at 53-54. The stigmatization of hidden characteristics can also lead to significant inefficiencies. See Douglas G. Baird et al., *Game Theory and the Law* 145 (1994) (arguing that absent antidiscrimination protection, individuals with hidden disabilities might be required to go to great and socially undesirable lengths to keep those conditions hidden); see also *supra* notes 252-253 and accompanying text (discussing the argument that people with "hidden" disabilities should be protected to prevent inefficient labor-market churning). To be fair to Sunstein, he does concede that it sometimes "might make sense to speak as well of characteristics that, while not highly visible, are easily verified," Sunstein, *Anticaste Principle*, *supra* note 207, at 2432, a qualification that might be read to reach the "discreditable" person with a "hidden" disability.

³⁶⁴ Cf. Wendell, *supra* note 49, at 43 ("The lack of realistic cultural representations of experiences of disability not only contributes to the 'Otherness' of people with disabilities by encouraging the assumption that their lives are inconceivable to non-disabled people but also increases non-disabled people's fear of disability by suppressing knowledge of how people live with disabilities.").

³⁶⁵ See *supra* note 173.

workers and consumers for whom social and physical structures should be designed. But people with “hidden” disabilities may not get the benefit of this effect. The “hidden-ness” of their impairments will make integration alone a less effective way of forcing society to consider people with such conditions to be among the “normal users” of workplaces and services.³⁶⁶

Even though asymptomatic HIV is generally “hidden” from public view, then, the *Bragdon* Court would have been on solid ground to say that the condition is widely stigmatized, and that Sydney Abbott thus had an impairment “regarded”—by society if not by Dr. Bragdon—as substantially limiting. Justice Ginsburg hinted at such a “regarded as” rationale in her concurring opinion when she stated that HIV infection “has been regarded as a disease limiting life itself.”³⁶⁷ In particular, “[t]he disease inevitably pervades life’s choices: education, employment, family and financial undertakings. It affects the need for and, as this case shows, the ability to obtain health care because of the reaction of others to the impairment.”³⁶⁸ Justice Ginsburg therefore concluded categorically that “HIV infection is ‘a physical . . . impairment that substantially limits . . . major life activities,’ or is so perceived.”³⁶⁹ Justice Ginsburg’s concurring opinion suggests an analysis that has much in common with the approach I propose in this Article. When Bragdon refused to fill Abbott’s cavity, his action was no isolated incident. Abbott and other people with HIV face discrimination in a variety of endeavors, based on widespread fear and prejudice against people with that condition, and Bragdon’s action only added to that pattern of exclusion. Bragdon thus discriminated

³⁶⁶ See, e.g., Wendell, *supra* note 49, at 25 (“These people [with ‘hidden’ disabilities] often long to be perceived as disabled, because society stubbornly continues to expect them to perform as healthy non-disabled people when they cannot, and refuses to acknowledge and support their struggles.”); Weis, *supra* note 97, at 184 (“People with [learning disabilities] often face a double invisibility: the invisibility of not being considered individually for their attributes and potential, and the invisibility of a stigmatic condition which, unlike physical disabilities, is less readily observable and all the more vulnerable to unwarranted assumptions.”) (citation omitted); cf. Yoshino, *supra* note 361, at 531–33 (arguing that the power of an “invisible” group to transform stigmatizing practices by infiltrating mainstream society is necessarily limited by the group’s invisibility).

³⁶⁷ *Bragdon*, 524 U.S. at 656 (Ginsburg, J., concurring).

³⁶⁸ *Id.* (Ginsburg, J., concurring).

³⁶⁹ *Id.* (Ginsburg, J., concurring) (quoting 42 U.S.C. § 12102(2)(A) (1994)).

against Abbott on the basis of an impairment that was "regarded"—by society, if not by him—as substantially limiting major life activities. Had the Court based its ruling on the widespread stigma and discrimination visited on people with HIV, it would have provided more certain protection to all people with HIV³⁷⁰ while at the same time avoiding some of the more controversial implications of its decision.³⁷¹

B. Mitigating Measures

1. Properly Taking Account of Mitigating Measures

The principal question before the Court in *Sutton* and *Murphy* involved what has come to be known as the "mitigating measures" issue: Should the "substantial limitation" inquiry take account of whatever mitigating measures (such as medicines or prosthetics) an individual uses to reduce the limiting effects of his or her impairment? Or, should the impairment be considered in its untreated state? In accord with specific language in the committee reports accompanying the ADA,³⁷² the EEOC and the DOJ had stated (in "interpretive guidance") that courts should ignore mitigating measures when making the "substantial limitation" decision.³⁷³ Thus,

³⁷⁰ Cf. Ajalet, *supra* note 338, at 767–68 (noting that, under the *Bragdon* Court's rationale, it is unclear whether "[c]hildren, homosexual men, and women past child-bearing age" with HIV are protected).

³⁷¹ The Court could also have avoided these implications by saying that HIV, as a degenerative, debilitating, progressive, and fatal disease, inherently imposes substantial limitations on all major life activities. Justice Ginsburg's concurring opinion suggests such a broad "actual disability" position as well. See *Bragdon*, 524 U.S. at 656 (Ginsburg, J., concurring). The Court declined to address that rationale because Abbott had not raised it in the lower courts. See *id.* at 637–38. The United States (as amicus curiae), however, raised both the "regarded as" and the "all major life activities" arguments in the court of appeals. See Brief for United States at 18–21, 27–29, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (No. 96-1643).

³⁷² See H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. . . . [P]ersons 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."); H.R. Rep. No. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. Rep. No. 101-116, at 23 (1989).

³⁷³ See 28 C.F.R. pt. 35, app. A, § 35.104, at 479 (1999) ("The question of whether a person has a disability should be assessed without regard to the availability of

“[a]n individual who uses artificial legs would . . . be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices”;³⁷⁴ “a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication”;³⁷⁵ a person with epilepsy is substantially limited in various major life activities even though her seizures “are controlled by medication”;³⁷⁶ and “a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid.”³⁷⁷ In *Sutton*, the Court resolved a conflict in the circuits and rejected the administrative interpretation.

The Court found it apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is “substantially limited” in a major life activity and thus “disabled” under the Act.³⁷⁸ The Court echoed this conclusion in *Murphy*.³⁷⁹

The Court’s conclusion seems entirely sound, both as a matter of basic statutory interpretation and as a means of implementing an antisubordination principle. Showing off its facility with grammatical categories, the *Sutton* Court noted one crucial textual point: “[T]he phrase ‘substantially limits’ appears in the Act in the present indicative verb form.”³⁸⁰ If a person has uncorrected vision of 20/800 (well beyond the threshold of “legal blindness”) but can correct her vision to 20/20 simply by wearing contact lenses or glasses, it is hard to say that her visual impairment “substantially limits” anything.³⁸¹ To be sure, it *would* substantially limit the major

mitigating measures, such as reasonable modification or auxiliary aids and services.”); id. pt. 36, app. B, § 36.104, at 620 (same); 29 C.F.R. pt. 1630, app. § 1630.2(j), at 348 (1998) (“The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.”).

³⁷⁴ 29 C.F.R. pt. 1630, app. § 1630.2(j), at 348 (1998).

³⁷⁵ Id.

³⁷⁶ 28 C.F.R. pt. 35, app. A, § 35.104, at 479 (1999).

³⁷⁷ Id.

³⁷⁸ *Sutton*, 119 S. Ct. at 2146.

³⁷⁹ See *Murphy*, 119 S. Ct. at 2137.

³⁸⁰ *Sutton*, 119 S. Ct. at 2146.

³⁸¹ Although it did not appear important to the Court, my conclusion on this point rests significantly on the fact that the EEOC and DOJ described their mitigating

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life activity of seeing—if we lived in a world without corrective lenses. But corrective lenses are a readily available, easy to use mechanism that will eliminate the limiting effect of the impairment at no appreciable cost. Nor are corrective lenses—or the condition of being unable to see without them—stigmatized in society at large to the degree that they frequently result in the denial of opportunities to people who wear them.

The example of eyeglasses shows that the ability to use mitigating measures will sometimes make an enormous difference in the way society responds to an impairment. A person with uncorrectable 20/800 vision (well past the threshold for “legal blindness”) would surely be regarded by society as abnormal and “disabled.” But if she could improve her vision to 20/20 by wearing eyeglasses, she would instantly become “normal” and have no need for any special remedy to protect her against systematic disadvantage. As Justice Ginsburg, who seems to have found this point especially compelling, explained: “[P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination.”³⁸²

Thus, the Court was correct to hold that the identical-twin plaintiffs in *Sutton* had no “actual” disability. Although their

measures guideline as an interpretation of their regulations—regulations that themselves did little more than paraphrase the statutory language. Had those agencies acted pursuant to their legislative rulemaking authority, they could presumably have adopted a rule that went beyond the literal terms of the statute if reasonably necessary to carry out the ADA’s provisions. See, e.g., *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973) (“Where the empowering provision of a statute states simply that the agency may ‘make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,’ we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation.’”) (citation omitted). The *Sutton* Court’s reliance on a “plain meaning” interpretation of the statute to avoid any need to inquire into the deference due to the EEOC and DOJ positions continues a trend several commentators noted as early as 1994. See, e.g., Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 *Wash. U. L.Q.* 351, 355–63 (1994); Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 *Colum. L. Rev.* 749, 749–52, 763–66 (1995); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 *Sup. Ct. Rev.* 429, 486–519. For a discussion of administrative rulemaking authority under the ADA, see *infra* notes 491–516 and accompanying text.

³⁸² *Sutton*, 119 S. Ct. at 2152 (Ginsburg, J., concurring).

uncorrected vision was 20/200 in the right eye and 20/400 in the left, their vision in both eyes was correctable to 20/20.³⁸³ United Airlines rejected their applications for pilot positions because the airline required uncorrected vision of 20/100 or better in *both* eyes.³⁸⁴ Because their impairment was so readily correctable, and imposed so little societal disadvantage once corrected,³⁸⁵ it is hard to say that the *Sutton* plaintiffs experienced any substantial limitation on major life activities.³⁸⁶

2. Taking Proper Account of Mitigating Measures

Notwithstanding the conventional wisdom, however, it is important to note that the *Sutton* opinion did not reject the core of the EEOC/Justice Department interpretation. As the Court explained, the “use of a corrective device does not, by itself, relieve one’s disability. Rather, one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity.”³⁸⁷ Indeed, the measures taken to mitigate the effects of an impairment may themselves impose substantial limitations.³⁸⁸ My discussion of infertility illustrates both points.³⁸⁹ Medical treatments may allow a person with infertility to have a child, but that fact alone does not necessarily relieve the substantial limitation in the major life activity of reproduction. When gestation can occur only through a burdensome and

³⁸³ See *id.* at 2143.

³⁸⁴ See *id.*

³⁸⁵ The plaintiffs did not appear to allege that uncorrected vision requirements like the one maintained by United were widespread in the airline industry.

³⁸⁶ The Court was also correct to conclude that United did not “regard” the plaintiffs as disabled, but the Court reached that conclusion too quickly; I discuss that issue in Section IV.C below.

³⁸⁷ *Sutton*, 119 S. Ct. at 2149.

³⁸⁸ See *id.* at 2146 (holding that “both positive and negative” effects of mitigating measures must be considered in the substantial limitation inquiry); *id.* at 2147 (arguing that ignoring mitigating measures would “lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects” of those measures). This point is particularly important for many individuals with mental disorders, who may experience significant side effects from their medication. See Laura Lee Hall, Making the ADA Work for People with Psychiatric Disabilities, *in* *Mental Disorder, Work Disability, and the Law*, *supra* note 30, at 241, 256.

