THE AMERICANS WITH DISABILITIES ACT AND THE WORKPLACE: A STUDY OF THE SUPREME COURT'S DISABLING CHOICES AND DECISIONS

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I. INTRODUCTION

On July 12, 1990, the United States House of Representatives, by a vote of 377-28, passed H.R. 2273, the Americans with Disabilities Act (ADA or Act).[1] The following day the United States Senate voted for a companion bill, S. 933, by a vote of 91-6.[2] Senator Orrin Hatch, Republican of Utah, was moved to tears as he spoke of his late brother-in-law who had polio.[3] "This landmark legislation will mark a new era for the disabled in our Nation," said Arizona Republican Senator John McCain.[4] Then-Republican (now Independent) Senator Jim Jeffords of Vermont noted that "[t]his legislation will bring fundamental changes to American society."[5] And Senator Tom Harkin, Democrat of Iowa, gave a speech in sign language—a Senate first—and addressed his deaf brother: "I just wanted to say to my brother, Frank, that today was the proudest day of my 16 years in Congress. That today, Congress opens the door to all Americans with disabilities. The ADA is the 20th century Emancipation Proclamation."[6]

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This article is dedicated to the memory of Yale Rosenberg.

1. 136 CONG. REC. 17,296 (1990).

2. *Id.* at 17,376.

3. *See* Elaine Povich, *Senate OKs Bill Fixing Rights of the Disabled*, CHI. TRIB., July 14, 1990, at 1.

4. 136 CONG. REC. 17,364 (1990).

5. *Id.* at 17,374 (1990).

6. Povich, *supra* note 3, at 2; *see also* Matthew Brelis, *Thornburgh Applauds Disabled-Rights Law*, BOSTON GLOBE, Sept. 15, 1990, at 26 (focusing on then-United States Attorney General Richard Thornburgh's reference to the emancipating nature of the ADA).

Thereafter, on July 26, 1990, President George Herbert Walker Bush signed into law the ADA.[7] In his signing statement the President declared that the statute "represents the full flowering of our democratic principles" and "promises to open up all aspects of American life to individuals with disabilities—employment opportunities, government services, public accommodations, transportation, and telecommunications."[8] Pledging the support of his administration, President Bush stated:

> The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.[9]

Similarly, at a bill-signing ceremony at the White House, the President told a large audience that "'[e]very man, woman and child with a disability can now pass through a once-closed door to a bright new era of equality, independence and freedom.'"[10] Noting the 1989 fall of the Berlin Wall, Bush declared that the ADA "'takes a sledgehammer to another wall—one which has for too many generations separated Americans with disabilities from the freedom they could glimpse but not grasp.'"[11]

A dramatic development in civil rights law,[12] the ADA, in the view of one commentator, was "arguably the most significant civil rights and social policy legislation to become law in more than a decade."[13] Comprised of five titles covering employment (Title I, the focus of this article),[14] public entities (Title II),[15] public accom-

7. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 and scattered sections of 2 U.S.C., 29 U.S.C., and 47 U.S.C.). For more on the drafting and enactment of the ADA, see *infra* Part IV-A.

8. *Statement by President George Bush Upon Signing S. 933*, 1990 U.S.C.C.A.N. 601 (July 30, 1990).

9. *Id.* at 602.

10. Gaylord Shaw, *Bush Signs 1990 Disabilities Act*, N.Y. NEWSDAY, July 27, 1990, at 15.

11. *Id.*

12. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 325 (2002).

13. David S. Broder, *The Press's Fumble On the Hill*, WASH. POST, Dec. 5, 1990, at A25.

14. *See infra* Part III.

modations (Title III),[16] telecommunications (Title IV),[17] and "miscellaneous" matters,[18] the statute recognized and found that "individuals with disabilities continually encounter various forms of discrimination" and "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 powerlessness in our society."[19] Seeking to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals,"[20] Congress declared that the ADA provides a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," as well as "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[21]

The acclamatory views of the ADA expressed by members of Congress and by President Bush at the time of the enactment of the statute—hailing the law as a modern-day Emancipation Proclamation and likening it to the Declaration of Independence—have not been shared by a majority of the members of the United States Supreme Court in that institution's interpretation and application of the employment discrimination provisions of the statute. As discussed in this article, the Court has not read the ADA in an expansive and generous way in line with and cognizant of the acclamatory views expressed by legislators and by President Bush. Instead, the

15. Title II prohibits discrimination against a qualified individual with a disability by a "public entity," with that term defined as "any State or local government," "any department, agency, special purpose district, or other instrumentality of a State or States or local government," or "the National Railroad Passenger Corporation, and any commuter authority." 42 U.S.C. § 12131 (2000).

16. Under Title III, no public accommodation shall discriminate against any person "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." 42 U.S.C. § 12182 (2000). Private entities constitute public accommodations and the statute sets forth a listing of such entities which are covered by the title. *See* 42 U.S.C. § 12181(7)(A)–(L) (2000).

17. Title IV requires common carriers providing "telephone voice transmission services" to provide telecommunications relay services that

> provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio.

47 U.S.C. § 225(a)(3), (c).

18. *See* 42 U.S.C. §§ 12201–12213 (2000).

19. 42 U.S.C. § 12101(a)(5), (7) (2000).

20. *Id.* § 12101(a)(8).

21. *Id.* § 12101(b)(1)–(2).

Court's interpretations of the ADA's provisions and its rulings have provided rough sledding for plaintiffs,[22] have evinced a narrow conception of disability and a resulting reduction in the scope of federal disabilities discrimination law, and have not provided employees with the protection anticipated and desired by the law's proponents.

To be sure, the views of President Bush and the legislators noted above were not the only perspectives on or about the law. For some, the ADA "has been a source of considerable public consternation."[23] One commentator considers the ADA to be "one of the most monstrous pieces of legislation ever conceived, with tentacles that reach into virtually every American business."[24] Others have described the ADA as "a venture into freelance social reconstruction inspired by the kind of overwrought identity politics that ran wild in the 1970s and 1980s"[25] and "a particularly egregious example of vague legislation backed by peer pressure worthy of a junior-high clique. To question the act—even to ask for specifics—was to declare oneself an insensitive boor."[26] Complaints were made that the ADA is a "Lawyers Annuity Act"[27] and a gift "delivered to the plaintiffs' bar,"[28] that the law "set a modern world record for legislative vagueness that will not soon be broken,"[29] and that the statute allows "the disabled lobby . . . [to] wag[e] warfare

22. The difficulties plaintiffs have experienced in prevailing in employment-related ADA suits decided by the Court are also present in the lower courts. *See, e.g.*, Amy L. Allbright, *Employment Decisions under the ADA Title I—Survey Update*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 508 (2001); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248 (2001).

23. RONALD A. CASS, THE RULE OF LAW IN AMERICA 101 (2001).

24. LARRY ELDER, SHOWDOWN: CONFRONTING BIAS, LIES, AND THE SPECIAL INTERESTS THAT DIVIDE AMERICA 284 (2002).

25. WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 87 (1997).

26. Virginia I. Postrel, *Trust-Me Laws*, BALT. SUN, Dec. 17, 1990, at 9A.

27. Carolyn Lochhead, *New Law on the Disabled to Make a Huge Impact*, S.F. CHRON. Nov. 14, 1991, at A1.

28. CATHERINE CRIER, THE CASE AGAINST LAWYERS 187 (2002).

29. John Leo, *The Age of Litigation*, U.S. NEWS & WORLD REPORT, Mar. 30, 1992, at 22. *See also* Kevin T. Higgins, *Handicapped Rights: Good Intentions, Bad Policy? (Americans with Disabilities Act)*, BUILDING SUPPLY HOME CENTERS, Dec. 1, 1990, at 20, *available at* 1990 WL 2548311 ("By using deliberately vague terms in [the] ADA, legislators have crafted a law that many retailers view as bordering on the bizarre.").

against every other citizen."[30] Justice Sandra Day O'Connor, in an extrajudicial statement, commented that the ADA illustrates what happens when "sponsors are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together. That act is one of those that did leave uncertainties as to what Congress had in mind."[31] And Professor Richard Epstein believes that "the entire statutory scheme should be scrapped" and that the "disabled should be allowed to sell their labor at whatever price, and on whatever terms, they see fit."[32]

Given the acclamatory view of the ADA held by some and the skeptical view held by others, it was a certainty that the application of the ADA and the operative meaning of its phrases and terms would be contested in court cases brought by plaintiffs alleging that certain acts of a defendant violated the law's provisions and by de-

30. PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 150 (1994).

31. Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2. Professor Chai Feldblum, a professor of law at Georgetown University who assisted in the drafting of the ADA, disagreed with O'Connor. "This law was the product of two years of careful research, drafting and negotiation between disability-rights lawyers and business community lawyers." *Id.* Robert Burgdorf, who drafted the original Americans with Disabilities Act legislation introduced in Congress in 1988, also has noted the care taken in promulgating the ADA:

> One feature which makes the ADA stand out from prior federal civil rights laws is the extensive statutory language devoted to defining discrimination and establishing standards to prohibit it. Members of Congress were apparently unwilling to leave the development of legal standards under the Act to the vagaries of the regulatory and judicial processes, and preferred to provide extensive guidance as to how the requirements of the Act were to be interpreted and applied. The desire for more detailed provisions also reflects congressional dissatisfaction with administrative and judicial interpretations and applications of prior federal disability rights provisions that had been broader and more abbreviated in their wording.

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, 509–10 (1991).

32. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 484 (1990). In Epstein's view, the ADA

> effectively ignor[es] the unmistakable costs that other people bear in doing business with the disabled. Even if no one is at fault for X's disability, having to deal with X, given that disability, is costlier than having to deal with Y, who lacks that disability. Business is harder to conduct as the pace of transaction slows.

Id. at 486. For a critique of Epstein's position, see Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314 (2000).

fendants contending that they did not violate the law. As it is "the province and duty of the judicial department to say what the law is,"[33] the courts provide the answers to the questions arising under the ADA, with the United States Supreme Court having the final and definitive say.

The Court, to be fair, has interpreted and applied the ADA in a number of recent cases, with its initial rulings coming down on the side of plaintiffs. In *Pennsylvania Department of Corrections v. Yeskey*,[34] the Court held that the statute's prohibition of discrimination by public entities applied to and protected inmates of state prisons.[35] In *Bragdon v. Abbott*,[36] the Court held that asymptomatic infection with the human immunodeficiency virus (HIV) was a disability under and within the meaning of the ADA.[37] A later decision, *PGA Tour, Inc. v. Martin*,[38] held that the public accommodations provision of the statute required a professional golf association to allow a disabled golfer to use a golf cart, notwithstanding the association's

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

34. 524 U.S. 206 (1998).

35. Title II of the ADA provides that public entities shall not discriminate against qualified individuals with disabilities and includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government" in the definition of "public entity." 42 U.S.C. § 12131(1)(B) (2000). A unanimous Court, in an opinion by Justice Scalia, concluded that the ADA's "language unmistakably includes State prisons and prisoners within its coverage." *Yeskey*, 524 U.S. at 209. In the Court's view, "[s]tate prisons fall squarely within the statutory definition of 'public entity'" and "the plain text of Title II of the ADA unambiguously extends to state prison inmates." *Id.* at 210, 213.

36. 524 U.S. 624 (1998).

37. *Id.* As discussed below, the ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. § 12102(2)(A) (2000). Holding that HIV infection "is an impairment from the moment of infection," the Court in *Bragdon* reasoned that the infection "must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection." *Bragdon*, 524 U.S. at 637. The Court determined that the plaintiff's major life activity of reproduction was substantially limited in two ways. "First, a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected." *Id.* at 639. "Second, an infected woman risks infecting her child during gestation and childbirth, *i.e.*, perinatal transmission." *Id.* at 640. The Court then concluded: "Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation." *Id.* at 641. Notably, the Court did not address and did not decide whether HIV infection constitutes a *per se* disability under the ADA. *See id.* at 642.

38. 532 U.S. 661 (2001). For an excellent discussion of this case, see Frederick Schauer, *The Dilemma of Ignorance:* PGA Tour, Inc. v. Casey Martin, 2001 SUP. CT. REV. 267.

rule mandating walking by competitors in its events.[39] And, in *Olmstead v. Zimring*,[40] the Court held that the ADA requires states to provide community-based treatment for persons with mental disabilities, and that states are entitled to consider the available resources in determining whether such placement is appropriate.[41]

Other Supreme Court decisions involving claims by employees alleging that employers violated Title I of the ADA were not as favorable to those seeking the protection of the statute. In one apparent victory for plaintiffs, the Court concluded that an employee who sought and received federal social security benefits was not automatically estopped from pursuing an ADA lawsuit.[42] Yet, in three other cases decided in 1999, the Court held that plaintiffs with severe myopia who applied for commercial airline pilot positions were not disabled;[43] that an employee whose hypertension was controlled by medication was not protected by the statute;[44] and that an employer did not violate the ADA when it fired an employee who suffered from monocular vision.[45] Subsequent decisions held that individuals could not bring ADA Title I suits seeking monetary

39. Casey Martin's disability, a progressive and degenerative circulatory disorder known as Klippel-Trenaunay-Weber Syndrome, caused severe pain in and atrophy of his right leg and rendered him unable to walk eighteen holes on a golf course. Martin asked the Professional Golfers Association (PGA) for a waiver of its rule requiring players to walk the golf course during the third and final stage of a qualifying tournament for playing privileges on the PGA tour or another professional tour. When that request was denied by the PGA, Martin sued under the ADA. The Supreme Court concluded that a waiver of the walking rule would not fundamentally alter the nature of the event he was participating in, and that the walking rule was "not an essential attribute" of golf nor "an indispensable feature of tournament golf." *PGA Tour, Inc.*, 532 U.S. at 685; *see also id.* at 689 (noting that "the walking rule is at best peripheral to the nature of [the PGA's] events"). The essence of golf, in the Court's view, "has been shotmaking—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible." *Id.* at 683.

40. 527 U.S. 581 (1999).

41. *Id.* at 607. A later non-employment ADA case, *Barnes v. Gorman*, 536 U.S. 181 (2002), held that punitive damages could not be awarded in private suits brought under Title II of the ADA and the Rehabilitation Act.

42. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999), discussed *infra* notes 81–97 and accompanying text. As discussed *infra*, this apparent victory for plaintiffs has not prevented lower courts from deciding that plaintiffs in post-*Cleveland* cases were estopped from bringing ADA actions.

43. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), discussed *infra* notes 112–56 and accompanying text.

44. *See* Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999), discussed *infra* notes 164–71 and accompanying text.

45. *See* Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999), discussed *infra* notes 172–77 and accompanying text.

damages from states;[46] that an employee claiming that a disability substantially limited her ability to perform manual tasks had to show that the impairment severely restricted activities that were of central importance to most people's daily lives, and not just that the impairment limited the employee's ability to perform work-related tasks;[47] that, in the event of a conflict between an employer's seniority system and an employee's requested reasonable accommodation for reassignment, the employer's reliance on seniority rules is ordinarily sufficient;[48] that an employer's refusal to hire a worker on the ground that doing so would pose a direct threat to that individual's health or safety did not violate the ADA;[49] and that the courts should resort to the common law when determining whether individuals are "employees" within the meaning of the ADA.[50]

This article examines these ADA-in-the-workplace decisions and considers and critiques the Court's view and interpretation[51] and application of a statute proclaiming a new and empowering era for the nation's disabled. The discussion proceeds as follows: Part II provides an overview of various interpretive methodologies employed in the judicial construction of statutes. Part III examines the interpretive choices made by the Court as it decides the meaning of the ADA in the employment setting. Part IV considers the lessons to be learned by those who contend that the Court's rulings have not provided optimal protection for the disabled and are not faithful to or reflective of the intent of Congress. As urged in that part,

46. *See* Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001), discussed *infra* notes 220–64 and accompanying text.

47. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), discussed *infra* notes 265–77 and accompanying text.

48. *See* US Airways, Inc. v. Barnett, 535 U.S. 391 (2002), discussed *infra* notes 278–94 and accompanying text.

49. *See* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002), discussed *infra* notes 295–330 and accompanying text.

50. *See* Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003), discussed *infra* notes 331–42 and accompanying text.

51. In discussing statutory interpretation I am guided by Aharon Barak's description of the essence of interpretation:

> Interpretation, by which I mean rational activity giving meaning to a legal text (whether it be a will, contract, statute, or constitution), is both the primary task and the most important tool of a supreme court. Interpretation derives the legal meaning from the text. Put another way, interpretation constitutes a process whereby the legal meaning of a text is "extracted" from its linguistic meaning. The interpreter translates "human" language into "legal" language. He changes "static law" into "dynamic law" by transforming a linguistic text into a legal norm.

Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 64 (2002).

proponents of the ADA and other statutes must engage in anticipatory interpretation: they must examine and make reasoned predictions as to the courts' likely approaches to and interpretations of statutes, and (if possible, given the realities of the legislative process) should strive to craft statutory language that eliminates or at least reduces the likelihood of judicial readings contrary to advocates' views and understandings of a law's expected and desired outcomes.