³⁸⁹ See *supra* notes 341–352 and accompanying text.

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stigmatizing course of treatment, a person's medically generated *ability* to reproduce will not eliminate the *substantial limitation* on reproduction.³⁹⁰

Although the EEOC and DOJ guidelines do not analyze the issue this way, each of their examples represents a case where the mitigating measures do not in fact eliminate the substantially limiting effects of an impairment.³⁹¹ Bill Demby, the Vietnam veteran from the DuPont television commercial, is "substantially limited" in the major life activity of walking, even though his two prosthetic legs permit him to "play[] a spirited game of basketball on an urban blacktop."³⁹² He can walk only on the condition that he wears prosthetic legs—a stigmatizing condition that most people need not experience and that those who have designed our social institutions and physical structures are likely not to have considered.³⁹³ Simi-

³⁹⁰ *Murphy* might be another good example of the point that mitigating measures may themselves impose substantial limitations. United Parcel Service fired the plaintiff from his mechanic's job because it deemed his blood pressure—even in its medicated state—high enough to disqualify him from certification to drive a commercial motor vehicle. See *Murphy*, 119 S. Ct. at 2136. That disqualification may have excluded him from a "substantial" number of jobs. (For discussion of this issue, see *infra* notes 447–453 and accompanying text.) The Court expressly declined to decide whether, considered in its medicated state, Murphy's high blood pressure actually imposed a substantial limitation on his ability to work. See *Murphy*, 119 S. Ct. at 2137 (concluding that the issue was not included in the questions on which the Court granted certiorari).

³⁹¹ See *supra* notes 374–377 and accompanying text (discussing examples listed in the guidelines).

³⁹² Shapiro, *supra* note 22, at 35. A more recent television commercial for Nike shoes features a woman with two prosthetic legs running a sprint.

³⁹³ See *Sutton*, 119 S. Ct. at 2149 ("[I]ndividuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run."); see also *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946, 950 (8th Cir. 1999) (holding post-*Sutton* that a person who experienced residual effects of polio but could "walk and engage in many physical activities with the use of his leg brace" was substantially limited in the major life activity of walking: "The full range of motion in his leg is limited by the brace, and his gait is hampered by a pronounced limp."). Some in the disability rights community have overlooked this point. See, e.g., John Hockenberry, Editorial, *Disability Games*, N.Y. Times, June 29, 1999, at A19 (finding the Court's analysis in *Sutton* "something of a revelation. I have a job. I have a family. I travel all over the world. By this definition the fact that I use a wheelchair to mitigate my paraplegia suggests I am not disabled."). I do not mean to suggest that stigma will always attach to the use of prosthetic legs: "[I]mproved methods for building artificial limbs have the potential to change our understanding of whether a missing limb is any more disabling than poor eyesight that is correctable with glasses." Glennon, *supra* note 95, at 1306. The

larly, although the Court has rejected the proposition that *all* people with diabetes necessarily have a “disability,”³⁹⁴ many are likely to experience a substantial limitation in *most* major life activities. Many people with diabetes will be unable to perform *any* meaningful activity if they do not monitor their blood sugar levels, follow strict diets, and take insulin on a regular basis. These are conditions that intrude frequently on the diabetic individual’s day; they may frequently clash with work schedules and other obligations designed without people with diabetes in mind, and they can themselves be quite stigmatizing.³⁹⁵ A person who wears a hearing aid is substantially limited in the major life activity of hearing for the same reason: She can hear, but only on the condition that she adorn herself with one of the classic “stigma symbols.”³⁹⁶ In each

DuPont and Nike advertisements vividly illustrate that the technological preconditions for such a attitudinal shift are very close to being attained. Whether new attitudes will quickly follow and be realized in the environment is a separate question.

³⁹⁴ See *Sutton*, 119 S. Ct. at 2147 (criticizing the “ignore mitigating measures” rule: “[U]nder this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes.”).

³⁹⁵ In *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997), two of the three judges applied a similar analysis and concluded that, even in its medicated form, the plaintiff’s insulin-dependent diabetes might actually impose substantial limitations on his major life activities—in part because of the burdensome nature of the treatment regime. See *id.* at 767–68 (Kennedy, J., concurring in part and dissenting in part); *id.* at 768 (Guy, J., concurring in part and dissenting in part). For a non-diabetes case holding that the mitigating measures may themselves be stigmatizing and thus substantially limiting, see *Cehrs v. Northeast Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998) (holding that plaintiff presented sufficient evidence to survive summary judgment on the question whether her intermittently symptomatic psoriasis was a “disability” and noting that the plaintiff “receives weekly medication and treatment” that “sometimes causes her to lose her hair and fingernails, and occasionally causes her skin to peel”).

³⁹⁶ Goffman, *supra* note 23, at 43–44 (describing “stigma symbols” as “signs which are especially effective in drawing attention to a debasing identity discrepancy, breaking up what would otherwise be a coherent overall picture, with a consequent reduction in our valuation of the individual”); *id.* at 92 (“It should be noted that since the physical equipment employed to mitigate the ‘primary’ impairment of some handicaps understandably becomes a stigma symbol, there will be a desire to reject using it.”); see also *id.* at 20 (suggesting the stigma attached to hearing aid use). See generally Smith, *supra* note 134, at 106–07 (contrasting the stigma attached to hearing aid use with the lack of stigma attached to wearing eyeglasses). By suggesting that *Sutton* dictates that a hearing impairment “corrected” through use of a hearing aid

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case, mitigating measures may reduce the physical symptoms, but they do not eliminate the stigma that can lead to systematic exclusion. They may even feed that stigma.

What about people with controlled epilepsy? Perhaps they are "actually" disabled for the same reason that many people with insulin-dependent diabetes are: Without a course of drug treatment that itself constitutes a "substantial limitation," they would from time to time lose consciousness. The *Sutton* Court did cite a study that "catalog[ed] serious negative side effects of new antiepileptic drugs."³⁹⁷ Even absent such side effects, a more compelling reason for protecting people with controlled seizure disorders rests on the societal-stigma "regarded as" analysis. Since ancient times, people with such disorders have experienced stigma: Generations of people have learned elaborate myths about epilepsy, such as the belief that it indicates demonic possession.³⁹⁸ In the early part of this century, various states enacted laws that targeted people with epilepsy for institutionalization, sterilization, and bans on intermarriage.³⁹⁹

The stigma attached to the condition still lingers. In the congressional hearings examining the proposed ADA, one witness testified that "[a]lthough at least 85% of people with epilepsy have obtained control of their seizures, through medication, a significant

might no longer be a disability, the Fifth Circuit disregarded these crucial points in *Ivy v. Jones*, 192 F.3d 514 (5th Cir. 1999) (remanding the "disability" question for consideration by the district court).

³⁹⁷ *Sutton*, 119 S. Ct. at 2147 (citing Curry & Kulling, *Newer Antiepileptic Drugs*, *Am. Family Physician*, Feb. 1, 1998).

³⁹⁸ See, e.g., Goffman, *supra* note 23, at 124; Gaylene Becker & Regina Arnold, *Stigma as a Social and Cultural Construct*, in *The Dilemma of Difference: A Multidisciplinary View of Stigma* *supra* note 153 at 39, 42.

³⁹⁹ See, e.g., Kevles, *supra* note 94, at 100 (noting that epilepsy was targeted by most state eugenic sterilization laws); Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860–1920*, 23 *Law & Soc. Inquiry* 541, 572–74 (1998) (discussing laws preventing, *inter alia*, epileptics of child-bearing age from intermarrying); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 *N.Y.U. L. Rev.* 30, 34–36 (1985) (describing the creation of the Virginia Colony for Epileptics and Feeble-minded, where Carrie Buck was institutionalized); see also Cook, *supra* note 93, at 403 n.74 ("A respected New York physician advocated [in 1904] the elimination of children with severe disabilities, including 'idiots,' most 'imbeciles,' and the greater number of epileptics, for society's protection, via a 'gentle, painless death' by the inhalation of carbonic gas."). Eugenic sterilization laws targeted at people with epilepsy remained on the books into the 1980s in at least four states. See Note, *Developments in the Law—The Constitution and the Family*, 93 *Harv. L. Rev.* 1156, 1297 & n.13 (1980).

number of employers flatly refuse to hire epileptics without any consideration of the effect the condition will have on safety and job performance.”⁴⁰⁰ Other witnesses testified about the discrimination they had recently experienced after revealing their seizure disorders to educators and employers.⁴⁰¹ This testimony was consistent with an earlier study that found “that personnel directors would prefer to hire a former prison inmate or mental hospital patient [rather] than an epileptic.”⁴⁰² Even today, “one fifth to one quarter of people with *controlled* seizures are significantly less likely to work than people in the general population.”⁴⁰³ As this discussion should indicate, epilepsy is widely “regarded as” a condition that substantially limits a variety of major life activities. When an individual experiences discrimination because she has that condition, she should be entitled to protection under the ADA’s “regarded as” prong. Nothing in *Sutton* even addresses, much less forecloses, such an analysis.⁴⁰⁴

3. Remembering the “Record” Prong

Perhaps more important, the *Sutton* and *Murphy* decisions did not at all address the “record” prong of the ADA’s “disability” definition, which protects people from discrimination based on a “record of” a substantially limiting impairment.⁴⁰⁵ *Sutton* and *Murphy* would have been particularly poor cases for invocation of the “record” prong: There appears to have been no suggestion in either case that the plaintiffs spent a substantial amount of time with their impairments before they began to use the mitigating measures at issue. The plaintiffs therefore could have had no “record” of a substantially limiting impairment, because their impairments

⁴⁰⁰ Small Business Hearing, *supra* note 97, at 133 (statement of Arlene Mayerson).

⁴⁰¹ See House Oversight Hearing, *supra* note 354, at 132–33 (statement of Barbara Waters); *id.* at 139–40 (statement of Sarah Bloor).

⁴⁰² Small Business Hearing, *supra* note 97, at 129–30 (statement of Arlene Mayerson).

⁴⁰³ Epilepsy Found. of Am., *Epilepsy: A Report to the Nation* 8 (visited Sept. 5, 1999) <<http://www.efa.org/news/nation/nation.html>> (emphasis added).

⁴⁰⁴ The recent decision in *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999), which held that a plaintiff who experienced only mild seizures while taking his epilepsy medication had no “disability,” explicitly noted that the plaintiff had waived reliance on the “regarded as” or “record” prongs. See *id.* at 452 n.5.

⁴⁰⁵ See 42 U.S.C. § 12102(2)(B) (1994).

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were essentially always "controlled" and hence never (under the Court's assumption) *in fact* substantially limiting.⁴⁰⁶

Many people with now-controlled medical conditions *were* at some point substantially limited, however. A person may have been hospitalized for tuberculosis but have fully recovered.⁴⁰⁷ Another might have recovered after a year-long battle with cancer.⁴⁰⁸ Still others might have experienced significant, limiting effects from diabetes or seizure disorders before their physicians discovered the appropriate treatment. If an employer denies a job to one of these individuals because of their prior diagnoses—whether by disqualifying them for all time or by disqualifying them until they have shown no symptoms for an arbitrarily fixed period⁴⁰⁹—it seems clearly to have discriminated based on the individual's "record of" a substantially limiting impairment. If courts begin to recognize the potential of the "record" prong,⁴¹⁰ the statute can still provide protection to people who face prejudice and stereotypes based on the lingering stigma of a once-active condition. It can do so, however, without ignoring the effects of all corrective measures.⁴¹¹

⁴⁰⁶ As I have suggested, the plaintiff's blood pressure in *Murphy* may well have been substantially limiting notwithstanding the use of medication to treat it, but the Court treated that question as outside of the scope of its grant of certiorari. See *supra* note 390.

⁴⁰⁷ See *School Bd. v. Arline*, 480 U.S. 273, 281 (1987) (holding such an individual protected under the Rehabilitation Act's "record" prong).

⁴⁰⁸ Cf. *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655–56 (5th Cir. 1999) (finding a jury question as to whether plaintiff whose cancer was in remission, but who had suffered pre-diagnosis effects, experienced 30 days of hospitalization, and required isolation from other persons after his hospitalization, had a "record" of a disability). But cf. *Ellison v. Software Spectrum*, 85 F.3d 187, 192 (5th Cir. 1996) (holding that a plaintiff who had recovered from breast cancer was not protected under the "record" prong, because nothing in her employment file suggested that her cancer ever substantially limited her in a major life activity, and because she "did not miss a day of work" during a month and a half of radiation therapy).

⁴⁰⁹ Cf. *Scheer v. City of Cedar Rapids*, 956 F. Supp. 1496, 1502 (N.D. Iowa 1997) (assuming that a plaintiff who was denied a job until he was seizure-free for a certain period of time had a statutory "disability," though finding his requested accommodation unreasonable).

⁴¹⁰ Cf. *Eichhorn*, *supra* note 28, at 1461 (noting that the "record" provision is the "least litigated of the three" prongs of the ADA's "disability" definition).

⁴¹¹ For this reason, the Court was correct to disregard the passages in the ADA committee reports that stated that mitigating measures should be ignored. Even advocates of looking to legislative history should be hesitant to rely on committee

C. Substantial Limitation in Working

Sutton and *Murphy* also involved a separate question: When is an individual substantially limited (or regarded as substantially limited) in the major life activity of “working”? After rejecting the contention that the plaintiffs’ conditions actually limited any major life activities, the Court then turned to the argument that the employers regarded the plaintiffs as substantially limited in the major life activity of working. In *Sutton*, the Court ruled that the plaintiffs were not regarded as substantially limited in working, because United perceived their vision impairments as barring them from the position of global airline pilot but not from all pilot positions.⁴¹² So too in *Murphy*, the Court held that the plaintiff was not regarded as substantially limited in working, because United Parcel Service perceived his blood pressure as barring him from mechanic’s positions that required the ability to drive a commercial motor vehicle but not from all mechanic’s positions.⁴¹³ In making these rulings, the Court applied a very demanding test for identifying a substantial limitation in the ability to work—a test that appears far more demanding than the one it has applied to other major life activities. The Court also expressed significant discomfort with allowing a plaintiff to establish that she was “regarded as” disabled simply by showing that she could not satisfy an employer’s generally applicable physical criteria. Although the Court’s ultimate decision in *Sutton* is consistent with the approach I defend in this Article, the decision in *Murphy* is not. And the Court’s approach to the underlying legal issues fails to take proper account of

report language directing a specific interpretation that seems to be at odds with the text, particularly where the evident concern motivating that language can be accommodated in a way that accords with the text. Cf. Hart & Sacks, *supra* note 25, at 1254 (“Evidence in the internal legislative history of a statute concerning a specific application envisaged by individual legislators should be given weight only to the extent that the application envisaged fits rationally with other indicia of general purpose.”); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 Colum. L. Rev. 242, 243 n.3 (1998) (disavowing a claim “that it is useful to employ bits and pieces of legislative reports or debates to resolve particular issues of meaning” and instead advocating attention to “what problems concerned Congress and what was the general thrust of its response”).

⁴¹² See *Sutton*, 119 S. Ct. at 2151.

⁴¹³ See *Murphy*, 119 S. Ct. at 2138.

the role of stigma and societal disadvantage in constructing "disability."

1. "Working" as a Major Life Activity

The EEOC and DOJ regulations implementing the ADA all list "working" as one of the illustrative major life activities.⁴¹⁴ In *Sutton*, however, the Court was dubious about the decision to include that activity on the regulatory list. Quoting the oral argument of then-Solicitor General Charles Fried in the Rehabilitation Act case of *School Board of Nassau County v. Arline*,⁴¹⁵ the Court found "some conceptual difficulty in defining 'major life activities' to include work, for it seems 'to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.'" ⁴¹⁶

As Fried's argument in *Arline* suggests, commentators have long questioned the inclusion of "working" in the list of major life activities. In a pre-ADA article, for example, Gary Lawson argued that "the social act of having and holding a job" should not be considered a "major life activity," because it is not a biological or cognitive function.⁴¹⁷

The *Sutton* Court ultimately "assume[d] without deciding that working is a major life activity."⁴¹⁸ But its suggestion that working might *not* be such an activity is puzzling. "Working" has been treated as a major life activity since the regulations that implemented the Rehabilitation Act.⁴¹⁹ In *Arline*, the Court expressly rejected Solicitor General Fried's challenge to the inclusion of working as a major life activity in those regulations.⁴²⁰ When the ADA incorporated the standards applied under the Rehabilitation Act regulations,⁴²¹ it necessarily endorsed the notion that working is

⁴¹⁴ See 28 C.F.R. §§ 35.104(2), 36.104(2) (1998); 29 C.F.R. § 1630.2(i) (1998).

⁴¹⁵ 480 U.S. 273 (1987).

⁴¹⁶ *Sutton*, 119 S. Ct. at 2151 (quoting Tr. of Oral Arg. 15, *Arline*).

⁴¹⁷ Lawson, *supra* note 62, at 250–51.

⁴¹⁸ *Sutton*, 119 S. Ct. at 2151.

⁴¹⁹ See 45 C.F.R. § 84.3(j)(2)(ii) (1977).

⁴²⁰ See *Arline*, 480 U.S. at 283 n.10.

⁴²¹ See 42 U.S.C. § 12201(a) (1994).

in fact a major life activity. The Court had recognized this point just one year before *Sutton*.⁴²²

The notion of stigma helps to explain why substantial limitations on working are properly treated as “disabilities.” Working is a major part of being “normal” in our society.⁴²³ It is “a means of proving yourself worthy in your own eyes and in the eyes of others,” it “shapes individual identities in ways both general and particular,” and it provides the arena for significant social integration.⁴²⁴ Since our nation’s founding, work has been “a medium through which a free man might demonstrate that he was a citizen.”⁴²⁵ People who cannot work because of their impairments are therefore likely to experience prejudice, and they are particularly likely to be ignored when others decide how to construct the physical environment and attendant social structures. Such prejudice and neglect may result in even further deprivation of employment opportunities which may in turn promote additional prejudice and neglect. People with “work disability” are therefore likely to need the ADA’s protections against systematic disadvantage.⁴²⁶

This stigma-based justification for extending the ADA’s protection to people with “work disability” can help to frame a proper inquiry into what “substantial limitation” means in the “working” context. To begin with, it seems clear that the inability to perform a single position with a single employer ought not constitute a “substantial limitation.” For a variety of idiosyncratic reasons, many

⁴²² See *Bragdon*, 524 U.S. at 638–39 (stating that “the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act”; quoting the list of major life activities in the Rehabilitation Act regulations, including “working”; and ruling that “reproduction” must be a major life activity, because it “could not be regarded as any less important than working and learning”).

⁴²³ See, e.g., Diller, Entitlement and Exclusion, *supra* note 51, at 363–64.

⁴²⁴ Kenneth L. Karst, The Coming Crisis of Work in Constitutional Perspective, 82 *Cornell L. Rev.* 523, 532–33, 550–51 (1997) [hereinafter Karst, *Crisis of Work*]. For a post-*Sutton* case relying on precisely this argument to hold that working is a major life activity, see *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 654 (5th Cir. 1999).

⁴²⁵ Karst, *Crisis of Work*, *supra* note 424, at 531.

⁴²⁶ I use the term “work disability” in the general sense of a disability that is defined by limitations on the ability to work. For a discussion of the complexities of the term, see Bonnie, *Work Disability and the Fabric of Mental Health Law: An Introduction*, in *Mental Disorder, Work Disability, and the Law*, *supra* note 30, at 1, 6–7. For a discussion of the connection between the inability to work and disability stigma, see David Mechanic, *Cultural and Organizational Aspects of Application of the Americans with Disabilities Act to Persons with Psychiatric Disabilities*, 76 *Milbank Q.* 5, 6 (1998).

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people are unable to perform particular jobs—even jobs they want very much. The employer may need to have someone on the job immediately, for example, and the applicant may be unable to start for another two weeks. Whether the reason is a prior commitment to another employer, the need to take care of a sick relative, or the applicant's own recovery from minor surgery, the inability to take a particular job immediately is neither unusual nor stigmatized, and there is no reason to assume that the applicant is likely to suffer systematic disadvantage as a result. If the exclusion from a single position with a single employer did constitute a "substantial limitation" in working, moreover, then the *Sutton* Court's concern about circularity would be quite apt: The employer's very act of rejecting the plaintiff would be the sole basis for affording the plaintiff protection against the rejection. (This, recall, is the cover-everyone position).

Things are very different when an individual's impairment results in disqualification from a large number of jobs. Such individuals *do* experience systematic disadvantage as a result of their impairment. And there is nothing circular about protecting people against individual acts of discrimination on the ground that they are subjected to *repeated* exclusion by many employers. Thus, the Court was quite correct to say in *Sutton* that people whose impairments disqualify them from "a broad class of jobs" are substantially limited in working.⁴²⁷

But the Court was wrong to say that a plaintiff *cannot* be substantially limited in working *unless* she is "unable to work in a broad class of jobs."⁴²⁸ The Court was on particularly weak ground to suggest that the "broad class" standard cannot be met "[i]f jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available."⁴²⁹ If "working" is properly treated as a major life activity because the inability to work is likely to be stigmatizing and to lead to systematic disadvantage, then the test for substantial limitation should reflect that function. An individual can experience stigma without being entirely unable to work. Even if one can find a variety of jobs (as nearly all people could if they were willing

⁴²⁷ *Sutton*, 119 S. Ct. at 2151.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

to set their sights low enough), significant underemployment can itself be disheartening, disadvantaging, and stigmatizing.⁴³⁰ Under the justifications for the ADA I have discussed, people whose impairments lead to significant underemployment ought to be protected.

The *Sutton* Court justified its restrictive “broad class of jobs” test by referring to two dictionary definitions that suggested that “substantial” requires a *large* limitation.⁴³¹ But that foray into “plain meaning” territory ignored the Court’s own statement a decade earlier in *Pierce v. Underwood*⁴³² that “the word ‘substantial’ can have two quite different—indeed, almost contrary—connotations.”⁴³³ In *Pierce*, the Court ruled that an unsuccessful government litigating position would be “substantially justified”—and that the government could avoid the obligation to pay the attorney’s fees of the prevailing party—even if that position was not “justified to a high degree.”⁴³⁴ Such a position would be “substantially” justified if it were “justified to a degree that could satisfy a reasonable person.”⁴³⁵

If we view the ADA as protecting people against stigmatizing losses of status that social practices attach to present, past, or perceived impairments, then a *Pierce*-like interpretation of “substantially limits” suggests itself. A person should be deemed “substantially limited” in working if a reasonable person would consider the disqualifying effects of the impairment to work a stigmatizing loss in status.⁴³⁶ The Court seems to have entertained a similar under-

⁴³⁰ See Karst, *Crisis of Work*, supra note 424, at 531 (arguing that the “free choice to work” expresses and reinforces autonomy and dignity); id. at 533 (noting the “rough popular status-ordering of types of work”).