II.
AN OVERVIEW OF INTERPRETIVE METHODOLOGIES

In this age of statutes,[52] the federal judiciary performs a critical role. Under the separation-of-powers doctrine[53] applicable to the nation's governmental structure and the prescriptions of the Constitution,[54] the courts interpret and apply laws in cases and controversies brought to the courts for adjudication and decision. In performing this judicial function it has been urged that the judiciary, subordinate to the legislature,[55] should only declare what the law is, and should not make law or "substitute [its] own policy preferences through the creation and application of public values canons for the preferences of Congress as articulated in the words and history of the statute."[56] Viewing the matter differently, others

52. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

53. This doctrine was popularized by Baron de Montesquieu prior to the founding of the United States. *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS: A COMPENDIUM OF THE FIRST ENGLISH EDITION (David W. Carrithers ed., 1977); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 46 (2002) (discussing the twentieth century expansion of the judicial role into political territory traditionally occupied by Congress); Jack N. Rakove, *Judges: Conferring a Lifetime of Ideology*, N.Y. TIMES, May 13, 2001, at WK5 (suggesting that the political dimensions of the judicial appointment process might compromise judicial impartiality and independence and the virtues of separation of powers).

54. *See* U.S. CONST. art. I, §§ 1, 8, cl. 3, 7, cl. 2; *id.* art. II, § 1. *See also* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1650–51 (2001).

55. *See generally* Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair, in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 116 (Sanford Levinson & Steven Mailloux eds., 1988); Barak, *supra* note 51, at 40–41; Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); James M. Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886 (1930).

56. Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743, 744 (1992).

have argued that judicial lawmaking and policymaking are necessary and inevitable,[57] as it is predictable that legislators will not be able to anticipate all of the questions that will arise with regard to the meaning and application of statutory provisions.[58] Where such unanticipated issues arise, courts must resolve disputes on the basis of a rule or standard which may not be expressly addressed in or answered by the statutory text and, in providing answers to statutory questions, are called upon to fill in statutory gaps.[59] The judiciary has developed various interpretive methodologies and techniques and has employed these instruments of construction as it seeks to

57. *See* James B. Beam Distilling v. Georgia, 501 U.S. 529, 546 (1991) (White, J., dissenting) ("judges in a real sense 'make' law"); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 61 (2003) (contending that "judges make up much of the law that they are purporting to be merely applying" and "while the judiciary is institutionally and procedurally distinct from the other branches of government, it shares lawmaking power with the legislative branch"); Ray Forrester, *Truth in Judging: Supreme Court Opinions as Legislative Drafting*, 38 VAND. L. REV. 463, 464 (1985) ("[I]t is commonplace to recognize that the Supreme Court is a lawmaking body."); Erwin N. Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U. L. REV. 787, 801 (1983) ("Everyone knows that judges do make law, and should make law. It is rather a question of how much law they should make."); Erwin N. Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 94 (1960) ("[I]t is clear that judges do 'make law,' and have to do so . . . .").

58. On this point, consider H.L.A. Hart's view:

> [H]uman legislators can have no . . . knowledge of all the possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim. . . . When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way that best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of th[e] rule, of a general word.

H.L.A. HART, THE CONCEPT OF LAW 128–29 (2d ed. 1994). *See also* FRIEDRICH A. HAYEK, RULES AND ORDER 119 (1973) ("[N]ew situations in which the established rules are not adequate will constantly arise" and judges must formulate new rules).

59. *See* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1420 (1987) ("The national legislature expresses itself too often in commands that are unclear, imprecise, or gap-ridden . . . [Such statutes] are susceptible of diverse interpretation [and] inspire litigation."). For additional discussions on judicial gap-filling, see generally Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997); Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); Eric Schnapper, *Statutory Misinterpretation: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095 (1993); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509 (1994).

"reach accurate outcomes or promote other policy goals in deciding cases and controversies."[60]

A. Intentionalism

A judge engaged in the enterprise of construing statutes and in search of a resolution of a case presenting the parties' contested interpretations of a statutory provision has a menu of interpretive approaches at her disposal. One approach, intentionalism, seeks to discern the actual intent and understanding of a statute as held by the legislators who enacted the law.[61] That intent may be found in statutory text and/or legislative history (for example, conference and committee reports, floor debates, and statements by a bill's cosponsors).[62] Intent may also be determined through reconstructed intent analysis, by which a judge attempts to "put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him."[63] This methodology has been criticized for its search for the "obvious fiction" of the intent of a multimember legislature whose participants

60. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2108 (2002). This discussion of interpretive methodologies is not and is not intended to be exhaustive. For additional discussions and materials, see generally REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 88–115 (1991); WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999); Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754 (1966); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (1991); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565 (1997).

61. *See* DICKERSON, *supra* note 60, at 88.

62. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 327 (1990); James N. Landis, *supra* note 55, at 888–89; Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217 (1992).

The use of legislative history, controversial in some quarters, has been likened to "looking over the crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983); *see also* Convoy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

63. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286–87 (1985); *see* RICHARD A. POSNER, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189–90 (1986–87); *see also* Burnet v. Guggenheim, 288 U.S. 280, 285 (1933) (stating that a judge should ask "which choice is it the more likely that Congress would have made?").

usually do not have a defined or definable specific intent with regard to many or most applications of a statute.[64]

B. Purposivism

A second approach, purposivism, focuses on statutory purpose and a court's understanding of the problems addressed and the ends sought by the legislature. This discernment of purpose may be "sympathetic and imaginative,"[65] and has in some instances led courts to issue decisions on the basis of statutory purpose that are not in accordance with the literal words of the law.[66] Several objections to purposivism have been posed. Reliance on and the elevation of purpose over text can override and effectively modify, if not nullify, language used by the legislature.[67] Further, the purposivist approach assumes that a judge can determine a statute's relevant and operational purpose or purposes, a problematic proposition where no purpose is expressly set forth in a statute, or when a law has more than one stated or plausible purpose.[68]

C. Textualism

A third and currently prominent methodology, textualism, has been championed by United States Supreme Court Justice Antonin Scalia and others.[69] For the textualist, who is skeptical of legislative history,[70] the statutory text "is the law, and it is the text that must be

64. *See* ESKRIDGE, *supra* note 60, at 16; LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 119 (2001); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 40 (1993).

65. POPKIN, *supra* note 60, at 207.

66. For a prominent example of a decision based not on the statute's language but on its purpose, see *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), discussed and analyzed in Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998). For additional examples, see *United Steelworkers, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201 (1979), and *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940).

67. Thus, there is a risk that a judge's determination of purpose may effectuate a goal neither contemplated nor desired by the legislature, thereby awarding a faction or interest group "a benefit it had been unable to win in the legislative arena." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 276, 277 (1990).

68. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 124 (1990).

69. *See* Rosenkranz, *supra* note 60, at 2138; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1325 (1990).

70. *See, e.g.*, Crosby v. National Foreign Trade Council, 530 U.S. 363, 390 (2000) (Scalia, J., concurring in the judgment) (stating that legislative history is

observed."[71] Legislatures "have authority only to pass statutes, not to form abstract 'intentions' "[72] and what counts is the plain meaning of the pertinent text—"that is, given the ordinary meaning of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?"[73] In deciding upon textual meaning and signification, a court may turn to dictionary definitions, case law, the statutory text and related provisions, "statutory clear statement rules setting forth policy presumptions that will govern absent clear textual contradiction," and canons of construction.[74] Critics of textualism have argued that construing statutes "through plain meaning possesses a chameleonic quality that spans the color spectrum," for "English as a language lacks precision. Virtually all words have a multiplicity of meanings, as the most nodding acquaintance with a dictionary will attest."[75]

D. Deference

In those instances where an administrative agency is empowered to implement a statute, the question of judicial deference to the agency's determination will arise. Under one approach, known as *Skidmore* deference, an agency's rulings, interpretations, and opinions concerning the meaning and application of a statute "constitute a body of experience and informed judgment to which

not "a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute . . . ."); Edwards v. Aguillard, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting) ("[l]egislative histories can be contrived and sanitized . . . ."); Wallace v. Christensen, 802 F.2d 1539, 1559–60 (9th Cir. 1986) (Kozinski, J., concurring in the judgment) ("[L]egislative history can be cited to support almost any proposition, and frequently is."); Hirschey v. Federal Energy Regulation Comm'n, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring) (expressing doubt about and warning against judicial deference to committee reports).

71. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997). *See also* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998) (stating that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").

72. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 83 (2000).

73. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38 (1994).

74. *Id.* at 42–43; *see generally* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION (6th ed. 2001); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992).

75. SEGAL & SPAETH, *supra* note 64, at 34.

courts and litigants may properly resort for guidance."[76] A separate deferential analysis, set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[77] If this inquiry is answered in the negative, a court

> does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[78]

If the answer to the latter question is yes, the court is to defer to the agency's view.[79]

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76. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (reasoning that the weight given to the agency's judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

For more recent applications and discussions of *Skidmore* deference, see *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735 (2002); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105 (2001).

77. 467 U.S. 837, 842–43 (1984); *cf.* Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) (asking whether "the agency interpretation is not in conflict with the plain language of the statute . . ." instead of asking whether Congress directly spoke to the issue before a court, as did the *Chevron* Court). In the view of one commentator, "[t]his reformulation is obviously designed to make step one of the *Chevron* doctrine a purely textualist inquiry. No consideration of legislative history or of the 'intent' of Congress is mentioned. 'Plain language,' 'structure and language,' and 'the text' are all that count." Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 358 (1994).

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

79. The reader should be aware that a third analysis, *Seminole Rock* deference, calls on courts to "look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); *see* Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 541 (2000) (explaining that this type of deference "means that an agency's interpretation of its own regulations are conclusive and binding on the courts, so long as the agency's interpretation is neither arbitrary nor capricious.").

III.
THE COURT'S ADA AND EMPLOYMENT DECISIONS

The interpretive methodologies[80] surveyed in the preceding section form the backdrop for the focus of the article—the Supreme Court's construction of the ADA in workplace cases. Of particular relevance to this enterprise are questions concerning the Court's choices and selection of methodologies in resolving the statutory issues before it. Does the text of the ADA provide "plain meaning" answers to the questions raised in the litigation before the Court? What role, if any, has legislative history played? Has the Court engaged in purposivist analysis and, if so, how has it discerned the pertinent statutory purpose(s)? Has the Court deferred or not deferred to administrative regulations, in particular those of the Equal Employment Opportunity Commission (EEOC), with respect to the meaning and application of the ADA's provisions? Has the Court correctly identified and effectuated the Congressional command, or does the Court's ADA-in-the-workplace jurisprudence instead reflect its own views of the extent to which the ADA's regulatory regime does and should require employers to change their behavior and practices? These questions should be kept in mind as we turn to a discussion of the Court's decisions and its readings and application of various provisions of Title I of the ADA.

A. Judicial Estoppel

In its first employment-related ADA decision, *Cleveland v. Policy Management Systems Corporation*,[81] the Court considered a case brought by a plaintiff who suffered a stroke and, after losing her job, applied for and received Social Security Disability Insurance (SSDI) benefits from the federal Social Security Administration (SSA). One week before the award of the benefits, the plaintiff brought an ADA action in federal court alleging that her employer

80. Some or all of these methodologies can be employed by judges in a particular case. One commentator has noted that, in order "to achieve his desired objective, Justice Brennan would apply 'Intentionalism,' 'Literalism,' 'Textualism,' and 'Purposivism,' or any combination thereof, so long as he could reach the result he wanted." J. Ruggero J. Aldisert, *The Brennan Legacy: The Art of Judging*, 32 LOY. L.A. L. REV. 673, 680 (1999) (footnote omitted). In a recent example of resort to several methodologies in one opinion, a unanimous Court, in defining the term "employee" under the National Labor Relations Act, 29 U.S.C. § 152(3), referred to and relied on text, dictionary definitions, statutory purpose, Congressional reports and floor statements, and precedent, and deferred to the views of the National Labor Relations Board under *Chevron*. NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995).

81. 526 U.S. 795 (1999).

violated the ADA by terminating her employment without reasonably accommodating her disability.[82] The question before the Supreme Court was whether there was a special presumption significantly inhibiting a recipient of SSDI benefits from simultaneously maintaining an ADA action claiming that the plaintiff could perform the essential functions of the job with reasonable accommodations. A unanimous Court, in an opinion by Justice Breyer, concluded that a plaintiff who sought and received SSDI benefits is not automatically estopped from pursuing an ADA claim, and that there is no "strong presumption against the recipient's success under the ADA."[83] But, the Court stated, a plaintiff must explain why her SSDI claim (that she is unable to work because of a disability) is not inconsistent with her ADA claim (that she can perform the essential functions of the job with reasonable accommodations).[84]

Both the Social Security Act (SSA) and the ADA define the term "disability." The SSA provides that a disability is an "inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[85] The impairment must be "of such severity that [the claimant] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ."[86] The ADA's different definition of "disability," modeled on the definition of disability found in the Rehabilitation Act,[87] provides that a disability is:

82. Under the statute, a "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position such individual holds or desires." 42 U.S.C. §12111(8) (2000). "Reasonable accommodation," in turn, is defined as including "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" and "job restructuring, part-time or modified work schedules, reassignment to a vacant position," and other accommodations for disabled individuals. *Id.* § 12111(9).

83. *Policy Mgmt. Sys. Corp.*, 526 U.S. at 797–98.

84. *Id.* at 798.

85. 42 U.S.C. § 423(d)(1)(A) (2000).

86. *Id.* § 423(d)(2)(A).

87. As amended in 1974, the Rehabilitation Act, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973), defined "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (1974). *See also* 42 U.S.C. § 3602(h)(1) (2000) (Fair Housing Amendments Act of 1988 definition

(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.[88]

As noted *supra*, the ADA prohibits discrimination against a qualified individual with a disability who can perform the essential functions of a job with or without reasonable accommodation.[89]

Applying these different definitions of "disability" in *Cleveland* and noting that the case before it did not present conflicting factual matters,[90] the Court found no inherent conflict in claims brought under the SSA and the ADA such that a special judicial presumption ordinarily preventing a plaintiff from asserting an ADA claim should apply. The two claims "can comfortably exist

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of "handicap"). As noted by the Supreme Court, "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." Bragdon v. Abbott, 524 U.S. 624, 631 (1998). Congress specifically called for such a construction of the ADA: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a) (2000).

88. 42 U.S.C. § 12102(2) (2002). Regulations define "physical or mental impairment" to mean:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (2002). Disorders and conditions constituting physical impairments include "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism." 45 C.F.R. pt. 84, app. A, at 343 (2002).

89. *See supra* note 82 and accompanying text.

90. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999). The case did not "involve directly conflicting statements about purely factual matters, such as 'The light was red/green,' or 'I can/cannot raise my arm above my head.'" *Id.* at 802. An individual's claim of disability within the meaning of the SSA

> differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, 'I am disabled for purposes of the Social Security Act.' And our consideration of this latter kind of statement consequently leaves the law related to the former, purely factual kind of conflict where we found it.

Id.

side by side" in a number of situations.[91] The ADA considers reasonable accommodations when defining a qualified individual with a disability, the Court noted, while the SSA's disability determination does not take reasonable accommodation into account and an SSDI applicant does not have to refer to accommodations when applying for benefits. "The result is that an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without it*."[92]

Moreover, the Court continued, the Social Security Administration, in order to efficiently administer a large system, simplifies and does not consider a number of factors and differences of potential relevance to the ability of an individual to perform a job. A person can qualify for SSDI benefits and still be capable of performing the essential functions of a job, and persons who work can receive full SSDI benefits during a nine-month trial period.[93] "And the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision."[94] In addition, the Court noted that a person who has applied for but not yet received SSDI benefits may pursue alternative theories as "any inconsistency in the theory of the claims is of the sort normally tolerated by our legal system . . . . We do not see why the law in respect to the assertion of SSDI and ADA claims should differ."[95]

Given its reading and interpretation of the two statutes, the Court declined to apply a special legal presumption to ADA cases brought by SSDI applicants/recipients. Genuine, non-presumptive conflicts may arise, however, when an ADA plaintiff's sworn application for disability benefits states that she is "unable to work," an assertion that

> will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total

91. *Id.* at 803.

92. *Id.*

93. *See id.* at 804–05; 42 U.S.C. §§ 422(c)(4)(A), 423(e)(1) (2000); 20 C.F.R. § 404.1592 (2003).

94. *Cleveland*, 526 U.S. at 805.

95. *Id.*

> disability claim. Rather, she must proffer a sufficient explanation.[96]

That explanation is to be provided and considered under the following approach:

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."[97]

What has been the impact of *Cleveland*? Consider two decisions by the United States Court of Appeals for the Third Circuit, one decided before and the other after the Supreme Court's ruling in *Cleveland*. *McNemar v. Disney Store, Inc.*[98] concluded that the plaintiff, who was HIV-positive, was judicially estopped from pursuing an ADA action because he had asserted in applications for federal and state disability benefits (under penalty of perjury) that he was totally and permanently disabled.[99] Thus, the court determined, the plaintiff "has represented to one federal agency and to the agencies of two different states that he was totally disabled and unable to work" while also claiming that he was a qualified individual with a disability who could perform the essential functions of his job and was therefore protected by the ADA.[100] Plaintiffs cannot speak out of both sides of their mouths, the court stated.

> Nothing grants a person the authority to flout the exalted status that the law accords statements made under the penalty of perjury. Nothing permits one to undermine the integrity of the judicial system by "playing fast and loose with the courts by asserting inconsistent positions." Nothing vests such immunity.[101]

96. *Id.* at 806.

97. *Id.* at 807.

98. 91 F.3d 610 (3d Cir. 1996).