⁴³¹ See *Sutton*, 119 S. Ct. at 2150 (quoting Webster’s Third New Int’l Dictionary 2280 (1976); 17 Oxford English Dictionary 66–67 (2d ed. 1989)).

⁴³² 487 U.S. 552 (1988).

⁴³³ Id. at 564.

⁴³⁴ Id. at 565 (internal quotations omitted).

⁴³⁵ Id.

⁴³⁶ The goal articulated in the text is not an unambiguous social good. Tying eligibility for antidiscrimination protections to stigmatizing losses of status gives more protection to those with more to lose—highly skilled and trained workers. Cf. Stone, supra note 22, at 66 (discussing the difference in eligibility criteria for white-collar and blue-collar workers in the German disability insurance system and noting its role in “preserv[ing] the occupational hierarchy and social status relationships”). This is a troubling point, and it deserves further attention. For the present argument, however, it should be enough to suggest that one can advocate social change of the existing occupational hierarchy and status relationships while at the same time believing that—whatever the

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standing of "substantially" in *Bragdon*, where it suggested that even an 8% risk of passing along a dread disease to one's child might be a substantial limitation on reproduction.⁴³⁷ Although no physical obstacle stood in the path of Abbott's attempt to reproduce, a reasonable person would find the risks attendant to pregnancy by an HIV-infected woman to be a meaningful impediment to reproduction, and the Court found those risks to be a substantial limitation.

It is easy enough to come up with examples of cases where a reasonable person would feel "substantially limited" in working—and would experience a stigmatizing loss of status—even if "jobs utilizing [her] skills" were available.⁴³⁸ The court in *E.E. Black, Ltd. v. Marshall*,⁴³⁹ an influential early Rehabilitation Act case, offered this illustration:

A person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney or a forest ranger. A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities.⁴⁴⁰

In *Sutton*, the Court held that the plaintiffs' visual impairments, as perceived by United, did not substantially limit their ability to work, because those impairments disqualified the plaintiffs only from the position of "global airline pilot."⁴⁴¹ The Court reasoned that "the position of global airline pilot is a single job," and that

general basis of social status—present, past, or perceived impairments ought not provide a basis for a loss in status.

⁴³⁷ See *Bragdon*, 524 U.S. at 641.

⁴³⁸ *Sutton*, 119 S. Ct. at 2151.

⁴³⁹ 497 F. Supp. 1088 (D. Haw. 1980).

⁴⁴⁰ *Id.* at 1099; see also *Cline v. Wal-Mart Stores*, 144 F.3d 294, 303–04 (4th Cir. 1998) (holding that exclusion from the class of maintenance supervisory jobs was sufficient to establish substantial limitation on working, even if the plaintiff could still perform nonsupervisory maintenance jobs). For a discussion of the reliance interests employees develop in their own career paths, see Weiler, *supra* note 320, at 63–67; cf. Liebman, *supra* note 51, at 842 (suggesting that "prior work" requirement in Social Security disability program reflects "the notion that personal expectations and reliances are established with one's place in the workforce, and that it is significantly more disturbing to be struck from one's station than to be prevented from ever reaching it").

⁴⁴¹ See *Sutton*, 119 S. Ct. at 2151.

“there are a number of other positions utilizing petitioners’ skills, such as regional pilot and pilot instructor to name a few, that are available to them.”⁴⁴² But “global airline pilot” is not a single job; every global airliner has such a pilot aboard. To determine whether the exclusion from all such jobs was a “substantial” limitation, the Court should have done more than simply note that the plaintiffs could still work as regional airline pilots or flight instructors. Rather, it should have asked whether the inability to work as an international airline pilot causes a stigmatizing loss of status. If the inability to work as an international airline pilot does not leave a regional airline pilot or flight instructor systematically disadvantaged, then the justification for statutory protection against discrimination and the failure to accommodate does not apply.

Applying the analysis I propose, the Court’s ultimate decision seems correct, but the issue is more complicated than the Court acknowledged. The inability to work for a global airline can make a large difference in a pilot’s life. Most notably, pilots at small regional airlines can earn a great deal less than—perhaps as little as a third of the salaries of—their counterparts at the major carriers.⁴⁴³ A person who must spend her life as a regional airline pilot will likely be in a very different socioeconomic class than one who can work as an international airline pilot. Similarly, flight instructor jobs typically represent the lowest-paid first rung on a pilot’s career ladder.⁴⁴⁴ The ability to work as a flight instructor thus provides little solace to one who cannot be an airline pilot. If a function of the ADA is to protect people against significant losses of status that are the socially contingent product of present, past, or perceived impairments, then it is hardly laughable to say that the pilot who cannot work at an international airline qualifies for protection.

The argument against statutory coverage seems stronger, however. International airline pilot service is a highly specialized occupation that precious few people can perform. The inability to

⁴⁴² *Id.*

⁴⁴³ See Bureau of Labor Statistics, 1998–99 Occupational Outlook Handbook: Aircraft Pilots 7 (last modified March 18, 1998) <<http://www.bls.gov/oco/ocos107.htm>> (“Average earnings for experienced pilots with 6 years of experience ranged from \$28,100 at the turboprop airlines to almost \$76,800 at the largest airlines.”).

⁴⁴⁴ *Cf. id.* at 5.

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work as such a pilot may dash one's dreams, but it cannot be said to be generally stigmatizing. Nor can it be said to deprive a person of access to a "fair share" of society's "normal opportunity range."⁴⁴⁵ Even if the uncorrected eyesight criteria for United Airlines pilots are arbitrary and irrational, they do very little to create or maintain a systematically deprived class of people with disabilities. Although the Court would have done better to rely on this more narrow ground rather than suggesting that the existence of "other positions utilizing petitioners' skills" was sufficient to defeat a claim of substantial limitation,⁴⁴⁶ its bottom-line result was correct.

It is difficult to make the same defense of *Murphy*. There, high blood pressure (at least as perceived by UPS) rendered Murphy unable to work in *any* job that required driving a commercial motor vehicle in interstate commerce.⁴⁴⁷ The ability to drive a commercial motor vehicle is hardly a highly specialized skill like the ability to fly an international airliner. Indeed, as the Government's brief in *Murphy* pointed out, over seven million people had commercial driver's

⁴⁴⁵ Daniels, *supra* note 31, at 282–87. The EEOC's interpretive guidance recognizes these points by stating that the inability "to perform a specialized job or profession requiring extraordinary skill, prowess or talent" is not a substantial limitation, and giving the following example: "[A]n individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. pt. 1630 app. § 1630.2(j), at 349 (1998). The *Sutton* Court specifically relied on the EEOC's use of this example. See *Sutton*, 119 S. Ct. at 2151. For a similar case, see *Kampouris v. Saint Louis Symphony Soc'y*, 52 F. Supp. 2d 1096, 1104 (E.D. Mo. 1999) (holding that an employer's belief that plaintiff could no longer play as a full-time violinist for a major symphony orchestra did not establish that it "regarded" plaintiff as substantially limited in working, given that employer knew plaintiff could still "play[] with a community orchestra, play[] private performances, play[] in orchestras for musical theater productions, and teach[] violin"). To avoid any misunderstanding, it is important to note what I am not saying: I do not contend that wheelchair users who are denied positions as airline pilots or concert violinists should be unable to sue simply because the positions they sought were exceptionally unique. Disability-based discrimination is unlawful, regardless of how unusual the position at issue is or how many other positions the disabled plaintiff could find. But if a person's physical or mental condition imposes only one limitation—that she cannot fly an airliner, or that she cannot play for a major symphony—she has no "disability," and any discrimination on the basis of that condition is therefore not disability-based.

⁴⁴⁶ *Sutton*, 119 S. Ct. at 2151.

⁴⁴⁷ See *Murphy*, 119 S. Ct. at 2136, 2138.

licenses in 1994, the year Murphy was fired.⁴⁴⁸ And the *inability* to drive a commercial motor vehicle would not disqualify Murphy from “only a particular job” as the Court stated.⁴⁴⁹ Rather, it would disqualify him from literally millions of jobs: mechanic’s jobs that, like his position at UPS, required some test-driving of trucks;⁴⁵⁰ an enormous number of truck and bus driving jobs; and other jobs that involve incidental driving of commercial motor vehicles.⁴⁵¹ Given his education and experience (he had worked over 22 years as a mechanic⁴⁵²), it seems unlikely that Murphy would have had a fair chance of obtaining any other position as rewarding as that of a mechanic. And his blood pressure limited him to a subset (and presumably a less highly valued subset) of mechanic’s jobs. It is not much of a stretch to say that Murphy “possess[ed] an attribute that ma[de] him different from others in the category of persons available for him to be, and of a less desirable kind.”⁴⁵³ A reasonable person whose prospects were so limited would experience that systematic limitation as meaningful, and the Court should have concluded that it was “substantial.”

Sutton and *Murphy* are striking, because their restrictive interpretation of substantial limitation in working stands in sharp contrast to the Court’s more generous interpretation of the substantial limitation requirement in the context of other major life activities. In the context of “working,” the Court appears willing to require a virtual inability to work (hence the Court’s statement that there is no substantial limitation “[i]f jobs utilizing an individ-

⁴⁴⁸ See Brief for United States and Equal Employment Opportunity Comm’n as Amicus Curiae at 25 n.11, *Murphy v. United Parcel Serv.*, 119 S. Ct. 2133 (1999) (No. 97-1992).

⁴⁴⁹ *Murphy*, 119 S. Ct. at 2139.

⁴⁵⁰ See *id.* at 2136; see also Bureau of Labor Statistics, 1998–99 Occupational Outlook Handbook: Diesel Mechanics 3 (last modified January 15, 1998) <<http://www.bls.gov/oco/ocos182.htm>> (suggesting that such a requirement is not unusual for diesel mechanic jobs).

⁴⁵¹ See, e.g., Bureau of Labor Statistics, 1998–99 Occupational Outlook Handbook: Truckdrivers 4 (last modified January 27, 1998) <<http://www.bls.gov/oco/ocos246.htm>> (“Truckdrivers held about 3,050,000 jobs in 1996.”); Bureau of Labor Statistics, 1998–99 Occupational Outlook Handbook: Busdrivers 3 (last modified January 26, 1998) <<http://www.bls.gov/oco/ocos242.htm>> (“Busdrivers held about 592,000 jobs in 1996.”).

⁴⁵² See *Murphy*, 119 S. Ct. at 2139.

⁴⁵³ Goffman, *supra* note 23, at 3.

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ual's skills (but perhaps not his or her unique talents) are available"⁴⁵⁴). Yet in *Bragdon*, the Court found a substantial limitation in the major life activity of reproduction even though Abbott was fully *capable* of having children, and no physical obstacle even made it more difficult for her to do so. And in *Albertsons*, the Court rejected the notion that uncorrectable 20/200 vision in one eye was a disability *per se*, but it agreed "that people with monocular vision 'ordinarily' will meet the Act's definition of disability," apparently because of a substantial limitation in the major life activity of seeing.⁴⁵⁵

A focus on subordination suggests that the Court's restrictive interpretation of the substantial limitation requirement—even if limited to the major life activity of working—is an inappropriate way of giving content to the ADA's "disability" category. As in *Murphy*, the Court's approach denies protection to some people whose impairments lead to a stigmatizing loss of status. At the same time, it stigmatizes those people it protects. Under the Court's inability-to-work approach, plaintiffs who argue that they were wrongfully denied a job must begin by demonstrating that their impairment makes it virtually impossible for them to work. Even if that initial showing does not doom the plaintiff's subsequent attempt to establish that she is "qualified" for the position at issue,⁴⁵⁶ the requirement that the plaintiff make such a showing replicates the disempowering effects of the "truly disabled" approach. Because the Court's restrictive approach seems to be limited to the major life activity of "working," it may not have much practical effect.⁴⁵⁷ A subordination-focused analysis nonetheless suggests that the Court was wrong to adopt such an approach, even in that limited context.

⁴⁵⁴ *Sutton*, 119 S. Ct. at 2151.

⁴⁵⁵ *Albertsons*, 119 S. Ct. at 2169.

⁴⁵⁶ For the flip side of the problem, see *Olson v. General Elec. Astrospace*, 101 F.3d 947, 953 (3d Cir. 1996) ("[T]he evidence that was apparently offered to demonstrate Olson's fitness as an employee ironically establishes that he was not substantially limited in a major life activity.").

⁴⁵⁷ See Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. Colo. L. Rev. 107, 135–39 (1997) (arguing that "working" should not be deemed a major life activity in part because plaintiffs who allege only a substantial limitation in working rarely prevail anyway).

2. “Regarded As” Substantially Limited in Working

The Court did not purport to decide whether the plaintiffs in *Sutton* and *Murphy* were *actually* substantially limited in the ability to work. Rather, it focused only on whether they were “regarded” by the defendants as substantially limited. In *Sutton*, the “regarded as” posture seems to have had a significant effect on the Court’s analysis. In particular, the Court expressed great discomfort with the notion that an employer’s adoption of a generally applicable physical standard for its employees could compel the conclusion that the employer “regarded” an individual screened out by the requirement as substantially limited in working. The approach I have sketched in this paper suggests that the Court’s discomfort was misplaced.

As the Court approached the issue, a “regarded as” claim requires “that a covered entity entertain misperceptions about the individual” plaintiff—misperceptions of a kind that “often ‘resul[t] from stereotypic assumptions not truly indicative of . . . individual ability.’”⁴⁵⁸ But United had no misperception about the *Sutton* plaintiffs. It rejected them because it correctly concluded that they could not satisfy a generally applicable standard that required “uncorrected visual acuity of 20/100 or better.”⁴⁵⁹ That the airline maintained such a vision requirement, the Court concluded, did not in and of itself “establish a claim that respondent regards petitioners as substantially limited in the major life activity of working.”⁴⁶⁰ The plaintiffs had argued that United “regarded” them as substantially limited in working, because they would in fact have been substantially limited in working if *all* global airlines had used United’s criteria.⁴⁶¹ The Court, however, found it improper to speculate whether United’s vision requirements, if imposed by all

⁴⁵⁸ *Sutton*, 119 S. Ct. at 2150 (quoting 42 U.S.C. § 12101(a)(7) (1994)).

⁴⁵⁹ *Id.* at 2143. In *Murphy*, by contrast, UPS may have been wrong in thinking that the plaintiff could not satisfy the Department of Transportation qualifications to drive a commercial motor vehicle. Accordingly, the Court did not seem to view *Murphy* as challenging UPS’s general physical criteria; it asked only whether the inability to drive a commercial motor vehicle—the limitation in fact perceived by UPS—constituted a substantial limitation on the major life activity of working. See *Murphy*, 119 S. Ct. at 2137.

⁴⁶⁰ *Sutton*, 119 S. Ct. at 2150.

⁴⁶¹ See *id.* at 2151–52.

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global airlines, would make the plaintiffs "substantially limited" in the ability to work. The Court explained that "[a]n otherwise valid job requirement, such as a height requirement, does not become invalid simply because it *would* limit a person's employment opportunities in a substantial way *if* it were adopted by a substantial number of employers."⁴⁶² A contrary ruling, the court suggested, would call into question employers' ability "to prefer some physical attributes over others and to establish physical criteria" for their employees; such a ruling would therefore override Congress's decision to allow employers "to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job."⁴⁶³

Aside from the fact that it was unnecessary to the Court's decision,⁴⁶⁴ this analysis is flawed. To begin with, actions speak louder than words. The best evidence of what an employer regards to be necessary to perform a job is the set of minimum requirements it actually imposes on those who seek that job. If an employer disqualifies all people with asthma from bicycle courier positions, for example, one can rationally infer that the employer regards asthma as sufficiently interfering with an individual's ability to perform that job to disqualify her from all bicycle courier positions. If disqualification from all bicycle courier jobs amounts to a substantial limitation on working, it should not matter whether asthma is in fact substantially limiting. The "regarded as" analysis should be satisfied by the fact (inferred from the employer's imposition of the job requirement) that the employer *regards* asthma as imposing a limitation that would be substantial.

For the same reason, the employer's job criteria ought to be imputed to all other employers for purposes of the "regarded as" analysis.⁴⁶⁵ In a "regarded as" case where the plaintiff alleges that

⁴⁶² Id. at 2152.

⁴⁶³ Id. at 2150.

⁴⁶⁴ As I discussed in the previous section, the Court held that exclusion from all global airline pilot jobs would not, in any event, constitute a substantial limitation on working—a holding that can ultimately be squared with the approach I articulate here. Accordingly, even if all airlines had imposed the same vision requirements as United, the plaintiffs would not have been substantially limited in working.

⁴⁶⁵ See, e.g., *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1100 (D. Haw. 1980) ("In evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process.").

the defendant regarded her as disabled, it should be irrelevant whether other employers have adopted similarly disqualifying criteria.⁴⁶⁶ The issue should instead turn on whether the defendant *believed* that the plaintiff's impairment was incompatible with the safe and economical performance of a sufficient number of jobs to constitute a substantial limitation. Unless the employer acknowledges that its selection criteria are irrational—that they do not serve the purpose of screening out those who are incapable of performing the job safely and economically—there is every reason to believe that the employer regards applicants who fail its criteria as unable to perform similar jobs for all other employers.

Despite the Court's concerns, a decision to allow unsuccessful applicants to satisfy the "regarded as" prong by demonstrating that they failed the employer's physical standards would not necessarily render those standards "invalid."⁴⁶⁷ It would merely subject them to scrutiny under the ADA's substantive provisions. If the criteria in issue were "job related for the position in question" and "consistent with business necessity,"⁴⁶⁸ and if the plaintiffs who failed those criteria were unable, "with or without reasonable accommodation, [to] perform the essential functions of the employment position,"⁴⁶⁹ then the employer would be free to maintain them. The "regarded as" finding has only a limited effect: It requires the employer to justify general physical criteria that disqualify people with impairments without regard for their individual abilities.⁴⁷⁰ Such a result directly advances the central purposes of the ADA.

In fact, the Court's focus on individualized misperception by employers seems to have it backwards. The ADA's requirements of individualized consideration and accommodation impose on employers an obligation

⁴⁶⁶ See, e.g., H.R. Rep. No. 101-485, pt. 3, at 30 (1990), *reprinted in* 1990 U.S.C.A.N. 445, 453 (stating that plaintiff is covered under the "regarded as" prong "whether or not the employer's perception was shared by others in the field").

⁴⁶⁷ *Sutton*, 119 S. Ct. at 2152.

⁴⁶⁸ 42 U.S.C. § 12112(b)(6) (1994).

⁴⁶⁹ *Id.* § 12111(8).

⁴⁷⁰ Justice Stevens made a very similar point in his *Sutton* dissent, where he argued that the case raised only the question "whether the ADA lets petitioners in the door" to obtain "basic protection from irrational and unjustified discrimination because of a characteristic that is beyond a person's control." *Sutton*, 119 S. Ct. at 2156-57 (Stevens, J., dissenting).

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to consider people with disabilities as individuals and to avoid prejudging what an applicant or employee can or cannot do on the basis of . . . a preconceived and often erroneous judgment about an individual's capabilities based on 'labeling' of that person as having a particular kind of disability."⁴⁷¹

Inflexible physical criteria are at least as likely to reflect such "preconceived and often erroneous judgment[s]" as are individualized mistakes about a person's abilities.⁴⁷² If disability-based subordination often manifests itself in society-wide neglect—practices that are constructed in ways that unintentionally but systematically exclude people with stigmatized impairments—then generally applied physical criteria are particularly likely means of transmitting it.

Although the *Sutton* Court's analysis of the "regarded as" issue was wrong, it should not be overread. In particular, the Court's decision continues to allow a "regarded as" claim where the defendant rejects the plaintiff because it "entertain[s] misperceptions about [her as an] individual," rather than rejecting her because it correctly perceives that she cannot satisfy generally applicable physical standards it imposes for the job.⁴⁷³ The Court favorably quoted an EEOC release that "explain[ed] that the purpose of the regarded as prong is to cover individuals 'rejected from a job because of the "myths, fears and stereotypes" associated with disabilities.'"⁴⁷⁴ Where an employer, on discovering an applicant's impairment, rejects that applicant because of an unproven "myth, fear, or stereotype" about its effects on the applicant's ability to perform the job safely and economically, there remains strong reason to conclude that the employer "regarded" the applicant as substantially limited in a major life activity. In such cases, the employer entertains an individually inaccurate perception of the applicant's impairment.

Lower courts have tended to be hostile to such claims. They have generally rejected the proposition that an employer's stereotype-based rejection of an applicant for a single job indicates that

⁴⁷¹ H.R. Rep. No. 101-485, pt. 2, at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340. The Court recognized this point when it stated that the "actual disability" inquiry must focus on the individual plaintiff's limitations rather than on the label attached to her impairment. See *Sutton*, 119 S. Ct. at 2147.

⁴⁷² *Id.*

⁴⁷³ *Sutton*, 119 S. Ct. at 2150.

⁴⁷⁴ *Id.* (quoting 29 C.F.R. pt. 1630, app. § 1630.2(l), at 350 (1998)).

the applicant was “regarded” as substantially limited in the ability to work.⁴⁷⁵ They contend that the employer “regarded” the applicant as unsuited for only one job, rather than for working in general. The notion of stigma suggests a major flaw in that analysis. As I have explained, a key characteristic of impairment-based stigma is the “spread effect,” under which people believe that the inability to perform a particular function indicates a more general lack of abilities.⁴⁷⁶ Where an employer, by acting on the basis of “myths, fears, and stereotypes,” has already demonstrated its propensity to draw unnecessarily broad and negative conclusions from the fact of the plaintiff’s impairment, an inference should arise that the employer believes the plaintiff to be more generally limited. In particular, an inference should arise that the employer would have considered the plaintiff’s impairment disqualifying for other positions had it expressly considered the question.⁴⁷⁷ In some cases, those inferences will not ultimately be persuasive. The position at issue may, like flying a DC-10, require such extraordinary and unusual skill that no reasonable person would think that exclusion from that position could indicate a more general inability to work. Alternatively, the rejection may be based on some idiosyncratic feature of the particular job location. It nonetheless makes sense to

⁴⁷⁵ See, e.g., *Bridges v. City of Bossier*, 92 F.3d 329, 336 n.11 (5th Cir. 1996) (stating that rejection of Bridges, a firefighter applicant with an extraordinarily mild case of hemophilia, did not indicate that the city “regarded” him as substantially limited in working: “[W]e note that for Bridges to prevail on his claim that the City acted on ‘myths, fears, and stereotypes,’ he would still need to prove that the City regarded him as substantially disabled”), cert. denied, 519 U.S. 1093 (1997). I served as counsel for the United States, which participated as amicus curiae on Bridges’s behalf, on appeal to the Fifth Circuit. For other cases along the same lines, see, for example, *Christian v. St. Anthony Med. Ctr.*, 117 F.3d 1051, 1052–53 (7th Cir. 1997) (relying on *Bridges* and stating even more strongly that the ADA does not prohibit employers from acting on the basis of animus or stigma associated with physical impairments that they do not believe to be generally limiting), cert. denied, 118 S. Ct. 1304 (1998); cf. *Lessard v. Osram Sylvania, Inc.*, 175 F.3d 193, 199 (1st Cir. 1999) (expressing doubt “that even myth-motivated actions by the employer can be the basis for liability if the actions are based on a perceived impairment that does not substantially limit a major life activity,” and finding “no reason to think that Congress intended the scope of protection afforded against *perceived* disability discrimination to be larger than the scope of protection afforded against *actual* disability discrimination”).