99. In applications for federal social security benefits the plaintiff swore that he was unable to work because of a disabling condition. *Id.* at 615. His state disability benefits application similarly stated that he was unable to perform the duties of his regular occupation. *Id.* at 616. The same assertion of inability to work was made by the plaintiff in an application seeking deferment of repayment of student loans. *Id.*

100. *Id.* at 618.

101. *Id.* at 620 (internal citation omitted).

In a post-*Cleveland* decision, *Motley v. New Jersey State Police*,[102] a majority of a three-judge panel of the same court of appeals dismissed the ADA claim of a former state trooper who had stated in an application for an accidental disability pension that he was permanently and totally disabled. Focusing on what it described as factual inconsistencies between his successful state claim of total disability and his subsequent ADA claim that he was a qualified individual with a disability, the court concluded that the plaintiff failed to adequately explain his inconsistent positions. To prevail on the latter claim, the Court asserted that the plaintiff had to establish that he could perform the essential functions of a trooper position with or without reasonable accommodation. However, in his state disability hearing, the trooper had established that he had been permanently and totally incapacitated as the result of a January 1990 incident and was awarded and receiving monthly disability payments. While his claim was not (and under *Cleveland* could not be) automatically estopped because of his prior representations or determinations of disability, "the attainment of disability benefits is certainly some evidence of an assertion that would be inconsistent with the argument that the party is a qualified individual under the ADA."[103] Opining that the trooper was not being "completely honest"[104] and that his claims were "unreconcilable,"[105] the court concluded that the trooper's statements regarding his injuries and a diagnosis of a state medical board that he was permanently incapacitated (which he did not contest)[106] "are patently inconsistent with his present claims that he was a 'qualified individual' under the ADA."[107]

One analyst has posited that *Cleveland* "should put an end to the widespread practice of barring disability benefit recipients from

102. 196 F.3d 160 (3d Cir. 1999).

103. *Id.* at 166.

104. *Id.*

105. *Id.*

106. The court concluded that the state medical board "presumably took the fundamental job requirements for state police officers, along with reasonable accommodations such as light duty, into consideration when it chose to grant Motley full pension benefits." *Id.* The dissenting judge argued that "[t]his presumption is unfounded, and the majority provides no authority for its conclusion. The conclusion is tantamount to determining that no statutory explanation is possible in this case." *Id.* at 171 n.8 (Rendell, J., dissenting).

107. *Id.* at 167. In dissent, Judge Rendell argued that, because the case had been decided by the district court prior to the Supreme Court's *Cleveland* decision, it should have been remanded to the district court to provide the trooper with the opportunity to explain the inconsistency. *See id.* at 169.

bringing cases under Title I of the ADA."[108] However, as *McNemar* and *Motley* demonstrate, *Cleveland's* victory for ADA plaintiffs was more apparent than real. In the wake of *Cleveland*, courts have exhibited no difficulty in finding that claimants have not explained contradictions between assertions made when seeking disability benefits and subsequent ADA claims that they are qualified individuals with a disability who are in fact able to work.[109] These cases address situations in which

> an employee attempts to whipsaw his employer by first obtaining benefits or concessions upon a representation of total disability to work full time and then seeking damages for the employer's failure to accommodate the disability, which the employee now seeks to prove was not total after all.[110]

Protecting employers from this "whipsaw" has been the order of the day.[111]

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108. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 30 (2000).

109. *See, e.g.*, DeVito v. Chicago Park Dist., 270 F.3d 532 (7th Cir. 2001) (plaintiff's implicit representation that he could not work full time and explicit representation that his condition had not improved foreclosed subsequent ADA claim); Lee v. City of Salem, Indiana, 259 F.3d 667 (7th Cir. 2001) (employee explanation for inconsistency between SSDI and ADA claim insufficient and ADA claim foreclosed); Holtzclaw v. DSC Communications Corp., 255 F.3d 254, 258 (5th Cir. 2001) (employee did not explain inconsistency between unequivocal statements in application for disability benefits that he was "unable to work at all" and would never be able to return to work and ADA-based assertion that he was qualified individual with a disability); Lloyd v. Hardin County, 207 F.3d 1080, 1084–85 (8th Cir. 2000) (holding that employee's explanation of prior allegation of total disability in application for Social Security benefits failed to overcome presumption that he was not disabled under the ADA); Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 7 (2d Cir. 1999) (custodian's ADA claim of ability to function in other than sedentary position foreclosed by prior inconsistent statements in social security and workers' compensation proceedings).

For cases in which inconsistencies were adequately explained by employees, *see, e.g.*, Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001); Giles v. Gen. Elec. Co., 245 F.3d 474 (5th Cir. 2001); Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495 (7th Cir. 2000); Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000).

110. *DeVito,* 270 F.3d at 535.

111. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 947 (2003) ("*Cleveland* seems to have changed very little. Many plaintiffs continue to be precluded from asserting ADA claims because of statements they earlier made on disability benefits applications—statements that are not, in principle, inconsistent with their ADA claims."); Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417, 436 (2003) ("The *Cleveland* Court has thus made it fairly easy for district courts to grant defendant summary judgment motions in these cases, except when plaintiffs can convince trial judges that their

B. The 1999 Trilogy

On June 22, 1999, the Court issued three significant decisions dealing with and rejecting employees' claims that their employers discriminated against them in violation of the ADA.

In *Sutton v. United Air Lines, Inc.*,[112] the plaintiffs, twin sisters with severe myopia, applied for commercial airline pilot positions and were not hired because they failed to meet the employer's minimum vision requirement of uncorrected visual acuity of 20/100 or better. The sisters' uncorrected visual acuity was 20/200 or worse in the right eye and 20/400 or worse in the left eye; with corrective lenses their vision was 20/20 or better.[113] Challenging the employer's action, the plaintiffs filed suit alleging that they had been discriminated against on the basis of their disability in violation of the ADA, and that they were disabled within the meaning of the statute because they had or were regarded as having a substantially limiting impairment that limited a major life activity. The district court, affirmed by the United States Court of Appeals for the Tenth Circuit, held that the sisters were not substantially limited in a major life activity because their visual impairments could be fully corrected. The court further held that the sisters had not sufficiently alleged that they were disabled because the sisters only asserted that they were unable to satisfy the requirements of one job, that of global airline pilot.[114]

Affirming the judgment of the Tenth Circuit, the Supreme Court held that courts must consider corrective and mitigating measures in determining whether an individual is disabled under the ADA, and that the plaintiffs failed to state a claim that the employer regarded them as disabled. As for the first holding, the Court's opinion, authored by Justice O'Connor for herself and six other justices, stated that the question of the plaintiffs' statutory disability under subsection (A) of the statute "turn[ed] on whether disability is to be determined with or without reference to corrective measures."[115] The parties agreed that the EEOC, the Depart-

prior Social Security disability assertions are not entirely inconsistent with their current ADA employment discrimination allegations.").

112. 527 U.S. 471 (1999).

113. *Id.* at 475.

114. *See* Sutton v. United Airlines, Inc., 1996 WL 588917 (D. Colo. 1996), *aff'd*, 130 F.3d 893 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999). The Tenth Circuit's opinion was contrary to the views of the other federal courts of appeals addressing the issue of corrective impairments and the determination of disability. *See also Sutton*, 527 U.S. at 495–96 (Stevens, J., dissenting) and cases cited therein.

115. *Sutton*, 527 U.S. at 481.

ment of Justice (DOJ), and the Department of Transportation (DOT) were authorized by the statute to issue implementing regulations for Titles I through V of the statute and to provide technical assistance to individuals and institutions. Indeed, the EEOC issued an Interpretive Guidance providing that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[116] Justice O'Connor concluded the statute did not delegate to any agency the authority to interpret the term "disability," a term found in the ADA's generally applicable provisions and not in the titles of the Act.[117] But, because the parties accepted the validity of the regulations and because "determining their validity [wa]s not necessary to decide th[e] case, [the Court had] no occasion to consider what deference they [we]re due, if any."[118]

Justice O'Connor determined that evaluating persons "in their hypothetical uncorrected state" when making disability determinations was "an impermissible interpretation of the ADA."[119]

> Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or to 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.[120]

Having determined that the terms of the statute could not be read to allow the evaluation of an ADA plaintiff in her uncorrected state, Justice O'Connor saw "no reason to consider the ADA's legislative history."[121] That history included United States Senate and House of Representatives committee reports concluding that the question whether a person has a disability should be assessed without regard to or consideration of the availability of mitigating measures. For instance, the report of the House Education and Labor Committee explained:

116. 29 C.F.R. § 1630.2(j) (2003).

117. *Sutton*, 527 U.S. at 479. Disagreeing with the Court, Justice Breyer saw "no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation . . . . The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives." *Id.* at 514–15 (Breyer, J., dissenting).

118. *Id.* at 480. The Court also declined to decide what deference was due interpretive guidelines issued by the agencies. *See id.*

119. *Id.* at 482.

120. *Id.*

121. *Id.*

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.[122]

By relying solely on text, the Court ignored and was therefore able to avoid the task of explaining why this history did not call for a different result.

In support of its view that mitigating measures must be considered, Justice O'Connor referenced three terms of the ADA. First, the phrase "substantially limits" in the statute's definition of "disability"[123] "appears in the Act in the present indicative verb form" and "is properly read as requiring that the person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[124] Thus, a person with an impairment "corrected by medication or other measures does not have an im-

122. H.R. REP. NO. 101-485(II), at 52 (1990). The report of the House Judiciary Committee similarly stated that an

> impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in the less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment which substantially limits a major life activity, is also covered . . . .

H.R. REP. NO. 101-485(III), at 28–29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

The report of the Senate Labor and Human Resources Committee likewise stated that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. REP. NO. 101-116, at 23 (1989). That report also comments on mitigating measures and the "regarded as" prong of the statute's definition of disability: "Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions." *Id.* at 24. Examples of such conditions include "individuals with controlled diabetes or epilepsy" or persons wearing hearing aids. *Id.*

123. *See supra* note 87 and accompanying text.

124. Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999) (noting also that a disability does not exist "where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken").

pairment that presently 'substantially limits' a major life activity."[125] That person "still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity."[126]

A second statutory term, referring to impairments "of such individual,"[127] required an individualized inquiry and determination of disability. Judging persons in their uncorrected state "would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition."[128] Treating persons as group members and not as individuals would be "contrary to both the letter and the spirit of the ADA."[129] For example, O'Connor wrote that under a group approach, a

> diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. . . . [This] 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.[130]

The third provision identified in support of the Court's holding was Congress's finding that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[131] Noting that the specific origin of that number was not clear,[132] the Court reasoned that the 43 million figure "reflects an understanding that

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125. *Id.* at 482–83.

126. *Id.* at 483 (alteration in original). Writing in 1991, Robert Burgdorf expressed his view that "[t]he necessity for a major life activity limitation is not self-evident." Burgdorf, *supra* note 31, at 448.

> Even with some "traditional" disabilities, it may not be easy to show that a condition significantly limits a major life activity. Conditions such as epilepsy, controlled by medication; diabetes, in which insulin treatment is progressing routinely; cancer, multiple sclerosis and other conditions during periods of remission; cosmetic disfigurements such as facial scars or deformities; lower-leg amputations where the individual has a properly fitted prosthesis; and many other conditions traditionally considered to be "disabilities" may not have a substantial impact on performance of major life activities.

Id.

127. 42 U.S.C. § 12102(2) (2000).

128. *Sutton*, 527 U.S. at 483.

129. *Id.* at 484.

130. *Id.* at 483–84.

131. 42 U.S.C. § 12101(a)(1) (2000).

132. The Court cited a law review article by the drafter of the original ADA legislation introduced in Congress in 1988 and that article's reference to a Na-

those whose impairments are largely corrected by medication and other devices are not 'disabled' within the meaning of the ADA" and "gives content to the ADA's terms, specifically the term 'disability.'"[133] That a higher number of the disabled were not cited in the statute's findings "is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[134] In deciding whether this conclusion is correct the views of Chai Feldblum, who was involved in the drafting of the ADA, must be considered:

> I can attest that the decision to reference 43 million Americans with disabilities in the findings of the ADA was made by one staff person and endorsed by three disability rights advocates, that the decision took about ten minutes to make, and that its implications for the definition of disability were never considered by these individuals. Moreover, it was my sense during passage of the ADA that this finding was never considered by any Member of Congress, either on its own merits or as related to the definition of disability.[135]

Having concluded that the plaintiffs had not stated a claim of actual disability, the Court considered their claim that they were regarded as disabled under subsection (C) of the ADA's definition of disability. That subsection applies where the employer has "misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting."[136] Noting that the statute does not

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tional Council on Disability report stating that 36 million people were disabled. *See Sutton*, 527 U.S. at 484–85 (citing Burgdorf, *supra* note 31, at 413, 434 n.117).

133. *Id.* at 486–87.

134. *Id.* at 487. In a concurring opinion Justice Ginsburg argued that providing statutory protection to persons with correctable disabilities "would extend the Act's coverage to far more than 43 million people." *Id.* at 494 (Ginsburg, J., concurring). In her view, the 43 million figure and the ADA's finding that the disabled are "a discrete and insular minority" who have been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society," 42 U.S.C. § 12101(a)(1), (7) (2000), are inconsistent with the view that disabilities should be determined without reference to mitigating measures. Individuals with poor eyesight and those who take medication on a daily basis are "found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination." *Sutton*, 527 U.S. at 494 (Ginsburg, J., concurring).

135. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 154 (2000).

136. Sutton v. United Airlines, Inc., 527 U.S. 471, 489 (1999).

define the term "substantially limits," Justice O'Connor turned to the dictionary (not willing to consider legislative history, the Court did not hesitate to look to and use a source "never passed by either house of Congress nor presented to the President"[137] and a dictionary "legislators are even less likely to have read" than the statutory text[138]). According to *Webster's*, "'substantially' suggests 'considerable' or 'specified to a large degree.'"[139] "Substantially limits" was also defined in the EEOC's regulations to mean "[u]nable to perform" or "[s]ignificantly restricted"[140] and uses "the average person in the general population" as a point of comparison.[141] When applied to the major life activity of working,[142] the regulations define "substantially limits" to mean

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[143]

137. Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers,* 53 VAND. L. R. 1457, 1473 (2000).

138. Einer Elhauge, *Preference-Estimating Statutory Default Rules,* 102 COLUM. L. REV. 2027, 2066 (2002).

139. 527 U.S. at 491 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)).

140. 29 C.F.R. § 1630.2(j) (2003).

141. *See id.* (considering an individual's ability to perform a major life activity "as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity"). This definition was not found in prior regulations implementing Section 504. *See* Feldblum, *supra* note 135, at 136.

142. "*Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The EEOC has determined that working is a residual major life activity which is to be considered as a last resort. "If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered." 29 C.F.R. app. § 1630.2(j). *See also Sutton*, 527 U.S. 489, 491–92 (1999) (noting EEOC view).

143. 29 C.F.R. § 1630.2(j)(3)(i). The regulations set forth other factors to be considered when determining whether an individual is substantially limited in the major life activity of working, including the individual's reasonable access to a geographical area and "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified." § 1630.2(j)(3)(ii)(A), (B). This regulatory definition of the major life activity of working was a first. *See* Feldblum, *supra* note 135, at 137.

Reasoning from these definitions of "substantially limits," O'Connor concluded that

> one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.[144]

Assuming without deciding that working is a major life activity and that the EEOC's regulations defining "substantially limits" are reasonable,[145] the Court concluded that the plaintiffs' allegations that they were regarded as disabled failed to allege that they were substantially limited in the major life activity of working. Not being able to hold the single job of global airline pilot was not enough, the Court determined, as a number of other jobs were available to them, such as a regional pilot and pilot instructor.[146]

In a dissenting opinion Justice Stevens observed that the Court had "chart[ed] its own course—rather than follow the one that has been well marked by Congress, by the overwhelming consensus of circuit judges, and by the Executive officials charged with the responsibility of administering the ADA."[147] Looking to the purposes Congress sought to serve in enacting the statute, Stevens argued that the three prongs of the ADA's definition of disability

144. *Sutton*, 527 U.S. at 492.

145. *See id.* As the parties did not challenge the inclusion of working in the term "major life activities," the Court did not decide whether the EEOC's regulations were valid. In an unusual move, the Court referred to the 1986 oral argument of the United States Solicitor General in *School Bd. v. Arline*, 480 U.S. 273 (1987):

> [T]hat there may be some conceptual difficulty in defining major life activities to include work, for it seems "to argue in a circle to say that 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."

Sutton, 527 U.S. at 492 (alterations in original). The argument is circular in the sense that "the need for an accommodation establishes the entitlement to it if your life activity is working. That's not how the statute should work. It should work by identifying a disability and then seeing if it can be accommodated." Tr. of Oral Argument at 12–13, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (No. 00-1089). *See generally* Mark C. Rahdert, Arline*'s Ghost: Some Notes on Working as a Major Life Activity Under the ADA*, 9 TEMP. POL. & CIV. RTS. L. REV. 303 (2000) (discussing the Court's use of and reference to the Solicitor General's *Arline* argument in *Sutton*).

146. *See Sutton*, 527 U.S. at 493.

147. *Id.* at 513 (Stevens, J., dissenting).