⁴⁷⁶ See *supra* notes 94–101 and accompanying text.

⁴⁷⁷ It will frequently be unrealistic to require the plaintiff to show more than this. In deciding whether to fill a particular opening, an employer is unlikely to expressly consider the applicant’s abilities to perform jobs other than the one at issue.

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greet with skepticism an employer's self-serving assertion that the stereotype-based refusal to hire an individual with an impairment rested on a unique aspect of the particular position at issue. The "spread effect" is simply too powerful.⁴⁷⁸

Sutton, with its focus on individualized misperceptions, suggests that courts should give great weight to the employer's reliance on "myths, fears, and stereotypes." By emphasizing that the hallmark of a "regarded as" claim is stereotyping—the "primary cognitive component" of stigma⁴⁷⁹—the Court made clear that stigma counts in the "regarded as" analysis. It is unfortunate, however, that the Court did not seem to recognize that systematic exclusion can be transmitted by general physical criteria as well as individualized misperceptions.

*D. Individualization in the "Disability" Inquiry
and the Role of Courts and Agencies*

To this point, I have argued that an antisubordination approach can help give content to the ADA's broad and ambiguous definition of "disability." Because the statute gives significant administrative responsibility to the EEOC and the DOJ,⁴⁸⁰ however, a separate question presents itself: Which institution—the courts or the agencies—should have primary responsibility for applying the notion of stigma to the interpretive controversies that arise under the statute?

⁴⁷⁸ As Arlene Mayerson has explained, *Bridges* illustrates the pitfalls of deference to the employer's suggestion that its job tasks are distinctive. See Mayerson, *supra* note 6, at 607 n.92 (criticizing the Fifth Circuit for concluding that firefighting had a uniquely high risk of trauma and noting evidence in the record that "law enforcement, military service, EMT, paramedic, construction worker, manufacturing and machinery processing jobs, saw mill employees, quarry workers, and jobs in the iron and steel industry" involved similar risks) (internal quotation marks omitted).

⁴⁷⁹ Coleman, *supra* note 154, at 227.

⁴⁸⁰ Those agencies have the power to issue legislative rules, see 42 U.S.C. §§ 12116, 12134(a), 12186(b) (1994), provide technical assistance to regulated parties, see *id.* § 12206, and file enforcement actions in court, see *id.* §§ 12117, 12133, 12188. The statute also gives the Department of Transportation authority to issue rules implementing the transportation-specific provisions of Titles II and III, see *id.* §§ 12143(b), 12149, 12186(a), and it gives the Federal Communications Commission authority to issue rules implementing the accessible telecommunications provisions of Title IV, see *id.* § 225(b) (added by Title IV of the ADA).

The approach I have sketched could certainly be applied by the courts. A court in an “actual” disability case would look to whether that limitation is significant enough to be likely to lead to the denial of a range of opportunities. My discussion of the analysis the Court should have applied in *Murphy* illustrates such an inquiry.⁴⁸¹ In a “regarded as” case, courts would look to whether the plaintiff has experienced prejudice or stereotypes or has a condition frequently stigmatized in society at large. My discussion of the proper analysis in *Bragdon* and in cases where an employer rejects an applicant based on “myth, fear, and stereotype” is illustrative here.⁴⁸²

Such an approach does not solve all of the problems of vagueness inherent in the ADA’s broad “disability” definition. The concepts of stigma and systematic disadvantage hardly have firm boundaries.⁴⁸³ The determination whether a particular impairment or functional limitation is likely to be stigmatized may involve questions of broad social fact. Consider some of the facts I have discussed in evaluating whether particular conditions are stigmatized: (1) sociological studies and anecdotal evidence showing the existence of widespread discrimination;⁴⁸⁴ (2) surveys of the attitudes of employers and the general public;⁴⁸⁵ and (3) historical evidence of discrimination and ostracism.⁴⁸⁶ Other appropriate sources of information might include more general indicia of social disadvantage such as unemployment statistics, educational attainment data, or information regarding social pathology such as imprisonment statistics.⁴⁸⁷ There may be some question whether

⁴⁸¹ See supra notes 447–453 and accompanying text.

⁴⁸² See supra notes 353–355, 473–479 and accompanying text.

⁴⁸³ The “truly disabled” approach suffers from this problem to an even greater extent. Not only is the boundary of medically “severe” impairments uncertain, but it is difficult to construct a single metric to use in comparing the relative severity of impairments that have diverse effects on diverse body systems. The cover-everyone approach, by contrast, is quite easy to apply; that is a strong argument in its favor.

⁴⁸⁴ See supra note 354 (discussing HIV infection).

⁴⁸⁵ See supra notes 400–403 and accompanying text (discussing epilepsy).

⁴⁸⁶ See supra notes 398–399 (discussing epilepsy).

⁴⁸⁷ See supra notes 84–90 and accompanying text (looking to such data to demonstrate that people with disabilities, as a class, are stigmatized and disadvantaged); cf. Sunstein, Anticaste Principle, supra note 207, at 2444–49 (examining similar data to determine whether African-Americans and women are subordinated groups). At least in the kinds of evidence considered, there is some parallel between the inquiry in which I would have courts engage when addressing ADA coverage and the inquiry in which Charles Lawrence would have courts engage when deciding whether to activate

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courts are the best institutions to sort through this mass of information.⁴⁸⁸ The relevant agencies, which presumably have expertise in the area of disability, would probably be in a better position to address these issues of social fact. And, as the question of substantial limitation in "working" illustrates most starkly, difficult line-drawing questions abound: How much of a limitation (on the ability to work or on any other major life activity) is sufficient to lead to stigma or systematic disadvantage? How much disadvantage or stigma is sufficient to constitute a substantial limitation? And how can we reliably measure the amount of disadvantage or stigma that people with a particular impairment experience? There can be no mechanical answer to these questions. Such line-drawing issues would best be addressed by the politically accountable agencies to which Congress has delegated responsibility for issuing rules to carry out the statute.⁴⁸⁹

Some of the Court's statements in its "disability" quartet seem to call into question the authority of the EEOC and DOJ to address those issues, however. The Court's repeated refusal to state whether *Chevron* deference ever applies to interpretations of the ADA will undoubtedly lead some to conclude that those agencies do not have the breadth of interpretive authority that most agencies have. Indeed, a statement in *Sutton* suggests that *no* agency has the authority to issue regulations relating to the Act's "disability" definition.⁴⁹⁰ And the Court's repeated emphasis on the individual-

searching equal protection scrutiny. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 356 (1987) ("This test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny.").

⁴⁸⁸ For an argument that courts simply lack the competence to determine which groups suffer more stigma than others, see *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 296-97 (1978) (Powell, J., plurality opinion).

⁴⁸⁹ See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984).

⁴⁹⁰ See *Sutton*, 119 S. Ct. at 2145 ("Most notably, no agency has been delegated authority to interpret the term 'disability.'").

ized nature of the “disability” inquiry suggests that neither agencies nor courts can identify classes of impairments that are invariably disabilities. These suggestions are troubling for the approach I have defended, but they need not pose an insurmountable obstacle to that approach.

1. *The Scope of Chevron Deference Under the ADA*

The Court’s recent decisions leave it unclear whether EEOC and DOJ interpretations of the ADA are entitled to *Chevron* deference. In *Bragdon*, the Court seemed to state unequivocally that the DOJ’s interpretations were entitled to the benefit of the *Chevron* doctrine: “As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the Department’s views are entitled to deference. See *Chevron*, 467 U.S., at 844.”⁴⁹¹ Yet in the oral argument in *Olmstead v. L.C. ex rel. Zimring*,⁴⁹² Justice Kennedy (the author of the *Bragdon* decision), seemed to have forgotten this passage.⁴⁹³ And the Court’s decisions in *Olmstead*,⁴⁹⁴ *Sutton*,⁴⁹⁵ *Murphy*,⁴⁹⁶ and *Albertsons*⁴⁹⁷ all expressly re-

⁴⁹¹ *Bragdon*, 524 U.S. at 646.

⁴⁹² 119 S. Ct. 2176 (1999).

⁴⁹³ See Tr. of Oral Arg., *Olmstead v. L.C. ex rel. Zimring*, 1999 WL 252681 at *53 (“We did not reach the *Chevron* point in deference—*Chevron* deference point in *Bragdon*. We did not decide that you were entitled to the *Chevron* deference. We say you’re entitled to deference because it’s a well reasoned view of . . . much like many sources.”) (ellipsis in original transcript). Although Supreme Court argument transcripts do not specifically identify the justices, government counsel’s response to this question addressed Justice Kennedy by name.

⁴⁹⁴ See *Olmstead*, 119 S. Ct. at 2186 (“We need not inquire whether the degree of deference described in [*Chevron*] is in order; [i]t is enough to observe that the well-reasoned views of the agencies implementing a statute “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”) (quoting *Bragdon*, 524 U.S. at 642 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (citation omitted). It should be noted that the portion of *Bragdon* quoted by the *Olmstead* Court involved the question whether agency interpretations of the Rehabilitation Act are entitled to deference; *Bragdon*’s only discussion of deference to agency interpretations of the ADA appears in the passage I quoted in the text accompanying note 491.

⁴⁹⁵ See *Sutton*, 119 S. Ct. at 2145 (“Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any.”).

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served the question whether the interpretations of the Department and the EEOC are entitled to *Chevron* deference. Although the Court's shifting pronouncements may be somewhat sloppy, the refusal to decide the *Chevron* issue in *Olmstead*, *Sutton*, *Murphy*, and *Albertsons* may be interpreted kindly as implementing a practice of "leaving things undecided."⁴⁹⁸ There should be little doubt, however, that the EEOC's and DOJ's interpretations of the ADA are entitled to *Chevron* deference—at least where those interpretations are incorporated in legislative rules.⁴⁹⁹

The Court has not settled on a firm rationale for the *Chevron* doctrine. Since *Chevron* was decided, however, the Court has generally applied that doctrine to agency interpretations that are incorporated in duly authorized and promulgated legislative

⁴⁹⁶ See *Murphy*, 119 S. Ct. at 2138 ("As in *Sutton*, we assume, *arguendo*, that the EEOC regulations regarding the disability determination are valid.") (citation omitted).

⁴⁹⁷ See *Albertsons*, 119 S. Ct. at 2167 n.10 (1999) ("As the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC relating to the ADA's definitional section, 42 U.S.C. § 12102, for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due.") (citation omitted).