> are most plausibly read together not to inquire into whether a person is currently "functionally" limited in a major life activity, but only into the existence of an impairment—present or past—that substantially limits, or did so limit, the individual before amelioration. This reading avoids the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations.[148]

Unlike the Court, which looked only to statutory text, Justice Stevens examined legislative history, the views of executive agencies, and the EEOC's interpretive guidance providing that the disability determination must be made without regard to mitigation measures. In his view, those items "merely confirm the message conveyed by the text of the Act—at least insofar as it applies to impairments such as the loss of a limb, the inability to hear, or any condition such as diabetes that is substantially limiting without medication."[149] Invoking the canon of statutory construction that remedial legislation should be construed broadly in order to effectuate its purposes, Stevens wrote that the Court has consistently construed antidiscrimination statutes "to include comparable evils within their coverage, even when the particular evil at issue was beyond Congress' immediate concern in passing the legislation."[150] Under that approach "visual impairments should be judged by the same standard as hearing impairments or any other medically controllable condition. The nature of the discrimination alleged is of the same character and should be treated accordingly."[151]

As for the Court's "tenacious grip on Congress' finding that 'some 43,000,000 Americans' "[152] have a disability, Stevens pointed out that the Court has previously observed that a "statement of congressional findings is a rather thin reed upon which to base a statutory construction."[153] The 43 million figure "is not a fixed cap," he opined, and in providing protection for those who have a record of or are regarded as having a disability "Congress fully expected the Act to protect individuals who lack, in the Court's words, 'actual'

148. *Id.* at 499.

149. *Id.* at 502.

150. *Id.* at 505. Justice Stevens noted the Court's decisions in *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). *Sutton*, 527 U.S. at 505.

151. *Sutton*, 527 U.S. at 50).

152. *Id.* at 511.

153. *Id.* (internal quotation marks and citation omitted).

disabilities, and therefore are not counted in that number."[154] The Court's analysis "may have the perverse effect of denying coverage for a sizeable portion of the core group of 43 million," the justice concluded, and "it would be far wiser for the Court to follow—or at least to mention—the documents reflecting Congress' contemporaneous understanding of the term: the Committee Reports on the actual legislation."[155] Unable to agree with the Court's "crabbed vision of the territory covered by this important statute," Justice Stevens dissented.[156]

One of the questions before the *Sutton* Court—whether mitigating and corrective measures should be considered in determining whether an individual has an actual disability under and within the meaning of the ADA—is not definitively and unambiguously addressed and answered in the text of the statute. One could have concluded that, because the text was not unambiguously clear, other sources providing guidance with respect to the legislature's command should be considered by the Court, such as the reports of Congressional committees and the EEOC's regulations.[157] But, as we have seen, the Court declined to look to the committee reports and refused to defer to the EEOC's position on the issue; in its view, various textual phrases and terms ("substantially limits," "of such individual," and "some 43,000,000 Americans" with disabilities) provided what the Court considered to be the best evidence of the legislative will with regard to the mitigating-measures issue. Congress sought to limit the ADA's coverage to those who are presently and actually and not speculatively disabled, the Court determined, and in construing the statute in this way the Court effectively limited the number of persons who could successfully invoke the statute's protection. In every ADA case the threshold finding that the plaintiff does or does not have a "disability" determines whether the case goes forward or is dismissed.

A high, and for many insurmountable, hurdle at the disability-determination stage means that fewer viable claims can be brought and will survive. Consequently, employers will not have to engage in the additional and fact-intensive undertaking of establishing that a plaintiff, although disabled, is not qualified, or that the plaintiff's disability cannot be reasonably accommodated, or that the employer has other statutory defenses which come into play only after

154. *Id.* at 512.

155. *Id.*

156. *Id.* at 513.

157. *E.g.*, Washington v. HCA Health Servs., Inc., 152 F.3d 464, 467 (5th Cir. 1998), *vacated by* 527 U.S. 1032 (1999).

it has been concluded that the plaintiff is disabled as a matter of law.[158] Moreover, and significantly, the Court's approach creates a catch-22 for an ADA plaintiff who must show that she is so impaired and substantially limited in a major life activity that she is disabled as a matter of law, but not so disabled that she is not a qualified individual with a disability.[159]

The limited coverage of the ADA is further advanced by the Court's treatment of the "regarded as disabled" aspect of the case and the Court's resort to a dictionary and the very same EEOC regulations the Court declined to consider when deciding the mitigating measures question. Refusing to consider certain aspects of the regulations when doing so would have offered a more expansive and plaintiff-supportive reading of the statute, the Court readily relied on other regulatory sections when doing so supported its narrowing and employer-friendly interpretation. Moreover, and notwithstanding its concern that the ADA should focus on the individual and should not require the employer and courts to speculate about a person's condition,[160] the Court's approval of a comparison between an ADA plaintiff and the "average person in the general population"[161] requires speculation and places an additional burden on the plaintiff. Under the Court's approach, the plaintiff who claims a substantial limitation in the major life activity of working must be prepared to establish that, as compared to the average person of like skills and abilities, she is precluded from a class of jobs or a broad range of jobs, a determination employers do not make

158. As noted by two scholars,

> the definition of disability is the ballgame. Once an employee or potential employee overcomes the initial hurdle of being classified as disabled, the lawsuit moves to an inherently ambiguous and time-consuming search for the specific facts in each case. This almost inevitably results in an inquiry into the employer's claim that the disability could not be reasonably accommodated or that such accommodation would impose equally uncertain "undue burdens."

Samuel Issacharaoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the American with Disabilities Act?*, 79 N.C. L. REV. 307, 332–33 (2001) (citation omitted).

159. Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition of the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1455–56 (1999) (reviewing cases allowing "facts indicating an *ability* to perform a particular job to negate showings of *inability* with respect to other major life activities"); *see also* Jonathan Brown, *Defining Disability in 2001: A Lower Court Odyssey*, 23 WHITTIER L. REV. 355, 381–82 (2001) (discussing the tension between "showing that one is both disabled and qualified"); *see generally* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 448–49 (1991).

160. *See supra* notes 128–30 and accompanying text.

161. 29 C.F.R. § 1630.2(j) (1998).

when considering a person for a particular position.[162] This analysis assumes that jobs are fungible, "a strikingly odd presumption in the context of a statutory scheme designed to end occupational segregation."[163] To get to the facts and merits of the case, a plaintiff will have to devote time and resources to the development of facts showing work-preclusion, yet another obstacle and outcome-determinative fight over the question whether she has a statutory disability.

Sutton's interpretive and analytical approach put in place the framework applied to the two other cases of the 1999 trilogy. *Murphy v. United Parcel Service, Inc.*[164] addressed the mitigating measures issue in a case involving a mechanic with hypertension. When not medicated, his blood pressure was 250/160; when medicated, the hypertension was controlled and the employee could function normally.[165] An essential function of the mechanic position was the driving of commercial motor vehicles by individuals who met health requirements established by the federal Department of Transportation (DOT), including the requirement that drivers have "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."[166] Discharged when his blood pressure exceeded the DOT's requirements, the mechanic filed an ADA action. The district court granted summary judgment for the employer, and the Tenth Circuit affirmed on the grounds that the mechanic's medication allowed him to function normally, and that he was not regarded as disabled but was fired because his blood pressure exceeded the DOT's requirement and not because of "an unsubstantiated fear that he would suffer a heart attack or stroke. . . ."[167]

The Court, with Justice O'Connor again writing for the majority, applied *Sutton* and held that the Tenth Circuit correctly concluded that mitigating measures employed by the hypertensive

162. *See* Issacharoff & Nelson, *supra* note 158, at 330 ("No employer ever makes a determination that an employee is unfit for service in any part of the industry. At most, the employer will conclude that an applicant's impairment may render her incapable of working in that particular position.").

163. *Id.* at 329–30 (footnote omitted). "What the Court ignores in this analysis is that all jobs are not created equal. ADA plaintiffs do not seek the ability to join the workforce generally, but aim to enforce a vision of the statute that places them in the same positions as their non-disabled counterparts." *Id.* at 330.

164. 527 U.S. 516 (1999).

165. *Id.* at 519.

166. 49 C.F.R. § 391.41(b)(6) (2002).

167. *Murphy*, 527 U.S. at 521 (citing Murphy v. U.S. Postal Service, 141 F.3d 1185 (10th Cir. 1998)).

mechanic were to be taken into account in determining whether he had a disability.[168] As for the regarded-as-disabled issue, the Court assumed *arguendo*, as it had done in *Sutton*, that the EEOC's regulations regarding the determination of disability were valid, and concluded that the mechanic failed to demonstrate that there was a genuine issue of material fact as to whether the employer regarded him as an individual with a disability. "At most," O'Connor stated, "[the mechanic] has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial vehicle—a specific type of vehicle used on a highway in interstate commerce."[169] He "put forward no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial vehicle and thus does not require DOT certification" and "it is undisputed that [he] is generally employable as a mechanic . . . [having] secured another job as a mechanic shortly after leaving UPS."[170] The plaintiff's showing that he was "at most, regarded as unable to perform only a particular job" was not enough to establish that he was regarded as substantially limited in the major life activity of working.[171]

In the third decision, *Albertson's, Inc. v. Kirkingburg*,[172] an employee suffering from amblyopia[173] was fired by his employer because he did not meet the DOT vision standards. The United States Court of Appeals for the Ninth Circuit, reversing the district court's summary judgment for the employer, held that the employee was disabled in that his manner of seeing differed significantly from the manner in which most people see because he "sees using only one eye; most people see using two."[174] Rejecting that analysis, the Supreme Court concluded that the Ninth Circuit erred in finding that the employee was disabled. Justice Souter's opinion for the Court noted that there was no dispute that the employee's amblyopia was a physical impairment or that seeing is a major life activity.[175] But the Ninth Circuit's conclusion that the employee's

168. *Id.*

169. *Id.* at 524.

170. *Id.*

171. *Id.* at 525.

172. 527 U.S. 555 (1999).

173. The employee's amblyopia was "an uncorrectable condition that [left] him with 20/200 vision in his left eye and monocular vision in effect." *Id.* at 559.

174. Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1232 (9th Cir. 1998).

175. The Court assumed but did not decide that the EEOC's regulations providing that seeing is a major life activity were valid and did not determine what level of deference, if any, the regulations were due. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 n.10 (1999).

seeing differed from the way in which most people see wrongly transformed "substantially limits" and "significant restriction" into "difference" and "undercut the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities."[176] The Ninth Circuit also erred, in Souter's view, when it did not consider the employee's ability to compensate for his condition. Citing *Sutton*, the Court saw "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[177]

The interpretive framework put into place by the Supreme Court in the 1999 trilogy has certainly made it difficult for ADA plaintiffs. Courts have held that certain individuals with epilepsy were not disabled under and within the meaning of the statute. For example, in *EEOC v. Sara Lee Corp.*,[178] the Court held that an employee who had epilepsy was not substantially limited in the major life activities of sleeping, thinking, and caring for herself. The fact that she did not sleep well at night was not enough; she had to prove that her lack of sleep was worse than the general population's quality of sleep as "[m]any individuals fail to receive a full night of sleep."[179] Her ability to think was not substantially limited, the court concluded, even though on one occasion she forgot the location of her physician's office, forgot things two or three times per week and had to write them down to remember them, and some-

176. *Id.* at 565.

177. *Id.* at 565–66. The Court further concluded that the Ninth Circuit erred when it concluded that monocularity was always a disability and did not assess the condition as it affected the specific plaintiff. Although persons with monocular vision "'ordinarily' will meet the ADA's definition of disability," the statute "requires monocular individuals, like others claiming the Act's protections, to prove a disability by offering evidence that the extent of the limitations in terms of their own experience, as in loss of depth perception and visual field, is substantial." *Id.* at 567.

The unanimous Court also held that the Ninth Circuit wrongly concluded that the employer could not rely on the DOT's visual acuity standards because the employee received a waiver from the regulatory requirements. *Id.* at 574. In the Court's view, the waiver program did not modify the content of the basic standard. That program was an experiment and was "simply a means of obtaining information bearing on the justifiability of revising the binding standards already in place" and sought "to provide objective data to be considered in relation to a rulemaking exploring the feasibility of relaxing the current absolute vision standards . . . in favor of a more individualized standard." *Id.* at 574–75 (citation omitted).

178. 237 F.3d 349 (4th Cir. 2001).

179. *Id.* at 352.

times forgot to take her anti-seizure medication. Many adults in the general population forget things during a week and have to write things down to remember them, the court reasoned.[180] As for caring for herself, the court noted that the plaintiff's seizures were relatively infrequent, were not grand mal seizures, and that the plaintiff continued to perform a number of tasks despite the seizures, including driving a car, caring for her son, and performing her job. Thus, she was not substantially limited and was not disabled.[181]

In another case a court held that an employer did not regard a prospective employee as substantially limited in a major life activity where there was no evidence that the employer knew of the plaintiff's epilepsy and had determined only that the plaintiff was precluded from performing functions necessary to a specific job (but not other jobs) in its warehouse.[182] This is not to suggest that workers with epilepsy can never prevail on the issue of disability. In *Otting v. J.C. Penney Co.*[183] an employee suffered epileptic seizures even though she took medication for the condition. Finding that during her seizures the plaintiff was unable to speak, walk, see, work, or control the left side of her body, the court held that her seizures substantially limited the major life activities of walking, seeing, and speaking and that she therefore met the statutory definition of disability.[184]

Diabetics have faced similar difficulties establishing that their impairment is an ADA disability. A diabetic pharmacist was not disabled, in one court's view, as the record evidence did not establish that his condition presently and substantially limited a major life activity.[185] In another decision the court held that a diabetic worker was not disabled because she was not substantially limited in the major life activity of working and had not provided evidence

180. *Id.* at 353.

181. *Id.*

182. *See* Schuler v. SuperValu, Inc., 336 F.3d 702, 703 (8th Cir. 2003).

183. 223 F.3d 704 (8th Cir. 2000).

184. *Id.* at 710–11.

185. Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002). The plaintiff asserted that the diabetes substantially affected his ability to see, speak, type, read, and walk and closed the store pharmacy for thirty minutes so that he could eat lunch and avoid experiencing symptoms of hypoglycemia. In rejecting the plaintiff's claim the court refused to consider his argument that, in the context of insulin-dependent diabetes, eating constitutes a major life activity on the ground that he did not raise that issue before the district court. *See also* Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001) (holding in a case involving diabetes that eating is a major life activity).

that she was "'precluded from more than one type of job, a specialized job, or a particular job of choice.'"[186] And an employee suffering from asthma and migraines was not disabled where her condition was exacerbated by her work-related exposure to cigarette smoke. The plaintiff "established only that she was unable to function in one particular smoke-infested office" and could "perform her job requirements at a very high level, provided that she is given the opportunity to perform her work in a smoke-free atmosphere."[187] Therefore, the court concluded, the plaintiff failed to show "that she is generally foreclosed from jobs utilizing her skills because she suffers from smoke-induced asthma and migraines."[188] Employees with hypertension,[189] orthopedic conditions,[190] depression,[191] and other maladies[192] have been similarly unable to satisfy the threshold disability determination.

C. The ADA and the States

In a number of recent decisions the Supreme Court has limited the power of Congress to regulate certain conduct under the

186. Nordwall v. Sears Roebuck & Co., 46 Fed.Appx. 364, 367 (7th Cir. 2002) (quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999)). In support of this conclusion the court noted that the plaintiff testified that she felt that she was qualified for twenty-four other jobs with the employer. In addition, the court concluded that she was not disabled in the major life activity of caring for herself as she fed herself, drove a car, maintained a household, exercised, cared for her son and husband, and performed other routine activities. *Id.* at 367–68.

187. Rhoads v. FDIC, 257 F.3d 373, 388 (4th Cir. 2001) (internal citation omitted).

188. *Id.*

189. *See* Hein v. All America Plywood Co., 232 F.3d 482 (6th Cir. 2000) (holding that truck driver's hypertension not a disability where he successfully performed job with aid of blood pressure medication).

190. *See* Gonzalez v. El Dia, Inc., 304 F.3d 63 (1st Cir. 2002) (finding that a newspaper reporter whose impairment made it difficult to walk or sit for extended periods of time was not substantially limited in major life activity of working; there was no evidence that she was unable to perform a broad range of jobs and no evidence on the employment demographics in the relevant geographical area).

191. *See* Cash v. Smith, 231 F.3d 1301 (11th Cir. 2000) (rejecting claim of employee suffering from depression and other conditions because she failed to show limitations on major life activity; plaintiff's deposition testimony indicated that she was an active person who walked, swam, fished and held a forty-hour per week job).

192. *See* EEOC v. J.B. Hunt Transp., Inc., 321 F.3d 69 (2d Cir. 2003) (finding that over-the-road truck driver applicants perceived as unsuitable for job because of use of prescription medication were not perceived as substantially limited in major life activity of working; the perception of unsuitability for one job could not be characterized as perceived inability to perform a broad range or class of jobs).

United States Constitution's Commerce Clause[193] and Section 5 of the Fourteenth Amendment[194] and has invalidated a number of federal civil rights statutes on the ground that Congress exceeded its constitutional authority when it enacted those laws and acted in ways inconsistent with federalism.[195]

The Court's current posture on Congressional power under Section 5, which states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article"[196] (including the Fourteenth Amendment's equal protection guarantee)[197] is a departure from past rulings in this area. In *Katzenbach v. Morgan*[198] the Court held that a section of the Voting Rights Act (VRA)[199] was a valid exercise of Congress' Section 5 power. In so holding the Court rejected the state of New York's argument that the VRA could not be sustained as appropriate Section 5 legislation unless the judiciary decided that the application of the challenged state law was forbidden by the Equal Protection Clause. Not so, the Court concluded:

> A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for imple-

193. *See* U.S. CONST. art. I, § 8, cl. 3 (Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); United States v. Morrison, 529 U.S. 598 (2000); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995).

194. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997). *But see* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (holding that employees of the state of Nevada could recover money damages for state violations of the family-care provision of the federal Family and Medical Leave Act of 1993).

195. For discussions of the Court's recent federalism jurisprudence, *see* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109; Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

196. U.S. CONST. amend. XIV, § 5.

197. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

198. 384 U.S. 641 (1966).

199. 42 U.S.C. § 1973b(e) (2000).

> menting the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.[200]

Katzenbach declared that the drafters of Section 5 gave Congress "the same broad powers expressed in the Necessary and Proper Clause" of Article I of the Constitution,[201] with the reach of those powers formulated by Chief Justice Marshall in *McCulloch v. Maryland*:[202] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional."[203] *Katzenbach* made it clear that, in enacting the VRA and in deciding that federal law could constitutionally intrude on state interests, it

> was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. . . . It is not for [the Court] to review the congressional resolution of these factors. It is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did. . . .[204]

Emphasizing what Congress "might well have questioned" and "might well have concluded,"[205] the Court decided that the weighing of competing considerations was the prerogative of the legislative branch and "it is enough that we perceive a basis upon which Congress might predicate a judgment" that a state has engaged in certain conduct violative of the Fourteenth Amendment.[206]

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200. *Katzenbach*, 384 U.S. at 648–49 (footnote and citation omitted).

201. *Id.* at 650. *See* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.").

202. 17 U.S. (4 Wheat.) 316 (1819).

203. *Katzenbach*, 384 U.S. at 650 (quoting McCulloch, 17 U.S. (4 Wheat.) at 421).

204. *Id.* at 653 (footnote omitted).

205. *Id.* at 654.

206. *Id.* at 656.

Ten years later, in *Fitzpatrick v. Bitzer*,[207] the Court held that the Eleventh Amendment to the Constitution[208] did not preclude the awarding of back pay and attorneys' fees in private suits against states brought under Title VII of the Civil Rights Act of 1964 (Title VII).[209] The Court set forth the following formulation of the Section 5 power:

> When Congress acts pursuant to § 5, *not only is it exercising legislative authority that is plenary within the terms of the constitutional grant*, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.[210]

A significant development in the Court's view of Congressional power under Section 5 is found in *City of Boerne v. Flores*.[211] In 1993 Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA),[212] a legislative response to and overruling of *Employment Division, Department of Human Resources of Oregon v. Smith*,[213] wherein the Court held that generally applicable and neutral laws are enforceable even where the laws burden an individual's exercise of religion. RFRA "prohibited federal, state, and local governments from substantially burdening someone's exercise of religion, even by a neutral rule of general applicability, unless the government could show that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."[214] In holding that the statute unconstitutionally regulated the states, the Court declared that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power to 'enforce,' not the power to determine what constitutes a constitutional violation."[215] "There

207. 427 U.S. 445 (1976).

208. *See* U.S. CONST. amend. XI, *infra* note 224 and accompanying text.

209. *See* 42 U.S.C. § 2000e (2000).

210. *Fitzpatrick*, 427 U.S. at 456 (emphasis added and footnote and citation omitted).

211. 521 U.S. 507 (1997).

212. 42 U.S.C. § 2000bb.

213. 494 U.S. 872 (1990).

214. I LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 948 (3d ed. 2000) (footnote and internal quotation marks omitted).

215. *City of Boerne*, 521 U.S. at 519.

must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[216] RFRA did not meet this test, the Court concluded, as it could "not be understood as responsive to, or designed to prevent, unconstitutional behavior" and "appear[ed], instead, to attempt a substantive change in constitutional protections."[217] Setting out its view of the proper roles of the judiciary and the legislature, the Court opined:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. . . . [A]s the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.[218]

Thus, as noted by Laurence Tribe, the Court has made it clear that "when a matter comes before the Court in the context of a justiciable controversy, it will continue to follow its own interpretation rather than that of Congress."[219]

The ADA and the Section 5 power of Congress were at issue in *Board of Trustees of the University of Alabama v. Garrett*.[220] There, a registered nurse employed as Director of Nursing for the University of Alabama in Birmingham Hospital was diagnosed with and received treatment for breast cancer. Returning to work from a treatment-related leave, she was informed by her supervisor that she would have to relinquish the Director position. After transferring

216. *Id.* at 520.

217. *Id.* at 532.

218. *Id.* at 535–36 (citation omitted).

219. TRIBE, *supra* note 214, at 259.

220. 531 U.S. 356 (2001). For a pre-Garrett discussion of the constitutionality of the ADA, see James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91 (2000).

to a lower-paying nurse manager job, she filed an ADA Title I lawsuit against her employer. Another employee, a security officer for the Alabama Department of Youth Services, suffered from chronic asthma and sleep apnea. He informed the employer of his conditions and requested a modification of his duties which would allow him to avoid carbon monoxide and cigarette smoke, as well as reassignment to a daytime shift to accommodate his apnea. When that request was denied, the officer brought an ADA action challenging the employer's conduct.[221] Granting the state's motions for summary judgment,[222] the district court held that the ADA exceeded Congressional authority to abrogate the state's sovereign immunity under the Eleventh Amendment to the United States Constitution.[223] That decision was reversed by the United States Court of Appeals for the Eleventh Circuit, and that reversal was reviewed by the Supreme Court.

Was the state entitled to Eleventh Amendment immunity?[224] That amendment provides that

> [t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[225]

While the amendment clearly states that a state cannot be sued in federal court by a citizen of another state, the Supreme Court has expanded the amendment's immunity and has repeatedly held that the amendment is also applicable to, and therefore bars, suits brought by citizens of a state against their own state.[226] Thus, "the

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221. 531 U.S. at 362.

222. *See* 989 F.Supp. 1409 (N.D. Ala., 1998), *rev'd*, 193 F.3d 1214 (11th Cir. 1999), *rev'd*, 531 U.S. 356 (2001).

223. *See* U.S. CONST. amend. XI.

224. The Court has noted that the phrase "Eleventh Amendment immunity" is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden v. Maine, 527 U.S. 706, 713 (1999).

225. U.S. CONST. amend. XI.

226. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72–73 (2000); Hans v. Louisiana, 134 U.S. 1, 15 (1890); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002).

ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."[227] This broader immunity, which has been further extended to preclude federal administrative agency adjudication of a private party's claim against a nonconsenting state,[228] is not found in or derived from the text of the amendment.

In *Garrett* a divided Supreme Court ruled that the state was immune from the employees' private actions seeking money damages for state violations of Title I of the ADA.[229] Chief Justice Rehnquist, writing for a five-justice majority, initially noted that Congress can abrogate a state's sovereign immunity by (1) unequivocally intending to do so and (2) acting within its constitutional authority. The first requirement was met in the ADA's declaration that states would not be immune under the Eleventh Amendment from an ADA action brought in federal or state court.[230] As for the second requirement, the ADA states that a purpose of the statute was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment."[231]

Was the ADA appropriate Section 5 legislation? No, answered Chief Justice Rehnquist. Applying *City of Boerne v. Flores*,[232] he considered the Fourteenth Amendment's limitations on state treatment of the disabled and the Court's 1985 decision in *City of Cleburne, Texas v. Cleburne Living Center*.[233] *Cleburne* held that ra-

227. Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001).

228. *See* Fed. Mar. Comm'n v. South Carolina Ports Auth., 535 U.S. 743, 765 (2002).

229. The Court did not decide whether ADA Title II was appropriate legislation under Section 5 of the Fourteenth Amendment. *See Garrett*, 531 U.S. at 360 n.1. For lower court decisions holding that Congress validly abrogated Eleventh Amendment state immunity under Title II, see, e.g., *Lane v. Tennessee*, 315 F.3d 680 (6th Cir. 2003); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003); *Phiffer v. Columbia River Corr. Inst.*, 66 Fed. Appx. 335, 337 (9th Cir. Mar. 6, 2003); *Kiman v. N.H. Dep't of Corr.*, 301 F.3d 13 (1st Cir. 2002), *reheard en banc*, *opinion withdrawn*, 310 F.3d 785 (1st Cir. 2002), *reversed* 332 F.3d 29 (1st Cir. 2003). For decisions adopting the contrary view, see *Robinson v. Univ. of Akron Sch. of L.*, 307 F.3d 409, 413 (6th Cir. 2002); *Wessel v. Glendening*, 306 F.3d 203, 206 (4th Cir. 2002); *Reickenbacker v. Foster*, 274 F.3d 974, 976 (5th Cir. 2001); *Thompson v. Colorado*, 258 F.3d 1241, 1243–44 (10th Cir. 2001). For a scholar's argument that Title II constitutionally abrogates state sovereign immunity, see Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 694–701 (2000).

230. *See* 42 U.S.C. § 12202 (2000) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

231. 42 U.S.C. § 12101(b)(4) (2000).

232. 521 U.S. 507 (1997); *see also supra* notes 215–218 and accompanying text.

233. 473 U.S. 432 (1985).

tional basis review governed "an equal protection challenge to a city ordinance requiring a special use permit for the operation of a group home for the mentally retarded."[234] Rejecting the view that mental retardation was a quasi-suspect category for purposes of equal protection analysis, *Cleburne* stated that

> if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, *the disabled*, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[235]

Rational basis review, and not heightened scrutiny, was appropriate, in the *Cleburne* Court's view, because national and state legislatures had responded to the plight of the mentally retarded and "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[236] This "legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers."[237] Thus, wrote Rehnquist for the *Garrett* Court, under *Cleburne*, "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."[238] States "could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."[239]

The chief justice's choice of and reliance on *Cleburne* is curious and analytically problematic in at least three respects. First, and as

234. Bd. of Trs. v. Garrett, 531 U.S. 356, 366 (2001) (discussing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

235. *Cleburne*, 473 U.S. at 445–46 (emphasis added).

236. *Id.* at 443 (citing Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2000), and the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6009 (2000)).

237. *Id.* at 445.

238. *Garrett*, 531 U.S. at 367.

239. *Id.* at 367–68.

Garrett does not mention, the challengers of the city ordinance in *Cleburne* won their case as the Court concluded that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[240] Second, Chief Justice Rehnquist's opinion in *Garrett* does not tell us that in *Cleburne* five justices called for something greater than rational basis review. In a concurring opinion in *Cleburne* Justice Stevens, joined by Chief Justice Burger, argued for "a continuum of judgmental responses to differing classifications" and "especially vigilant" judicial evaluation "of any classification involving a group that has been subjected to a tradition of disfavor."[241] Justice Marshall's separate opinion, joined by Justices Brennan and Blackmun, urged that "heightened scrutiny is surely appropriate" given "the history of discrimination against the retarded and its continuing legacy."[242] Thus, the view that rational basis review was applicable in cases involving the mentally retarded was not held by a majority of the Court. Third, *Cleburne*'s call for the disabled to seek legal protection through positive law and not through the Constitution was not mentioned by Chief Justice Rehnquist in *Garrett*, a case involving the positive law of the ADA and a significant legislative victory for the disabled.

Having concluded that states are not constitutionally required to accommodate the disabled, Chief Justice Rehnquist then asked whether the Congress enacting the ADA had identified a history and pattern of state discrimination against the disabled.[243] Answer-

240. *Cleburne*, 473 U.S. at 450.

241. *Id.* at 451, 453 n.6 (Stevens, J., concurring) (internal quotation marks omitted).

242. *Id.* at 473 (Marshall, J., concurring in the judgment in part and dissenting in part).

243. *Garrett*, 531 U.S. at 369 (citation omitted) (limiting this inquiry to discrimination by states and not extending it to local government units because "the Eleventh Amendment does not extend its immunity to units of local government." Local governmental units "are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment.").

Disagreeing with the Court on this point, Justice Breyer argued that evidence of societal discrimination against the disabled "implicates state governments as well, for state agencies form part of that same larger society. There is no particular reason to believe that they are immune from the stereotypic assumptions and pattern of purposeful unequal treatment that Congress found prevalent." *Id.* at 378 (Breyer, J., dissenting) (internal quotation marks omitted). Moreover, Breyer wrote, the Fourteenth Amendment applies to state and local governments, and the latter "often work closely with, and under the supervision of, state officials, and in general, state and local government employers are similarly situated." *Id.*

ing that question in the negative, he concluded that the "legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[244] Noting that several examples of discriminatory conduct by state officials set forth in the plaintiffs' briefs to the Court "undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA,"[245] Rehnquist wrote that it was debatable that the incidents are irrational under *Cleburne*, "particularly when the incident is described out of context."[246] Even if each incident resulted from unconstitutional state conduct, "these incidents taken together fall far short of even suggesting a pattern of unconstitutional discrimination on which § 5 legislation must be based."[247] Pointing out that the ADA found that some 43 million Americans were disabled and that in 1990 the states employed 4.5 million disabled persons, Rehnquist stated that "[i]t is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled."[248] In addition, Chief Justice Rehnquist thought it significant that the ADA's findings do not mention a pattern of unconstitutional behavior by the states, and that House and Senate committee reports referred to private-sector, and not state, discrimination.[249]

The Court then concluded that the ADA, enacted in 1990, did not pass the congruence and proportionality standard of the Court's 1997 *Boerne* decision. While states can rationally and constitutionally conserve resources by hiring only workers who are able to use existing facilities, Rehnquist reasoned, the ADA requires em-

244. *Id.* at 368.

245. *Id.* at 370.

246. *Id.*

247. *Id.*

248. *Id.*; *see also id.* at 375–76 (Kennedy, J., concurring) (If states had discriminated against persons with impairments, "one would have expected to find in decisions of the courts . . . extensive litigation and discussion of the constitutional violations.").

In characterizing the legislative record as minimal, the Court was not swayed by an appendix in Justice Breyer's dissent, listing incidents of discrimination against the disabled. *See id.* at 391–424 (Breyer, J., dissenting). That appendix "consists not of legislative findings," the Court concluded, "but of unexamined, anecdotal accounts of adverse, disparate treatment by state officials" submitted to a task force and not directly to Congress. *Id.* at 370 (internal quotation marks omitted). Interestingly, that task force was created by Congress to assess the need for legislation protecting persons with disabilities. *See id.* at 377.

249. *Id.* at 371–72.

ployers to render facilities accessible to disabled persons.[250] The ADA also requires employers to make reasonable accommodations for disabled employees in the absence of undue hardship.[251] That mandate "far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall far short of imposing an undue burden upon the employer" and "makes it the employer's duty to prove that it would suffer a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision."[252] And, Rehnquist added, the ADA forbids certain disparate impact discrimination[253] which does not on its own violate the Fourteenth Amendment.[254]

For these reasons, the Court concluded that the ADA did not provide a congruent or proportional remedy for discrimination on the basis of disability. "[T]o uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*. Section 5 does not so broadly enlarge congressional authority."[255] As the Court noted, this ruling did not mean that individuals with disabilities could not rely on Title I of the ADA in challenging state conduct, for Title I can be enforced by the federal government in suits for monetary

250. *Id*. at 372; 42 U.S.C. §§ 12112(b)(5)(B), 12111(9) (2000).

251. *See* 42 U.S.C. § 12111(9),(10) (2000). For discussions of the statutory reasonable accommodation requirement, see Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Christine Jolls, *Accommodation Mandates*, 53 STAN L. REV. 223 (2000); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197 (2003).

252. *Garrett*, 531 U.S. at 372 (citation and internal quotation marks omitted). Justice Breyer argued that the reasonable accommodation "requirement may exceed what is necessary to avoid a constitutional violation. But it is just that power—the power to require more than the minimum that Section 5 grants to Congress, as this Court has repeatedly confirmed." *Id*. at 385–86 (Breyer, J., dissenting). Breyer noted that in *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966), the Court likened the Section 5 power to the Congressional power under the Necessary and Proper Clause. *See Garrett*, 531 U.S. at 386 (Breyer, J., dissenting).

253. *See* 42 U.S.C. § 12112(b)(3)(A) (2000) ("the term 'discriminate' includes . . . utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability").

254. *Garrett*, 531 U.S. at 372–73 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).

255. *Garrett*, 531 U.S. at 374.

damages and by private individuals suing for injunctive relief[256] and suing under state disability discrimination laws.[257]

Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsburg, complained that the Court erred in concluding that a pattern of unconstitutional state conduct has not been sufficiently established in the legislative record. Congress "compiled a vast legislative record" of societal discrimination against the disabled through thirteen Congressional hearings, over forty years of Congressional enactments of disability legislation, hearings conducted by a Congressionally-created task force in every state, and other data culminating in the enactment of the ADA.[258] The Court ignored the hundreds of examples of disparate treatment set forth in the appendix to Breyer's dissent[259] and gave insufficient weight to those incidents because the individuals who presented them "rarely provided additional, independent evidence sufficient to prove in court that, in each instance, the discrimination they suffered lacked justification from a judicial standpoint."[260] "But a legislature is not a court of law," Breyer wrote, and "Congress, unlike courts, must and does, routinely draw general conclusions . . . from anecdotal and opinion-based evidence of this kind, particularly when the evidence lacks strong refutation."[261] This institutional distinction was important to Breyer:

> There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations. Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy. Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly

256. *Id.* at 374 n.9 (citing Ex Parte Young, 209 U.S. 123, 155–59 (1908) (holding that federal courts may enjoin state officers from enforcing state statutes which contravene the U.S. Constitution)).