⁴⁹⁸ Cass Sunstein is the most noted modern advocate of such a general practice. See generally Sunstein, *One Case*, supra note 71 (defending such a practice). There are reasons to doubt that the Court should make a practice of leaving undecided the basic question of whether *Chevron* analysis applies. In 1994, Thomas Merrill described the "currently fashionable approach" as one in which "the Court . . . exercise[s] independent judgment, find[s] that the statutory meaning is unambiguous, and then drop[s] a footnote indicating that there is no need to consider deference to agency views." Merrill, supra note 381, at 362. As Merrill explained, such a practice in fact reflects a particular and contestable understanding of the *Chevron* doctrine—a view that *Chevron* is a tool to aid courts in making interpretations that are in all respects theirs to make, rather than an allocation of authority reflecting the important policymaking role of the executive branch in our administrative state. See *id.* at 362–63.

⁴⁹⁹ The line between legislative and interpretive rules is a contested one, so it makes sense to set forth my conception of legislative rules (though this is not the place to defend it). In my view, legislative rules are those adopted pursuant to an explicit grant of authority, that independently have the force of law, and that may go beyond the four corners of the statutory text if reasonably necessary to carry out the statute. Even a rule giving content to a statutory term can be "legislative" in this understanding if promulgated pursuant to a grant of legislative rulemaking authority after following the proper procedures. For a similar understanding, see Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 *Duke L.J.* 1311, 1321–23 (1992).

rules.⁵⁰⁰ The arguments for deferring to agency interpretations seem particularly strong in such cases, for Congress has explicitly granted the agency authority to adopt rules that give further content to statutory terms.⁵⁰¹ Because Congress granted the EEOC and the DOJ authority to adopt rules to “carry out” or “implement” the provisions of ADA Titles I, II, and III,⁵⁰² interpretations that are incorporated in those rules should be entitled to the benefit of the *Chevron* doctrine.

In *Sutton*, the Court suggested one reason why *Chevron* deference might not apply to agency regulations that give additional content to the ADA’s “disability” definition: That definition appears in 42 U.S.C. § 12102, one of two general, preliminary sections

⁵⁰⁰ See, e.g., *United States v. Haggard Apparel Co.*, 119 S. Ct. 1392, 1395–96 (1999) (holding that *Chevron* doctrine applies to a Customs Service regulation involving availability of duty allowances); *United States v. O’Hagan*, 521 U.S. 642, 673 (1997) (according *Chevron* deference “[b]ecause Congress has authorized the Commission, in § 14(e), to prescribe legislative rules”); cf. *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 152–55 (1991) (according deference to OSHA interpretations of OSHA regulations, because it has rulemaking and enforcement authority under the Occupational Safety and Health Act, but denying such deference to the Occupational Safety and Health Review Commission, which has only (nonpolicymaking) adjudicative power).

⁵⁰¹ For arguments that *Chevron* deference should apply only in cases of explicit delegation of legislative rulemaking authority, see, for example, Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 *Admin. L.J. Am. U.* 1, 24–26 (1996); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *Tex. L. Rev.* 113, 199–203 (1998). Justice Scalia would not attach any significance to the “‘legislative rules vs. other action’ dichotomy.” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment). To him, the key question is whether the interpreting agency “administers” the statute. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment). The role of the DOJ and the EEOC under the ADA should satisfy this standard, but it is unclear whether Justice Scalia would think so. See *Tr. of Oral Arg., Olmstead v. L.C. ex rel. Zimring*, 1999 WL 252681 at *50–51 (“I thought *Chevron* deference was—came about because when Congress passes a statute that requires administration by an executive agency, the executive is necessarily the first person to take a cut at giving meaning to it, and we give deference to that person’s cut because it’s part of his necessary function. But you have here a statute in which Congress simply said, we don’t want the courts to interpret this legislation, we want the Attorney General to, and gave—gave power to the Attorney General to simply make rules, not because he’s responsible for administering the act, but because Congress just likes the Attorney General’s view of the statute better than it likes ours. I don’t know of any other instance where we’ve done that.”). As with the earlier quote from the *Olmstead* argument, see *supra* note 493, government counsel’s answer indicates that Justice Scalia was speaking.

⁵⁰² 42 U.S.C. §§ 12116, 12134(a), 12186(b) (1994).

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of the ADA, rather than in one of the Act's four substantive titles.⁵⁰³ (The other preliminary section, 42 U.S.C. § 12101, contains the statutory findings). Because the EEOC's rulemaking authority extends only to Title I,⁵⁰⁴ and the DOJ's rulemaking authority extends only to Titles II and III,⁵⁰⁵ the Court stated that "no agency has been delegated authority to interpret the term 'disability.'"⁵⁰⁶

That statement, which is best characterized as dictum,⁵⁰⁷ is fundamentally misguided. The power to promulgate legislative regulations is not limited to the issuance of interpretations of statutory terms, much less to the issuance of interpretations of terms whose definitional provisions appear in the portion of the statute that the agency has authority to implement. Indeed, legislative rules can even incorporate substantive standards of liability that go beyond those set forth in the authorizing statute, so long as they are "reasonably related to the purposes of the enabling legislation."⁵⁰⁸ Legislative rulemaking authority is thus "substantially equivalent to an executive 'necessary and proper' power."⁵⁰⁹

The issuance of regulations that give content to the meaning of "disability" would fall well within that general power.⁵¹⁰ Title I, for example, prohibits discrimination against "qualified individual[s] with a *disability* because of the *disability*."⁵¹¹ A rule helping to specify the parties who are protected by that core provision of Title I is at least "reasonably related" to that Title. It is entirely appropriate

⁵⁰³ See *Sutton*, 119 S. Ct. at 2145.

⁵⁰⁴ See 42 U.S.C. § 12116 (1994) (requiring the EEOC to issue regulations "to carry out this subchapter," i.e., Title I of the Act).

⁵⁰⁵ See *id.* § 12134(a) (requiring the Attorney General to issue regulations "that implement this part," i.e., the generally applicable provisions of Title II of the Act); *id.* § 12186(b) (requiring the Attorney General to issue regulations "to carry out the provisions of this subchapter," i.e., Title III of the Act).

⁵⁰⁶ *Sutton*, 119 S. Ct. at 2145.

⁵⁰⁷ The Court ultimately stated that "[b]ecause both parties accept these regulations [interpreting the "disability" definition] as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any." *Id.*; see also *Murphy*, 119 S. Ct. at 2138 (stating that the Court "assume[s], *arguendo*, that the EEOC regulations regarding the disability determination are valid").

⁵⁰⁸ *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Housing Auth.*, 393 U.S. 268, 280-81 (1969)).

⁵⁰⁹ Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *Colum. L. Rev.* 1, 42 (1993).

⁵¹⁰ See *Sutton*, 119 S. Ct. at 2161-62 (Breyer, J., dissenting).

⁵¹¹ 42 U.S.C. § 12112(a) (1994) (emphasis added).

to allow the EEOC to issue such a rule in the course of exercising its power “to carry out” Title I.

The *Sutton* Court appeared to believe that the inclusion of the “disability” definition in the Act’s preliminary general provisions, rather than one of the four substantive titles, bespoke a Congressional decision to withhold from the implementing agencies the power to issue regulations that relate to that definition. But there is another obvious explanation for the decision to place the “disability” definition in a preliminary section: By doing so, Congress could set forth the definition only once, rather than repeating it in each of the substantive titles.⁵¹² Perhaps the Court feared that the different agencies would adopt disparate interpretations of the “disability” definition.⁵¹³ Such a fear seems misplaced, however. Even if the agencies’ own notions of intra-governmental comity are not sufficient to do the trick, coordinating techniques within the executive branch (like OMB regulatory review) can help to ensure that the agencies do not adopt contradictory rules.⁵¹⁴ Any inconsistencies that slip through those intra-executive processes may provide a basis for the courts to invalidate the agencies’ regulations as insufficiently reasoned. And divergent, if not inconsistent, approaches may make some sense under the different titles.⁵¹⁵ In implementing Title I, which applies only to employment discrimination, the EEOC may have a more pressing need to give

⁵¹² Cf. *Sutton*, 119 S. Ct. at 2162 (Breyer, J., dissenting) (“The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives.”).

⁵¹³ Cf. *Bowen v. American Hosp. Ass’n*, 476 U.S. 610, 642 n.30 (1986) (suggesting that *Chevron* deference is inapplicable to the Rehabilitation Act because 27 agencies had issued regulations implementing the statute); *Rapaport v. U.S. Dep’t of Treasury*, 59 F.3d 212, 216–17 (D.C. Cir. 1995) (arguing that a multiple-agency exception to *Chevron* is necessary because “[t]he alternative would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all”), cert. denied, 516 U.S. 1073 (1996).

⁵¹⁴ For the most recent executive order creating centralized OMB review of major regulations, see Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note (1994).

⁵¹⁵ Cf. Duffy, *supra* note 501, at 208 (“If Congress grants multiple agencies substantive rulemaking powers, then the court should review the regulations of each agency by trying to harmonize the statute and the regulations. The separate sets of rules would be like separate subchapters of a statute, each supplementing more general provisions found in the law.”) (citation omitted).

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content to the major life activity of "working" than do the other agencies. Similarly, in implementing the transportation-specific provisions of Titles II and III,⁵¹⁶ the Department of Transportation may have greater occasion than the other agencies to elaborate on the circumstances in which mobility impairments (which may cause unique accessibility problems when they interact with various means of transportation) should count as disabilities. But any suggestion that these agencies are barred from giving content to the "disability" definition seems unwise and unnecessary.

2. Agency Power to Classify

I have suggested that impairments like HIV and epilepsy should invariably be considered to be "disabilities" because extensive evidence of society-wide stigma and discrimination indicates that many people "regard" them as substantially limiting.⁵¹⁷ The EEOC and DOJ should have the power to identify other conditions that—because of their stigmatizing effects or because of the widespread disadvantage they provoke—should invariably be considered to be "disabilities" under either an "actual disability" or a "regarded as" analysis. In the "disability" quartet, however, the Court suggested that such an approach would be illegitimate.

In particular, the *Albertsons* Court criticized the Ninth Circuit for failing to "pay much heed to the statutory obligation to determine the existence of disabilities on a case-by-case basis."⁵¹⁸ Although recognizing that monocularity "ordinarily will meet the Act's definition of disability," the Court rejected the notion that it was a disability *per se*.⁵¹⁹ And in *Sutton*, the Court found the "ignore mitigating measures" guideline inconsistent with the statutory requirement "that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.'"⁵²⁰ If mitigating measures were ignored, the Court argued, conditions like diabetes would invariably be treated as "disabilities": "Thus,

⁵¹⁶ See 42 U.S.C. §§ 12143(b), 12149, 12186(a) (1994).

⁵¹⁷ See *supra* notes 354–355 and accompanying text (discussing HIV); *supra* notes 397–404 and accompanying text (discussing epilepsy).

⁵¹⁸ *Albertsons*, 119 S. Ct. at 2169.

⁵¹⁹ *Id.* (internal quotation marks omitted).