257. *Id.* On the protection afforded by state disability discrimination laws, see generally Ruth Colker & Adam Milani, *The Post-*Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002).

258. *Garrett*, 531 U.S. at 377–78 (Breyer, J., dissenting).

259. *Id.* at 391–424 app. C.

260. *Id.* at 379.

261. *Id.* at 379–80 (citations omitted).

> obtain information from constituents who have firsthand experience with discrimination and related issues.[262]

Congress "is not a lower court," Breyer explained and, unlike members of Congress, unelected judges "do not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."[263]

Garrett is the most recent example of the Court's "willingness . . . to impose what might be called 'deliberative requirements' on legislatures."[264] Congressional enactments under Section 5 that are not based on a legislative record deemed adequate by the Court are unconstitutional, including laws passed prior to the Court's recent assumption of a dominant institutional role in defining what does and does not violate the Constitution. *Garrett* thus took away from ADA claimants that which Congress had given them—the right to bring private suits for money damages against their state employers who engaged in proscribed conduct violative of the statute. This interpretive approach, coupled with the Court's atextual interpretation and application of the Eleventh Amendment, further narrowed the ADA's regulatory scope.

D. The 2002 Trilogy

A second trilogy of workplace ADA decisions issued by the Court in 2002 addressed significant questions and presented important constructions and applications of the ADA.

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams[265] dealt with the issue of what a plaintiff was required to show in order to demonstrate a substantial limitation in the major life activity of performing manual tasks. The plaintiff, an assembly line worker suffering from carpal tunnel syndrome and other medical conditions, asserted that she was disabled and that her employer failed to provide her with reasonable accommodations as required by the statute.[266] The United States Court of Appeals for the Sixth Circuit found that the plaintiff's impairment substantially limited her in the major life activity of performing manual tasks and granted her partial summary judgment on the question whether she was disabled. In that court's view, the plaintiff had been able to "show that her manual disability involve[d] a 'class' of manual activities affecting the ability to perform tasks at work," as her condition prevented

262. *Id.* at 384.
263. *Id.* at 383–88 (citations and internal quotation marks omitted).
264. Ferejohn, *supra* note 53, at 62.
265. 534 U.S. 184 (2002).
266. *Id.* at 187.

her from performing certain manual assembly jobs requiring repetitive work with her hands and arms extended at or above her shoulders for extended periods of time.[267]

A unanimous Supreme Court reversed the Sixth Circuit. Writing for the Court, Justice O'Connor concluded that the appeals court's analysis of the question whether the plaintiff was substantially limited in performing major life activities was erroneous.[268] Turning to the statutory definition of "disability" and relying, once again, on dictionary definitions of the word "substantially,"[269] O'Connor wrote that the "word 'substantial' . . . clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities."[270] And, according to *Webster's*, the word "major" in the phrase major life activities "means important" and "thus refers to those activities that are of central importance to daily life."[271]

> In order for performing manual tasks to fit into this category—a category that includes such basic abilities as walking, seeing, and hearing—the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so.[272]

Justice O'Connor made it clear that the ADA's definition of disability must "be interpreted strictly to create a demanding standard for qualifying as disabled" and relied again on the 43 million disabled Americans figure in the statute's findings.[273] "If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Ameri-

267. *See* 224 F.3d 840, 843 (6th Cir. 2000), *rev'd*, 534 U.S. 184 (2002).

268. The Court assumed without deciding that the EEOC's regulations stating that the performance of manual tasks is a major life activity were reasonable. 534 U.S. at 192–93. The Sixth Circuit concluded that, in order for an impairment to substantially limit the major life activity of performing manual tasks, a class of manual activities had to be implicated. This was error, the Supreme Court said, because the class analysis the Court applied to the major life activity of working in *Sutton* (see *supra* notes 112–156 and accompanying text) is not applicable to any other major life activity, a conclusion supported by the EEOC's regulations. *See generally* 29 C.F.R. § 1630.2(j)(2) (2003).

269. "'[S]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'" *Williams*, 534 U.S. at 196–97 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)).

270. *Id.* (citation omitted).

271. *Id.* (citation omitted) (citing WEBSTER'S, *supra* note 269, at 1363).

272. *Id.*

273. *Id.*

cans would surely have been much higher."[274] Therefore, "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[275]

What evidence must a plaintiff supply in establishing a substantial limitation in performing manual tasks? Williams was able to tend to her personal hygiene and her flower garden, and was able to prepare breakfast, do laundry, and perform other household chores. "Yet household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether respondent [Williams] was substantially limited in performing manual tasks."[276] Because of her medical condition she was not able to sweep or dance, sometimes sought help in getting dressed, and reduced the time she spent playing with her children, gardening, and driving long distances. "But these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual task disability as a matter of law."[277]

The next case, *US Airways, Inc. v. Barnett*,[278] presented the question of whether a disabled employee's reasonable accommodation request for reassignment to a particular position trumped the bidding rights of other employees under an employer's seniority system. After injuring his back while working as a cargo handler, the plaintiff invoked his seniority rights and transferred to a less physically demanding position in the employer's mailroom. Pursuant to the employer's policy, the plaintiff's and other employees' positions were opened to seniority-based bidding. Learning that two employees with greater seniority were going to bid for the

274. *Id.* (citation omitted).

275. *Id.* The Court noted that the question is not whether a plaintiff is unable to perform tasks associated with a job. Rather, "the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives." *Id.* at 693. "Otherwise, *Sutton*'s restriction on the claims of disability based on a substantial limitation in working will be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a 'class' of tasks associated with that specific job." *Id.* The plaintiff's repetitive work requiring her to extend her hands and arms at or above her shoulders for extended periods of time were "not necessarily important parts of most people's lives" and did not suffice as proof that she was substantially limited in the performance of manual tasks. *Id.*

276. *Id.* at 693.

277. *Id.* at 694.

278. 35 U.S. 391 (2002).

mailroom position he held, the plaintiff asked the employer to make an exception to the seniority system and to accommodate his disability by allowing him to continue working in the mailroom job. That request was denied by the employer and, lacking the requisite seniority, the plaintiff was terminated. His suit alleging that the employer violated the ADA did not survive the employer's motion for summary judgment, as the district court held that any significant alteration of the seniority system would result in an undue hardship to the employer and to non-disabled employees.[279] That ruling was reversed by the United States Court of Appeals for the Ninth Circuit; in that court's view, a seniority system is only a factor in the analysis of undue hardship and whether reassignment would cause such a hardship must be determined on a case-by-case basis.[280]

By a vote of 5 to 4, the Supreme Court vacated the Ninth Circuit's judgment. Justice Breyer's majority opinion assumed that the plaintiff's reassignment request would be reasonable within the meaning of the ADA[281] were it not for the fact that the reassignment would violate the seniority system.[282] "Does that circumstance

279. *See id.* at 431 (discussing the district court ruling).

280. *See* 228 F.3d 1105, 1120 (9th Cir. 2000), *vacated and remanded*, 535 U.S. 391 (2002).

281. *See* 42 U.S.C. § 12111(9)(B) (2000) ("reasonable accommodation" includes "reassignment to a vacant position"). The Court rejected the employer's argument that it was not required to grant a requested accommodation where doing so would violate a disability-neutral rule and would constitute preferential treatment of disabled workers. That argument

> fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.

Barnett, 535 U.S. at 397. The Court also rejected the plaintiff's argument that "reasonable accommodation" means "effective accommodation." "For one thing, in ordinary English the word 'reasonable' does not mean 'effective.' It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness." *Id.* at 400. The Court buttressed this conclusion with references to the "primary purpose" of the ADA and the discussions of the reasonable accommodation requirement in the EEOC's regulations. *See id.* at 400–03.

282. The employer urged that the ADA's requirement of the reasonable accommodation of reassignment to a vacant position was not applicable because the position sought by the plaintiff was not vacant since another employee would be assigned to it under the seniority system. The Court rejected that argument: "Nothing in the Act . . . suggests that Congress intended the word 'vacant' to have

mean that the proposed accommodation is not a 'reasonable' one?"[283]

> In our view, the answer to this question ordinarily is "yes." The statute does not require proof on a case-by-case basis that a seniority system should prevail. That is because it would not be reasonable in the run of cases that the assignment in question trumps the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail.[284]

Justice Breyer then looked to analogous case law dealing with collectively-bargained seniority policies negotiated by employers and unions[285] and reasonable accommodation issues arising under Title VII, the Rehabilitation Act, and the ADA. In 1977 the Court held that Title VII did not require an employer to grant an employee's religion-based request for a work schedule accommodation that would have conflicted with the seniority rights of other employees.[286] And federal courts of appeals have held in Rehabilitation Act and ADA cases that reasonable accommodation requests are trumped by collectively-bargained seniority systems.[287] Seniority is important to employees, Breyer stated, as it provides them with job

a specialized meaning. And in ordinary English, a seniority system can give employees seniority rights allowing them to bid for a 'vacant' position." *Id.* at 399. Moreover, the Court noted, the employer reserved the right to change the seniority system at will, a fact that prevented agreement with the employer's view that the ADA would automatically deny the plaintiff's requested accommodation. *See id.*

In a concurring opinion Justice O'Connor argued that the dictionary defined the word "vacancy [as] 'not filled or occupied by an incumbent [or] possessor.'" *Id.* at 409 (O'Connor, J., concurring). She continued by arguing that "[i]n the context of a workplace, a vacant position is a position in which no employee currently works and to which no individual has a legal entitlement . . . In contrast, when an employee ceases working in a workplace with a legally enforceable seniority system, the employee's former position does not become vacant if the seniority system entitles another employee to it." *Id.* O'Connor concluded that an employee with an expectation of assignment to a position under an unenforceable seniority policy is not a "possessor" as she does not have a contractual right to what would be a vacant position. *Id.*

283. *Id.* at 403.

284. *Id.*

285. Justice Breyer determined that the fact that the seniority system at issue in *Barnett* was not collectively bargained, but was unilaterally implemented by the employer, did not call for a different analysis. "[T]he relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems." *Id.* at 404.

286. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). Title VII provides that "it shall not be an unlawful employment practice for an employer" to differentiate between employees "pursuant to a bona fide seniority . . . system . . . ." 42 U.S.C. § 2000e-2(h).

287. *See Barnett,* 535 U.S. at 403–04 and cases cited therein.

security, advancement based on objective criteria, due process and a limitation on employer unfairness in personnel matters, and encourages employees to invest in the company as they accept "less than their value to the firm early in their careers in return for greater benefits in later years."[288] Requiring an employer faced with an accommodation request to do more than show the existence of a seniority system "might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend," Breyer opined, and would substitute discretionary managerial decision-making for "the more uniform, impersonal operation of seniority rules."[289] Finding "nothing in the statute that suggests Congress intended to undermine seniority systems in this way," the Court concluded that an employer's demonstration of a "violation of the rules of a seniority system is by itself ordinarily sufficient."[290]

When an ADA plaintiff-employee challenges a seniority system, the employer's showing of a violation of a seniority rule entitles it to summary judgment unless the employee shows that, because of special circumstances, the accommodation is reasonable even where doing so requires the making of an exception to that system.[291] Examples of such special circumstances include situations in which an employer retains "the right to change the seniority system unilaterally, [and] exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference."[292] Or the plaintiff can show that the seniority system "already contains exceptions such that, in the circumstances, one further exception is unlikely to matter."[293] Thus, in order to show the existence of special circumstances, "the plaintiff must explain why, in the particular case, an exception to the employer's seniority policy can constitute a reasonable accommodation even though in the ordinary case it cannot."[294] Such a showing defeats an employer's summary judgment motion.

288. *Id.* at 404 (internal quotation marks and citations omitted).

289. *Id.*

290. *Id.* at 405.

291. *See id.* at 394.

292. *Id.* at 405.

293. *Id.*

294. *Id.* at 405–06 (internal quotation marks omitted).

In June 2002 the Court decided *Chevron U.S.A. Inc. v. Echazabal*.[295] In that case the plaintiff, employed since 1972 by an independent contractor at the employer's refinery, applied for a job with the employer on two separate occasions. Offered a job both times contingent on his passing a physical examination,[296] the offers were withdrawn when the examinations revealed liver abnormality or damage caused by hepatitis C and the employer's doctors concluded that the plaintiff's condition would be aggravated by exposure to workplace toxins.[297] Subsequent to the second withdrawn offer of employment, the employer asked the contractor to reassign the plaintiff to a job in which he would not be exposed to hazardous chemicals or to remove him from the refinery.[298] The contractor laid off the plaintiff in 1996.[299]

Was the employer's action lawful? Defending against the plaintiff's ADA claim, the employer relied on the following EEOC regulation: "The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace."[300] Concluding that the employer was correct, the district court granted summary judgment to the employer on the ground that there was no genuine issue of material fact as to the question whether the employer reasonably relied on the medical advice of its doctors when it refused to hire the plaintiff. Rejecting that approach, the United States Court of Appeals for the Ninth Circuit determined that the EEOC regulation constituted impermissible rulemaking since the text of the ADA—"an individual shall not pose a direct threat to the health or safety of other individuals in

295. 536 U.S. 73 (2002).

296. *Id.* at 76. The ADA provides that an employer may "require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination." 42 U.S.C. § 12112(d)(3).

297. *Id.* at 76.

298. *Id.*

299. *Id.*

300. 29 C.F.R. § 1630.15(b)(2). The ADA provides that the term "discriminate" includes "using qualification standards . . . that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard . . . is shown to be job-related for the position in question and is consistent with business necessity . . ." 42 U.S.C. § 12112(b)(6).

the workplace"[301]—did not expressly provide a defense based on a direct threat of employment to the individual plaintiff-employee.[302]

Reversing the Ninth Circuit, a unanimous Supreme Court held that the EEOC's regulation did not exceed the scope of permissible rulemaking under the ADA. Justice Souter's opinion for the Court began with a consideration of the plaintiff's assertion that the text of the statute barred the regulation and that the statute did not leave a gap for the regulation to fill. Noting that the statute provides a defense where a plaintiff is screened out by "qualification standards" that are "job-related and consistent with business necessity,"[303] Souter wrote that "[w]ithout more, those provisions would allow an employer to turn away someone whose work would pose a serious risk to himself."[304] The plaintiff argued that this general language was narrowed by the statute's specification that an employer's qualification standards "may include" the requirement that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[305] Relying on the canon of construction *expressio unius exclusio alterius*,[306] the plaintiff argued that "[b]ecause the ADA defense provision recognizes threats only if they extend to another . . . threats to the worker himself cannot count."[307]

Justice Souter set forth three reasons for rejecting the application of the expression-exclusion canon. First, the statute's provision permitting employers to use qualification standards that are job-related and consistent with business necessity are "spacious defensive categories, which seem to give an agency (or in the absence of agency action, a court) a good deal of discretion in setting the limits of permissible qualification standards."[308] And the provision that standards "may include" not hiring individuals who pose a direct threat to others in the workplace is "expansive phrasing" that "points directly away from the sort of exclusive specification" claimed by the plaintiff.[309] In addition, Souter noted the absence

301. 42 U.S.C. § 12113(b).

302. Echazabal v. Chevron U.S.A, Inc., 226 F.3d 1063, 1069 (9th Cir. 2000), *rev'd*, 536 U.S. 73 (2002).

303. *Echazabal*, 536 U.S. at 78 (discussing § 12113(a)) (internal quotation omitted).

304. *Id.* at 79.

305. *Id.* (quoting 42 U.S.C. § 12111(3) (2000)).

306. "[E]xpressing one item of [an] associated group or series excludes another left unmentioned." *Id.* at 80.

307. *Id.*

308. *Id.*

309. *Id.*

of an "essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication."[310] Indeed, "[t]he canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."[311]

Second, the plaintiff did not identify an established series of terms, "including both threats to others and threat to self, from which Congress appears to have made a deliberate choice to omit the latter item as a signal of the affirmative defense's scope."[312] An earlier EEOC regulation interpreting the Rehabilitation Act of 1973 (which, like the ADA, permits an employer to refuse to employ those who pose "a direct threat to the health or safety of other individuals")[313] extended the defense to employment-related threats to self;[314] thus, the plaintiff contended, when Congress adopted the ADA's threat-to-others exception it deliberately omitted and intended to exclude the Rehabilitation Act's threat-to-self regulation. Not persuaded by this argument, Justice Souter pointed out that the regulations of other federal agencies implementing the Rehabilitation Act did not adopt the threat-to-self exception.[315] "It would be a stretch, then, to say that there was a standard usage, with its source in agency practice or elsewhere, that connected threats to others so closely to threats to self that leaving out one was like ignoring a twin."[316] Moreover, Congressional use in the ADA of the same threat-to-others language found in the Rehabilitation Act, with Congress "knowing full well what the EEOC had made of that language under the earlier statute,"[317] raised several questions:

> Did Congress mean to imply that the agency had been wrong in reading the earlier language to allow it to recognize threats

310. *Id.* at 81.

311. *Id.* (quoting E. CRAWFORD, CONSTRUCTION OF STATUTES 337 (1940)).

312. *Id.*

313. 29 U.S.C. § 705(20)(D)(2000).

314. *See* 29 C.F.R. § 1613.702(f) (1990) ("'Qualified handicapped person' means . . . a handicapped person who . . . can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . .").

315. *Echazabal*, 536 U.S. at 82 (citing 28 C.F.R. § 42.540(l)(1) (Department of Justice regulation); 29 C.F.R. § 32.3 (2003) (Department of Labor regulation); 45 C.F.R. § 84.3(k)(1) (2002) (Department of Health and Human Services regulation)).

316. *Echazabal*, 536 U.S. at 82.

317. *Id.* at 83.

> to self, or did Congress just assume that the agency was free to do under the ADA what it had already done under the earlier Act's identical language? There is no way to tell. Omitting the EEOC's reference to self-harm while using the very language that the EEOC had read as consistent with recognizing self-harm is equivocal at best. No negative inference is possible.[318]

The third reason given by the Court for rejecting the expression-exclusion canon was the absence of any "apparent stopping point to the argument that by specifying a threat-to-others defense Congress intended a negative implication about those whose safety could be considered."[319] In allowing employers to raise the threat-to-others defense, did Congress mean

> that an employer could not defend a refusal to hire when a worker's disability would threaten others outside the workplace? If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away? . . . *Expressio unius* just fails to work here.[320]

The last part of the Court's opinion addressed the issue of judicial deference to the EEOC's regulation. Justice Souter noted that "the agency regulation can claim adherence under the rule in *Chevron* . . . so long as it makes sense of the statutory defense for qualification standards that are job-related and consistent with business necessity."[321] The regulation was reasonable, in the employer's view, because it allowed the employer to forego the risk of violating the Occupational Safety and Health Act of 1970 (OSHA),[322] a statute requiring an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[323] Whether an employer would be liable under OSHA for hiring a person who knowingly consented to the hazards of a job may be an open question, Souter stated, but

> there is no denying that the employer would be asking for trouble: his decision to hire would put Congress's policy in the ADA, a disabled individual's right to operate on equal terms

318. *Id.*

319. *Id.*

320. *Id.* at 83–84.

321. *Id.* at 84 (citation and internal quotation marks omitted). On *Chevron* deference, see *supra* notes 77–79 and accompanying text.

322. 29 U.S.C. § 651 *et seq.* (2000). *See generally* MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 101 (4th ed. 1998).

323. 29 U.S.C. § 654(a)(1).

> within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of "each" and "every" worker.[324]

Any tension between the ADA and OSHA need not be resolved by the judiciary, Souter concluded, for "the EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in 42 U.S.C. Section 12113(a)."[325]

An additional argument was made by the plaintiff and rejected by the Court—that the EEOC's regulation unreasonably allowed workplace paternalism and "overprotective rules and policies" prohibited by the ADA.[326] Acknowledging that Congress meant to outlaw paternalism, Justice Souter opined that

> the EEOC has taken this to mean that Congress was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to

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324. *Echazabal*, 536 U.S. at 85.

325. *Id.*

326. *See* 42 U.S.C. § 12101(a)(5) (2000). In support of its unlawful paternalism argument, the plaintiff noted that the Court had previously rejected employers' paternalism as a defense to claims arising under Title VII. In one decision, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), the Court held that an employer's fetal protection policy excluding female employees from certain jobs because of the employer's concern for the health of the fetus a woman may conceive discriminated against women on the basis of sex in violation of Title VII. The Court concluded that "Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself." *Id.* at 206. Thus, "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII . . . ." *Id.* And, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court opined that "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." *Id.* at 335 (footnote omitted). *Dothard* concluded that more was at stake in that case which involved the risks of women working in a contact correctional counselor job in a maximum security male prison. *Id.* "A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood." *Id.*

The *Echazabal* Court concluded that *Johnson Controls* and *Dothard* "are beside the point, as they, like Title VII generally, were concerned with paternalistic judgments based on the broad category of gender, while the EEOC has required that judgments based on the direct threat provision be made on the basis of individualized risk assessments." *Echazabal*, 536 U.S. at 85 n.5.

> act for their own good in reliance on untested and pretextual stereotypes.[327]

Because the direct threat defense must be based on a reasonable medical judgment relying on the most current medical knowledge and on an individualized inquiry into the person's ability to perform safely the job in question,[328] Souter concluded that the "EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job."[329] Accordingly, the Court reversed the Ninth Circuit and remanded the case for further proceedings.[330]

E. Who Is An "Employee?"

The Court's recent workplace ADA decision, *Clackamas Gastroenterology Associates v. Wells*,[331] held that the common law governed in deciding whether director-shareholder physicians were "employ-

327. *Eschazabal*, 536 U.S. at 85. In a footnote to the quoted passage Justice Souter rejected the plaintiff's argument that legislative history called for a different conclusion. "Although some of the comments within the legislative history decry paternalism in general terms . . . those comments that elaborate actually express the more pointed concern that such justifications are usually pretextual, rooted in generalities and misperceptions about disabilities. . . ." *Id.* at n.5.

328. *See* 29 C.F.R. § 1630.2(r). In making this assessment, the factors to be considered by employers include: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." *Id.* These factors were first set out in Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987).

329. *Echazabal*, 536 U.S. at 86. The Court also rejected the plaintiff's argument that the conclusion that the EEOC's regulation was reasonable reduced the direct threat provision to "surplusage." *Id.* at 87.

> The mere fact that a threat-to-self defense reasonably falls within the general "job related" and "business necessity" standard does not mean that Congress accomplished nothing with its explicit provision for a defense based on threats to others. The provision made a conclusion clear that might otherwise have been fought over in litigation or administrative rulemaking. It did not lack a job to do merely because the EEOC might have adopted the same rule later in applying the general defense provisions, nor was its job any less responsible simply because the agency was left with the option to go a step further. A provision can be useful even without congressional attention being indispensable.

Id.

330. On remand, the Ninth Circuit held that factual issues precluded a grant of summary judgment for the employer and remanded the case to the district court for further proceedings. *See* Echazabal v. Chevron U.S.A. Inc., 336 F.3d 1023 (9th Cir. 2003).

331. 123 S.Ct. 1673 (2003).

ees" under the ADA. To be covered by the statute an "employer" must have "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."[332] Reversing the Ninth Circuit once again,[333] Justice Stevens's opinion for the Court pointed out that the ADA's definition of "employee"—"an individual employed by an employer"[334]—is circular and creates a gap that the courts had to fill.[335]

Guided by the Court's decision in *Nationwide Mutual Insurance Co. v. Darden*,[336] Stevens looked to the common-law definition of and the relevant factors defining the master-servant relationship. The *Restatement (Second) of Agency* defines "servant" as a "person whose work is 'controlled or is subject to the right of control by the master'" and lists other factors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other."[337] Noting the EEOC's agreement with this focus on the right-to-control and applying *Skidmore* deference,[338] Stevens concluded that the six factors identified by the EEOC should be applied when asking whether a shareholder-director is an employee.[339] Under the agency's standard,

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332. 42 U.S.C. § 12111(5).

333. *See* Wells v. Clackamas Gastroenterology Associates, P.C., 271 F.3d 903 (9th Cir. 2001), *rev'd*, 123 S. Ct. 1673 (2003).

334. 42 U.S.C. § 12111(4).

335. "[C]ongressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law." *Clackamas Gastroenterology Associates*, 123 S. Ct. at 1679.

336. 503 U.S. 318, 323 (1992) (applying common-law test in determining who is an "employee" under the Employee Retirement Income Security Act).

337. *Clackamas Gastroenterology Associates*, 123 S.Ct. at 1679 (quoting RESTATEMENT (SECOND) OF AGENCY §§ 220(1), (2)(a) (1958)).

338. *Id*. at 1679–80. On *Skidmore* deference, see *supra* note 76 and accompanying text.

339. The six factors set out in the EEOC's guidelines are:

> Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> Whether and, if so, to what extent the organization supervises the individual's work;
>
> Whether the individual reports to someone higher in the organization;
>
> Whether and, if so, to what extent the individual is able to influence the organization;
>
> Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
>
> Whether the individual shares in the profits, losses, and liabilities of the organization.

> an employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. The mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or proprietor. . . . Nor should the mere existence of a document styled "employment agreement" lead inexorably to the conclusion that either party is an employee. . . . Rather, as was true in applying common law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on all of the incidents of the relationship . . . with no one factor being decisive. . . .[340]

The Court remanded the case for further consideration in light of the EEOC's standard endorsed in its opinion.[341]

Whether the employer had the requisite number of employees is of obvious significance to the plaintiff in *Wells*, a bookkeeper who sued her employer and sought to invoke the protection of the ADA. A finding that the employer does not have at least fifteen employees means that it is not an "employer" within the meaning of the ADA and that its employees are not covered or protected by the statute. In ruling that common-law definitions of "employee" must be applied to the statute, the Court consciously chose what it perceived to be Congressional concerns over protecting small businesses from

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These factors are not to be treated as exhaustive and no one factor is decisive. *Clackamas Gastroenterology Associates*, 123 S.Ct. at 1680 n.10, 1681 (citing 2 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL § 605:0009 (2003)).

340. *Clackamas Gastroenterology Associates*, 123 S.Ct. at 1680–81 (citations and internal quotation marks omitted).

341. Dissenting, Justice Ginsburg, joined by Justice Breyer, noted that the physician-shareholders had been designated as "employees" for purposes of the Employee Retirement Income Security Act and state workers' compensation law. *See id.* at 1682 (Ginsburg, J., dissenting). She further noted that, in choosing to organize their practice as a corporation,

> the physician-shareholders created an entity separate and distinct from themselves, one that would afford them limited liability for the debts of the enterprise. . . . I see no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal antidiscrimination statutes.

Id. Ginsburg also disagreed with the Court's approach to the issue before it because "a firm's coverage by the ADA might sometimes turn on variations in ownership structure unrelated to the magnitude of the company's business or its capacity for complying with federal prescriptions." *Id.*

the regulation of federal antidiscrimination law over the statute's broad purpose of providing a legal right and remedy to employees who suffer and experience disability discrimination.[342] This choice, explained by the Court as one dictated by Congress, is nonetheless a choice that in certain circumstances can result in a reduction of the number of employers covered, and the number of employees protected, by the law.

IV.
LESSONS TO BE LEARNED

Those who were surprised, if not shocked, by the interpretive choices made and ADA Title I decisions issued by the Supreme Court, must question "what went wrong?" and "how didn't we see this coming?"

A. Drafting The Legislation

In 1987 Robert Burgdorf, then with the National Council on the Handicapped, drafted the initial version of the Americans with Disabilities Act legislation. That draft provided legal protection to individuals who were discriminated against "because of a physical or mental impairment, perceived impairment, or record of impairment"[343] and was included in the text of the Americans with Disabilities Act of 1988 introduced in the United States Senate by Senator Lowell Weicker, Republican of Connecticut, and thirteen Senate cosponsors.[344] This bill included the following definitions:

342. *See id.* at 1678. Justice Stevens noted that the Ninth Circuit "paid particular attention to the broad purpose of the ADA . . . consistent with the statutory purpose of ridding the Nation of the evil of discrimination." *Id.* (citation and internal quotation marks omitted). He agreed that "a broad reading of the term 'employee' would—consistent with the statutory purpose of ridding the Nation of discrimination—tend to expand the coverage of the ADA by enlarging the number of employees entitled to protection and by reducing the number of firms entitled to exemption." *Id.* at 1678 n.6. Stevens then weighed that consideration with Congress's decision to cover only firms with fifteen or more employees, a decision justified by the goal of "easing entry into the market and preserving the competitive position of smaller firms." *Id.* at 1678. The broad reading of "employee" gave way to the latter consideration.

343. Feldblum, *supra* note 135, at 91 (quoting Burgdorf draft). For discussion of the drafting and enactment of the ADA, see *id.* at 126–34; Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 94–102 (2000).

344. *See* S. 2345, 100th Cong., 134 CONG. REC. 9375 (1988). *See also* H.R. 4498, 100th Cong., 134 CONG. REC. 9600 (1988) (identical legislation introduced in United States House of Representatives).

(2) [PHYSICAL OR MENTAL IMPAIRMENT]—The term "physical or mental impairment" means—
  (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body, including the following—
    (i) the neurological system;
    (ii) the musculoskeletal system;
    (iii) the special sense organs, and respiratory organs, including speech organs;
    (iv) the cardiovascular system;
    (v) the reproductive system;
    (vi) the digestive and genitourinary systems;
    (vii) the hemic and lymphatic systems;
    (viii) the skin; and
    (ix) the endocrine system; or
  (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
(3) [PERCEIVED IMPAIRMENT]—The term "perceived impairment" means not having a physical or mental impairment as defined in paragraph (2), but being regarded as having or treated as having a physical or mental impairment.
(4) [RECORD OF IMPAIRMENT]—The term "record of impairment" means having a history of, or having been misclassified as having, a physical or mental impairment.[345]

The 100th Congress recessed without taking any action on the 1988 bill. In accepting the Republican Party nomination for president in 1988, George H.W. Bush announced, "I'm going to do whatever it takes to make sure the disabled are included in the mainstream."[346]

In May 1989 another version of the Americans with Disabilities Act was introduced in the Senate by Democratic Senators Tom Harkin of Iowa and Edward Kennedy of Massachusetts, along with thirty-two cosponsors.[347] This version, principally drafted by Harkin staffer Robert Silverstein,[348] defined "disability" as that term was defined in Section 504:

345. S. 2345, §§ 3(2)–(4), 100th Cong., 134 CONG. REC. 9379 (1988).

346. *See* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 78 (2002).

347. *See* S. 933, 101st Cong., 135 CONG. REC. 8505 (1989) (enacted). *See also* H.R. 2273, 101st Cong., 135 CONG. REC. 8709 (1989) (enacted) (identical House of Representatives bill).

348. *See* Feldblum, *supra* note 135, at 127.

(2) [DISABILITY]–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.[349]

Why was this language proposed instead of the 1988 draft definition of disability? Consider this explanation offered by Chai Feldblum, a person intimately familiar with and involved in the drafting of the legislation:

> Political advocates for people with disabilities in Washington preferred Silverstein's approach because, as a strategic matter, it seemed smarter to use a definition of disability that had fifteen years of experience behind it, rather than to attempt to convince Congress to adopt a new, untested definition. Moreover, although there have been . . . a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act. Finally, to the extent those cases were troubling, the Supreme Court's decision in *Arline*, with its expansive interpretation of the third prong of the definition of "handicap," seemed to ensure that any person who had been discriminated against because of any condition would automatically be covered under that prong of the definition—because the limitation caused by the exclusionary action would itself result in the necessary limitation on a major life activity.[350]

349. S. 933, §3(2), 101st Cong., 135 CONG. REC. 8510 (1989) (enacted). As set forth in the Section 504 regulations, a physical or mental impairment that "substantially limits" major life activities constituted a handicap, with "major life activities" including but not limited to "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. §§ 84.3(j)(i), 84.3(j)(2)(ii) (1977).

350. Feldblum, *supra* note 135, at 128; *see also* BURKE, *supra* note 346, at 80 (noting that Silverstein "argued that the ADA should as much as possible draw language and concepts from the enforcement of Section 504"); Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 324 (2003) (ADA sponsors' decision to mirror Rehabilitation Act definition of disability "was pragmatic: A statute that reiterates existing standards is far more likely to succeed politically.").

Feldblum also notes that the decision to adopt Section 504's definition of disability "was not a considered, deliberate decision to narrow the class of covered individuals from the wide-ranging group of individuals who had been covered

While Burgdorf argued against the use of the Section 504 definition, he "had little political capital to draw on in convincing other advocates of his position. The original ADA he had drafted had not reflected any understanding of the political realities of Capitol Hill on a range of issues . . . ."[351] What was needed was " 'legislative lawyering' . . . the capacity to combine a rigorous understanding of the law with a sophisticated grasp of politics."[352] With limited opposition from the business communities,[353] the ADA was enacted into law.

B. The Jurisprudential Backdrop

It is certainly correct that in the 1980s lower courts had interpreted and applied the Rehabilitation Act in a broad fashion and had held that the statute covered individuals with diabetes,[354] epilepsy,[355] HIV infection,[356] and other diseases and conditions. Additionally, the Supreme Court's decision in *Arline*[357] provided some indication that an ADA definition of disability modeled on the Rehabilitation Act would be interpreted expansively by the courts. Holding that a teacher afflicted with contagious tuberculosis may be considered a handicapped individual under Section 504, the

under Section 504" and "whether to use the Section 504 definition of disability was hardly a topic of conversation in negotiations on the ADA." Feldblum, *supra* note 136, at 129. The decision to use the Section 504 definition was based on a "legal judgment that the existing definition would cover most people with impairments along the spectrum of physical and mental impairments, and the political judgment that using any other definition would unnecessarily slow down passage of the bill." *Id.*

351. *Id.* at 128.

352. *Id.*

353. One analyst has noted that most business groups adopted the premises of the ADA and acquiesced in it from the beginning. The National Association of Manufacturers, the Chamber of Commerce, the Labor Policy Association, and the American Society of Personnel Administrators—the big business groups most involved with the ADA—worked to smooth the bill's edges rather than oppose it fundamentally. BURKE, *supra* note 346, at 81. Large businesses represented by the aforementioned groups "had learned to live with disability rights requirements because they were federal contractors and subject to [Section] 504," while groups representing small businesses were opposed to the statute. *See id.*

354. *See, e.g.*, Bentivegna v. U.S. Dep't of Labor, 694 F.2d 619 (9th Cir. 1982); Davis v. Meese, 692 F.Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592, 517 (3d Cir. 1989).