⁵²⁰ *Sutton*, 119 S. Ct. at 2147 (quoting 42 U.S.C. § 12102(2) (1994)).

the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.”⁵²¹

These statements should not be taken as prohibiting the relevant agencies from identifying particular conditions that are “disabilities” *per se*. For one thing, the Court made these statements only in the context of the “actual” disability inquiry. The underlying concern was evident—a desire to assure that people not be treated as actually substantially limited in a major life activity on the basis of “the name or diagnosis of the impairment the person has, . . . rather [than] on the effect of that impairment on the life of the individual.”⁵²² Under the “regarded as” prong, however, a person might invoke statutory coverage on the ground that she has an impairment that frequently provokes discrimination and exclusion, regardless of the actual physical limitations it imposes.⁵²³ In such a case, it would not be relevant whether the individual herself experienced any substantial limitation: that her impairment is stigmatized in society at large would be all that matters. Once a court made an individualized determination that the plaintiff had (or was perceived as having) the impairment at issue, the question of societal discrimination could be resolved on a classwide basis without doing violence to the statutory language, and without running afoul of the discussion in *Sutton* and *Albertsons*.

Even in “actual” disability cases, there may still be some room for a *per se* analysis. In *Albertsons*, the Court recognized that “some impairments may invariably cause a substantial limitation of a major life activity.”⁵²⁴ Quadriplegia is an obvious example. Even if a person with that impairment has adjusted to the condition to the extent that it imposes no meaningful limitation on her ability to perform ordinary daily tasks, there is little doubt that the Court would hold that she has a “disability” because quadriplegia *per se* imposes a substantial limitation on the major life activity of walk-

⁵²¹ *Id.*

⁵²² 29 C.F.R. pt. 1630, app. § 1630.2(j), at 347 (1998) (quoted in *Sutton*, 119 S. Ct. at 2147).

⁵²³ See *supra* notes 198–200 (arguing for such a societal-stigma “regarded as” analysis).

⁵²⁴ *Albertsons*, 119 S. Ct. at 2169.

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ing. The Court should have little objection if the EEOC or DOJ adopts a regulation adopting that conclusion. The same kind of analysis might apply to other impairments.

And even if the implementing agencies cannot adopt regulations providing that certain impairments are disabilities *per se*, the requirement of individualized determination would not prevent them from resolving a variety of issues on a categorical basis. The *Sutton* and *Albertsons* opinions may require an individualized determination that the plaintiff is substantially limited in a major life activity, for instance, but they do not require that the meaning of "substantially limits" or "major life activity" be decided anew in each case. What is a substantial limitation in walking, for example? Rather than leaving courts to decide the issue on an ad hoc basis, the Department of Justice might decide that the permanent inability to walk without crutches is sufficiently stigmatized—and that physical structures are frequently enough constructed without the needs of crutch users in mind—that the condition constitutes a substantial limitation on the major life activity of walking. (The Department would not have to draw the line at crutches; it might say that the inability to walk without a cane, the inability to walk more than five city blocks without resting, or some other restriction, constitutes a substantial limitation). If the Department incorporated that determination in a regulation, courts would still make individualized determinations: Does this plaintiff need crutches to walk? Is the condition permanent? In making those decisions, however, they would defer to the Department's (essentially interpretive or policymaking) determination that the permanent need for crutches is a "substantial limitation."⁵²⁵

Such an approach would have particular promise if applied to the major life activity of working. "[T]here are often times when the wisest approach to a regulatory problem is to draw a sharp line, even one stated in precise numerical terms."⁵²⁶ The question of substantial limitation in working seems like a clear illustration of that

⁵²⁵ The "substantially limits" determination would be easy in such cases, but it would nonetheless be individualized. Cf. *NCAA v. Board of Regents*, 468 U.S. 85, 110 n.39 (1984) (quoting Professor Areeda's observation that "the rule of reason can sometimes be applied in the twinkling of an eye").

⁵²⁶ David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 963 (1965).

point. The EEOC might adopt detailed quantitative standards that would (at least presumptively) govern the determination whether an individual experienced a “substantial limitation” in working. It could craft a matrix that, for a given combination of age, experience, and training, would list certain types of jobs for which disqualification would constitute a substantial limitation. Disqualification from all heavy labor jobs, for example, might be an inherently substantial limitation on working.⁵²⁷ Under such a regulation, the courts would make an individualized “substantially limits” determination in each case. In making that determination, however, it would apply the agency’s generally applicable determination of what limitations are “substantial.”⁵²⁸ The agency might even go a step further and identify certain medical conditions that, based on its exploration of the relevant facts, typically result in disqualification from a “substantial” chunk of jobs. If the plaintiff had such a condition, she might be rebuttably presumed to experience a substantial limitation in working.⁵²⁹ Application of such a regulation would still involve an individualized consideration of the plaintiff’s condition; that consideration would proceed, however, under an order of proof that the agency believed (based on its substantive expertise and its policy judgment) would simplify the “disability” inquiry while at the same time effectuating the purposes of the statute. *Sutton* and *Albertsons* should not be read to bar agency efforts to create such schemes.

⁵²⁷ The EEOC’s “interpretive guidance” to its Title I regulations already takes this position. See 29 C.F.R. pt. 1630, app. § 1630.2(j), at 349 (1998). My suggestion is that the agency should incorporate judgments like this in legislative rules.

⁵²⁸ See *American Hosp. Ass’n v. NLRB*, 499 U.S. 606, 612 (1991) (“[E]ven if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.”). Although *American Hospital Association* involved the adjudicator’s own prospective resolution of certain issues, the basic point applies here as well: The prospective, categorical resolution of issues of general applicability can coexist with a requirement of individualized determination.

⁵²⁹ All of the suggestions in this paragraph are obviously inspired by the Social Security Administration’s “grid” regulation. Cf. *Heckler v. Campbell*, 461 U.S. 458, 465–68 (1983) (upholding a regulation setting forth a detailed matrix for determining whether Social Security claimants are unable to find work and thus “disabled,” as well as rejecting a requirement that the Secretary go beyond this matrix and identify specific alternative jobs that she believes unsuccessful claimants could perform).

3. Implementation by the Courts

Although more detailed regulations giving content to the "disability" definition would be preferable, the relevant agencies might see little percentage in trying to craft them, given the Court's suggestion that their regulatory authority is (at best) narrow. Even if they do make the attempt, courts cannot avoid confronting the difficult questions of applying the statute's "disability" definition in the meantime. By using broad, undefined, and value-laden terms like "substantial" and "major," the statute and its implementing regulations require the courts to search for further guidance in assessing "disability." The best way for courts to do so, I contend, is to confront honestly the questions of value that the statutory language raises. The most appropriate guide for answering those questions should come from the underlying purposes attributed to the ADA. As I have argued, the statute should be seen as aiming to prevent a socially-defined impairment-based group status from resulting in systematic exclusion from opportunities to participate in public and private life. If courts attempt candidly to explain why the plaintiffs in the cases before them are (or are not) sufficiently likely to experience systematic disadvantage to warrant civil rights protection, their reasoning will be subject to critical examination by other courts, commentators, and legislators. Through a process of case-by-case evolution, courts may eventually develop a relatively detailed body of doctrine that will make the "disability" inquiry far less open-ended than would appear from the unadorned statutory language. Even if they do not, close attention to issues of stigma and subordination will produce decisions that more closely accord with the ADA's normative justifications than do the decisions that result from lower courts' current focus on medical severity.

My discussion of whether "infertility" is a disability⁵³⁰ illustrates these points: Considering the question in the abstract, one might conclude that *Bragdon* necessarily requires (as a simple matter of logic) that infertility be deemed a statutory "disability." But viewing the question through the lens of my proposed approach, the issue becomes more complicated: Is the limitation on reproduction occasioned by the various disorders referred to as "infertility"

⁵³⁰ See *supra* notes 341–352 and accompanying text.

equally stigmatizing and equally likely to form the basis for systematic exclusion as the limitation occasioned by HIV infection? For some types of infertility, the answer may be yes; for others, no. Courts should engage these questions overtly, with their answers subject to the critical scrutiny of all interested observers.

Through such a common-law process, courts may eventually be able to simplify the “disability” inquiry significantly by determining that a variety of impairments are always, or almost always, “disabilities.” After *Sutton* and *Albertsons*, such an approach seems most likely to succeed under the societal-stigma “regarded as” analysis I have advocated in this Article.⁵³¹ If such an approach leads to the development of new categories of *per se* disability (such as HIV infection and epilepsy), potential plaintiffs and defendants will have greater notice of their rights and obligations, and the uncertainties and inefficiencies occasioned by the statute will be reduced accordingly. Even when that approach does not lead to new *per se* categories, it will likely advance certainty by providing a principle that covered entities and people with impairments can use to make sense of existing precedent and to predict how courts will rule on novel fact patterns.

I do not mean to make any general point about the value of the common law process of “reasoned elaboration.” I mean only to address the question of how courts should interpret the ADA as it is currently written. The statute speaks in vague, general terms, the implementing agencies have made no attempt to make those terms more specific through rulemaking, and the Supreme Court has suggested (though not held) that those agencies *cannot* make such an attempt. Courts are thus left to make sense out of the statutory language on a case-by-case basis. If one rejects the view that everyone who has suffered even the slightest disadvantage from even the most minor impairment is entitled to the statute’s protection, then one must draw lines between those who are and are not members of the protected class. My proposed approach, which would promote principled elaboration of the statutory “disability” definition by reference to the underlying policies served by the ADA, may not be the ideal way to construct an antidiscrimination scheme. But it is, I think, the best way for courts to implement the

⁵³¹ See *supra* notes 198–200.

scheme that Congress, the implementing agencies, and the Supreme Court have given them.

CONCLUSION

This Article has had two purposes. First, I have tried to demonstrate the value of a subordination-based approach to the ADA's "disability" definition. The vague and open-ended statutory language requires courts to look to some broader principle in interpreting that definition, and the notion of subordination seems a promising candidate for the honor. A subordination-based approach seems to work on an abstract level: It makes sense of the statute's substantive provisions, accords with the basic goals of the disability rights movement, and meshes well with diverse normative arguments for the ADA. It also provides a fruitful and attractive way of approaching concrete controversies that arise under the Act. To be sure, my proposed approach does not provide determinate answers in hard cases. But it does provide a framework within which courts can make the difficult decisions such cases require. And it provides a principle that, elaborated over time in a case-by-case manner, can make the "disability" determination far more determinate and predictable than it is now. That may not be the most profound achievement, but it may be all that we can expect from a statute that is as ambiguous as the ADA.

Second, I have tried to demonstrate that the much-criticized decisions in the Supreme Court's "disability" quartet can in fact be seen as according with the best understanding of the ADA's goals as articulated by the statute's chief advocates. Both the result and reasoning in *Bragdon* can be persuasively defended, although my analysis suggests that the Court would better have rested its decision on HIV-specific grounds. The Court's rejection of the "ignore mitigating measures" guideline in *Sutton* seems entirely correct as well, both as a matter of reading the statutory language and as a matter of implementing an antisubordination principle. Although some of the analysis in *Sutton*, *Murphy*, and *Albertsons* may be properly criticized, the Court cannot be faulted for adopting a "protected class" construction of the ADA; such a construction is the inevitable result of any honest attempt to interpret the statute. And the core holdings of *Sutton* and *Albertsons* (though not *Mur-*

phy) are consistent with an understanding of the ADA as protecting against impairment-based subordination.

Though the “disability” quartet marks the Court’s first entry into the debate over the definition of disability under the ADA, it is not likely to be the last. Definitional issues arise too frequently, and the questions resolved by those cases represent but a small fraction of the ones that the statute leaves open. Applying a subordination-based approach, and paying careful attention to the issues the Court did and did not decide in its “disability” quartet, agencies and lower courts can resolve these open questions in a manner that accords with the important value that underlies the Americans with Disabilities Act—the goal of eliminating the physical and social structures that systematically exclude people with some present, past, or perceived impairments from full participation in social, economic, and civic life.