355. *See, e.g.*, Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Drennon v. Phila. Gen. Hosp., 428 F.Supp. 809 (E.D. Pa. 1977).

356. *See, e.g.*, Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990); Thomas v. Atascadero Unified Sch. Dist., 662 F.Supp. 376 (C.D. Cal. 1987).

357. 480 U.S. 273 (1987).

Court concluded that the plaintiff's "hospitalization for tuberculosis in 1957 suffices to establish that she has a 'record of . . . impairment' . . . and is therefore a handicapped individual."[358] Going beyond that holding, the Court's opinion stated that the statute's protection of "not only those who are actually physically impaired, but also those who are regarded as impaired" evinces Congressional acknowledgment "that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[359] Further, the Court noted that implementing regulations issued by the Department of Health and Human Services provided that a physical or mental impairment is not a covered handicap unless it results in a substantial limitation of a major life activity.[360] "Although many of the comments on the regulations when first proposed suggested that the definition was unreasonably broad, the Department found that a broad definition, one not limited to so-called 'traditional handicaps,' is inherent in the statutory definition."[361]

As advocates and Congress considered the text of the proposed antidiscrimination legislation protecting the disabled, another significant development could be observed in the nation's high court. In several cases interpreting civil rights and employment discrimination laws the Supreme Court ruled against plaintiffs and exhibited an approach to statutory interpretation that should have set off alarm bells for those who seek to enact and rely on statutes to protect employees from certain employer conduct.

In *Wards Cove Packing Co. v. Atonio*[362] the Court, by a 5 to 4 vote, changed well-settled law governing the allocations of the burdens of proof in Title VII disparate-impact cases. In its seminal 1971 decision in *Griggs v. Duke Power Co.*[363] the Court held that Title VII was violated by neutral employer practices that adversely impacted minorities, even where there was no evidence of discriminatory motivation on the part of the employer. "The touchstone is business necessity," *Griggs* instructed, and "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[364] Although subsequent decisions repeated that the em-

358. *Id.* at 281.
359. *Id.* at 284.
360. *See id.*
361. *Id.* at 280 n.5.
362. 490 U.S. 642 (1989).
363. 401 U.S. 424 (1971).
364. *Id.* at 431–32.

ployer bore the burden of establishing that its job requirements were job-related and manifestly related to the employment,[365] the *Wards Cove* Court changed the law. The touchstone was no longer business necessity; instead, the Court instructed, the "touchstone . . . is a reasoned review of the employer's justification for his use of the challenged practice" with "no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster. . . ."[366] The employer no longer bore the burden of proving that its practices were necessary, rather, "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."[367] Acknowledging, incredibly, that "some of our earlier decisions can be read as suggesting otherwise," the Court explained that "to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense . . . they should have been understood to mean an employer's production—but not persuasion—burden."[368]

One week later, in *Lorance v. AT&T Tech., Inc.*,[369] the Court held that the statute of limitations on plaintiffs' claims of discrimination based on a facially neutral seniority system began to run as of the time of the adoption of the seniority system. Section 706(e) of Title VII provides that a charge of discrimination "shall be filed" with the EEOC within the applicable limitations period after the occurrence of the alleged unlawful employment practice.[370] A 1979 collective bargaining agreement between the employer and the plaintiff's labor union representative changed the manner of calculating the seniority of testers, with tester seniority to be determined by time spent in the tester occupation and not by plantwide

365. *See* Connecticut v. Teal, 457 U.S. 440, 446 (1982) (the "employer must . . . demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'"); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (plaintiff's *prima facie* case rebutted by employer's "demonstration that its narcotic rule . . . is 'job related'"); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employer required to prove job relatedness of challenged employment requirements); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("burden of proving that its tests" are job-related rests with employer).

366. Wards Cove Packing Co., 490 U.S. at 659.

367. *Id.*

368. *Id.* at 660 (citations omitted). Justice Stevens complained that the Court's "casual—almost summary—rejection of the statutory construction that developed in the wake of *Griggs* is most disturbing" and refused to "join a rejection of a consistent interpretation of a federal statute." *Id.* at 672 (Stevens, J., dissenting).

369. 490 U.S. 900 (1989).

370. *See* 42 U.S.C. § 2000e-5(e) (2000).

service. Demoted in 1982 during a recession, the plaintiffs, who would not have been demoted under the pre-1979 seniority system, filed charges with the EEOC in 1983 alleging that the system discriminated against them on the basis of sex. Those charges were time-barred, the Court concluded, because any "diminution in [the plaintiffs'] employment status occurred in 1979—well outside the period of limitations for a complaint filed with the EEOC in 1983 . . ."[371] Thus, the 1979 adoption of the facially neutral seniority system, and not its adverse application to employees in 1982, triggered the commencement of the limitations period.[372] In dissent, Justice Marshall (joined by Justices Brennan and Blackmun) wrote that the Court's "severe interpretation of Section 706(e) will come as a surprise to Congress, whose goals in enacting Title VII surely never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days."[373] Requiring anticipatory employee lawsuits "is so glaringly at odds with the purpose of Title VII" and "is compelled neither by the text of the statute nor our precedents interpreting it. . . ."[374]

Three days later, in *Patterson v. McLean Credit Union*,[375] the Court issued a decision interpreting and applying a Reconstruction era statute, 42 U.S.C. Section 1981[376] and that statute's protection of the right to make and enforce contracts. Section 1981 did not prohibit racial harassment in employment, the Court concluded, because by "its plain terms" it covers only the formation of a contract (the right to make a contract) and not "postformation conduct" like harassment occurring "after the contract relation has been established . . . ."[377] As for the right to enforce contracts, the

371. *Lorance*, 490 U.S. at 906.

372. This reading of 42 U.S.C. § 2000e-5 takes into account the point at which interests in protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale claims, the Court opined, and also "strikes a balance between the interests of those protected against discrimination by Title VII and those who work—perhaps for many years—in reliance upon the validity of a facially lawful seniority system." *Id.* at 912.

373. *Id.* at 914 (Marshall, J., dissenting).

374. *Id.*

375. 491 U.S. 164 (1989).

376. *See* 42 U.S.C. § 1981(a) (West Supp. 2003):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

377. *Patterson*, 491 U.S. at 176–77.

law "does not extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights."[378] Claims of racial harassment in the workplace extend beyond the right to enforce contracts, the Court reasoned, and were not actionable under Section 1981 but could be litigated under Title VII.[379]

Four dissenters, in an opinion by Justice Brennan, accused the Court of giving a "needlessly cramped interpretation" of the statute and complained that the majority ignored the pertinent circumstances and legislative history of Section 1981.[380] Justice Brennan argued that this history demonstrates Congressional intent to prohibit employers from imposing post-contractual discriminatory working conditions on freed slaves, and that the language of the statute covered and proscribed discriminatory terms and conditions of employment, such as workplace harassment, which demonstrated that blacks were not allowed to contract on equal terms with white employees.[381] In a separate dissent Justice Stevens opined that the Court's "repeated emphasis on the literal language of Section 1981 might be appropriate if it were building a new structure, but it is not a satisfactory method of adding to the existing structure."[382] "In the name of logic and coherence," Stevens wrote, the Court "replac[ed] a sense of rational direction and purpose in the law with an aimless confinement to a narrow construction of what it means to 'make' a contract."[383]

One week later, the Court in *Independent Federation of Flight Attendants v. Zipes*[384] considered the circumstances in which Title VII attorneys' fees may be awarded against a losing intervenor. Section 706(k) of Title VII provides that a federal district court "in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee."[385] Interpreting that

378. *Id.* at 177–78.

379. *See id.* at 178–82. The Court also declined to "federalize matters traditionally covered by state common law." *Id.* at 183 (internal quotation marks omitted). "[I]nterpreting § 1981 to cover racial harassment amounting to a breach of contract would federalize all state-law claims for breach of contract where racial animus is alleged, since § 1981 covers all types of contracts, not just employment contracts." *Id.*

380. *Id.* at 189, 205 (Brennan, J., concurring in the judgment in part and dissenting in part).

381. *See id.* at 206, 207–08.

382. *Id.* at 222 (Stevens, J., concurring in the judgment in part and dissenting in part).

383. *Id.*

384. 491 U.S. 754 (1989).

385. 42 U.S.C. § 2000e-5(k) (2000).

section "in light of the competing equities that Congress normally takes into account,"[386] the Court "conclude[d] that district courts should . . . award Title VII attorney's fees against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation."[387] Remarking that the "central purpose" of Section 706(k) was encouraging victims of discrimination to make wrongdoers pay, the Court reasoned that an assessment of fees against a losing intervenor would not serve that purpose, as the losing defendant will "be liable for all of the fees expended by the plaintiff in litigating the claim against him, and that liability alone creates a substantial added incentive for victims of Title VII violations to sue."[388] Arguing that the Court's result "ignores both the language of Section 706(k) and the objectives of Title VII," Justice Marshall opined that the "critical question in determining whether fees are to be awarded pursuant to Section 706(k) should be whether the plaintiff prevailed, either against a named defendant or an intervenor. If the plaintiff has done so, fees ordinarily should—and certainly may—be awarded."[389]

C. Anticipatory Interpretation

Thus, at the same time that the ADA was being drafted and considered, the Supreme Court was restrictively and narrowly interpreting civil rights and remedial statutes[390] (so much so that Congress reacted and legislatively overruled the Court's handiwork in the Civil Rights Act of 1991).[391] The Court signaled that it could

386. *Indep. Fed'n of Flight Attendants*, 491 U.S. at 761. The competing equities, in the Court's estimation, were the ordinary award of attorneys' fees to prevailing plaintiffs acting as private attorneys general in vindicating Title VII's policy and the ordinary denial of fees to a prevailing defendant, with a possible award of fees to the defendant where a plaintiff's suit was frivolous, unreasonable, or without foundation. *See id.* at 759–60.

387. *Id.* at 761.

388. *Id.*

389. *Id.* at 771, 779 (Marshall, J., dissenting).

390. In addition to the 1989 decisions by the Court discussed in the text, see Martin v. Wilks, 490 U.S. 755 (1989) (white firefighters who did not intervene in employment discrimination litigation ended by consent decrees could challenge workplace decisions made on the basis of the decrees); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (defendant in mixed-motive Title VII case could avoid liability by establishing by preponderance of the evidence that it would have made same decision even if protected characteristic had not been taken into account).

391. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (overruling aspects of Supreme Court decisions such as Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Wards Cove Packing Co. v. Atonio,

read and apply the then-proposed ADA in ways not foreseen or desired by the legislation's proponents. This reality illustrates the need for anticipatory interpretation, a hardheaded, detailed, and worst-case inquiry into what the courts and legal representatives of defendants may argue and do when interpreting and litigating statutory questions.[392] Given the Court's 1989 decisions, it could have been anticipated that the Court would do its own (and not Congress's) thing when asked to apply the ADA's vague and ambiguous terms and phrases via a "case-by-case balancing of underspecified factors. This complexity and under-specification . . . has created a legal field characterized by intense normative ambiguity, which has in turn engendered hostility directed at the Act, its enforcers, and its beneficiaries."[393]

What do I mean by "anticipatory interpretation?" Suppose that the proponents (legislators and other interested parties) of a public policy seek to have that policy enacted into law. The general thrust of the policy, such as an antidiscrimination measure, may be easy to express (such as "covered entities shall not discriminate on the basis of x"). Other details of the statute (what constitutes the proscribed "discrimination" and how that term and other terms should be defined) may require more particular specification. The legislation's proponents must then consider what path to follow in drafting the law, a consideration that should take into account the judicial lay of the land with regard to statutory interpretation and the likelihood that the courts may not construe the proposed statute in ways that will recognize and implement the advocates' desired goals and purposes. The drafters could opt for broad and relatively indeterminate language in the text of the law, with explanatory and clarifying views and positions set forth in committee reports and other extra-textual materials. Or, if concerned that a court will not go beyond the text of the legislation and will not resort to other legislative materials, the proponents may present and attempt to enact language addressing and defining statutory terms

490 U.S. 642 (1989); and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 333 (1991).

392. Architects and promoters of social-change legislation must ask "how can the new law be structured and implemented so as to adhere to the greatest extent possible with broadly accepted, if yet unrealized, aspirations, values and ideals?" Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 520 (2000).

393. *Id*. *But see* Burgdorf, *supra* note 31, at 509–10 (arguing that ADA is very specific and is an "example of a tendency toward increasing detail in civil rights legislation generally.").

in an effort to eliminate or at least reduce ambiguity and vagueness and the risk of juridical readings contrary to the actual purpose of the proposal. In deciding which path to take the proposed language should be examined and a key question should be asked: How will or may courts interpret and apply the language if it is enacted into law?

Whether anticipatory interpretation and foresight would have led to the enactment of a different ADA is, of course, not known or provable. One can only speculate about how the Court would have interpreted and applied the simpler definition of "disability" in the Burgdorf version of the legislation,[394] a definition shorn of the coverage-limiting "substantially limits" and "major life activities" language found in the current statute. But, as those who worked on the bill have attested, an ADA based on the previously enacted Rehabilitation Act made legal and political sense.[395] Their goal was to secure the passage of this important civil rights and antidiscrimination legislation and they succeeded in doing so, only to see the Supreme Court take the law in a direction they had not intended as illustrated by the 1999 trilogy,[396] wherein the Court relied on purportedly unambiguous text, ignored legislative history, and refused to defer to regulations issued by the EEOC.[397] Under the interpretive regime of the current Supreme Court Congress must expressly define statutory terms or run the risk of judicial determinations contrary to the legislative intent and purpose. If, for example, Congress does not want mitigating or corrective measures to be considered in determining whether an individual has a statutory disability, the legislature must say so in the text of the statute. If Congress does not want the courts to use the dictionary to define the word "substantially," does not want the term "substantially limits" to be defined in its present indicative verb form,[398] or did not intend to cap the number of persons covered by the law when it made its

394. *See supra* notes 339–41 and accompanying text.

395. *See supra* note 346 and accompanying text.

396. *See supra* Part III(B).

397. As noted by one analyst:

> *Sutton* was a stunning defeat for the EEOC. The agency, backed by the Justice Department, had aggressively sought deference to its position on the mitigating measures issue. The EEOC, the independent agency with primary responsibility for civil rights enforcement, together with the Executive Branch, agreed on how best to resolve this difficult issue. Yet the Court summarily dismissed the EEOC's approach.

White, *supra* note 79, at 563.

398. *See supra* notes 123–26 and accompanying text.

reference to 43 million disabled,[399] the text of the ADA must expressly and unequivocally make clear Congress's views on those matters. Language cannot be added to a statute with little or no thought as to whether and how the term or provision can be construed and used to limit the law's scope and optimal enforcement.[400]

This pursuit of specificity done in response to the Court's textualist approach may come with and impose a cost on Congress, as disagreements that would have been resolved by compromise language may not be settled and, consequently, legislators may find it more difficult to form coalitions and forge majorities.[401] Thus, a "danger of statutory specificity is that particular provisions may arouse sufficient opposition [such] that they will be amended to be less stringent or to take a contrary position, or they may be entirely deleted."[402] Moreover, efforts to amend the ADA and plug the holes in the statute made by the federal courts must also take into account the textualist-satisfying specificity necessary to prevent or reduce the likelihood of further judicial interpretations deviating from the legislative command. Achieving such clarity may not be politically feasible.[403]

Again, attention must be paid to the Court's interpretive regime and to the past, current and likely future interpretive choices made by that institution in its reading and application of the ADA and other statutes. It must also be acknowledged, however, that specificity in statutory drafting and enactment, while possibly reducing the risk of judicial departure from the legislators' intent and goal, is no guarantee that one and only one construction of a term or phrase is possible. All words, including words employed to eliminate or reduce textual indeterminacy and uncertainty, will still be interpreted by judges who will have the final say.

399. *See, e.g.*, *supra* notes 134, 274 and accompanying text.

400. *See supra* notes 201–206 and accompanying text.

401. *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 681 (2002) ("legislators seeking compromise will rationally prefer ambiguity in the interpretation of statutory language").

402. Burgdorf, *supra* note 31, at 511.

403. *See* Mark A. Rothstein et al., *Using Established Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L. Q. 243, 270 (2003).

V.
CONCLUSION

The goals and aspirations of the architects and proponents of the employment discrimination provisions of the ADA—those who characterized the statute as a modern-day Emancipation Proclamation and likened it to the Declaration of Independence—ran into and did not survive the collision with the Supreme Court's interpretation and application of those very same provisions. Expectations that the ADA would usher in a new era of effective promotion and protection of the disabled in the nation's workplaces have been dashed by a reality of resistance to the statute and by a decline in the post-ADA labor force participation of disabled workers.[404] This is an illustration and a reminder that, as important as the views and beliefs of the legislators and advocates are, what a law says and requires is what the courts conclude it says and requires, conclusions that may be quite different from those that were or would have been reached by the enacting legislature. As the courts have the final say, much more attention must be paid to the interpretive regimes of and methodologies employed by the judiciary in the construction of Title I of the ADA.

404. *See* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT (Jane West ed., 1996); Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671 (1999–2000); Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271 (2000); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims are Different*, 33 CONN. L. REV. 603 (2000–2001).

For an argument that the results of prior empirical research do not establish that the employment-related goals of the ADA have not been accomplished, see Peter Blanck, Lisa Schur, Douglas Kruse, Susan Schwochau & Chen Song, *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267 (2003).