

**TO:** Participants in the UCLA Friday Colloquium  
**FROM:** Sam Bagenstos  
**DATE:** January 29, 2009  
**RE:** My Talk on February 6

Attached is a chapter of my forthcoming book on the disability rights movement and the law. The book is entitled *Law and the Contradictions of the Disability Rights Movement*, and it is basically an argument against the “backlash” narrative that has developed in the academy about the Americans with Disabilities Act. According to that narrative, the ADA was a great, historic achievement of a highly mobilized social movement, but the courts, hostile to the statute, snatched that victory away by reading the law unduly narrowly. As the book makes clear, I am critical of the courts’ response to ADA claims myself. But attempt to show that the disability rights movement is much more diverse than proponents of the backlash narrative suggest, and that far from rejecting “the” principles of the disability rights movement, the courts have often simply taken sides in debates *within* the disability rights movement.

The book is organized as follows: Chapter One is an introduction. Chapter Two offers a tour of the disability rights movement and its various, often potentially conflicting, projects. Chapters Three through Six examine important doctrinal issues through the lens of these conflicting projects. Chapter Three, which is attached, addresses the question of who counts as

having a disability; Chapter Four addresses the scope of and justifications for the requirement of reasonable accommodation; Chapter Five addresses discrimination on the basis of disability-linked safety risks; and Chapter Six addresses medical decisionmaking issues such as assisted suicide, the withholding of treatment from newborns with disabilities, and selective abortion. Finally, Chapters Seven and Eight address policy questions: How successful has the ADA been at achieving the goals of integration and empowerment, and in what new directions should disability law and policy proceed?

I'm very interested in your questions and comments on this chapter or the overall argument. I look forward to next Friday!

## **Chapter Three**

### **Defining Disability**

In this chapter, I examine the controversy over the definition of “disability” in the Americans with Disabilities Act. American civil rights laws generally have no protected classes. A law that prohibits race discrimination protects blacks, whites, and everyone else; a law that prohibits gender discrimination protects men and women; and a law that prohibits religious discrimination protects believers of all faiths as well as nonbelievers. But disability discrimination law is different. The ADA, for example, protects individuals against discrimination only if they have a “disability” as defined by the statute. Federal courts, including the Supreme Court, have read the ADA’s disability definition quite narrowly. Accordingly, an enormous portion of ADA litigation has focused on the threshold question of whether the plaintiff is a member of the protected class rather than on whether the defendant engaged in improper discrimination.

Disability rights advocates have criticized the Supreme Court’s definition-of-disability decisions as betraying the promises of the ADA. I share many of the criticisms, but I hope to show that they shed as much light on the limitations of the ADA itself, and the arguments deployed in its favor during the statute’s run to passage, as on the limitations of the Court’s vision. There is a reason the ADA was constructed and sold the way it was, however. The limitations highlighted by the definition-of-disability cases will

not be easy to overcome. Even Congress's recent effort to overcome these limitations, the ADA Amendments Act of 2008, raises as many questions as it answers.

### *The Critique of the Supreme Court's "Disability" Cases*

Following the model of the Rehabilitation Act<sup>1</sup> before it, the ADA protects only those individuals who have a "disability." The statute defines the term to include three conditions: (1) present disability—"a physical or mental impairment that substantially limits one or more . . . major life activities"; (2) past disability—"a record of such an impairment"; and (3) perceived disability—"being regarded as having such an impairment."<sup>2</sup> The ADA's protection against discrimination and its requirement of reasonable accommodation extend only to individuals who have one of these forms of "disability."

The Supreme Court has decided five cases that raised the question of how to interpret the ADA's disability definition. In the first, *Bragdon v. Abbott*,<sup>3</sup> the Court seemed to embrace a broad reading of that definition. Holding that HIV disease is an impairment "from the moment of infection," the Court further concluded that, even in its asymptomatic phase, the disease

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<sup>1</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (2000)).

<sup>2</sup> 42 U.S.C. § 12102(2).

<sup>3</sup> 524 U.S. 624 (1998).

substantially limited the plaintiff, Sidney Abbott, in her major life activity of reproduction. Although HIV disease does not prevent a woman from bearing children, the risk of transmission to one's child is enough to keep many people (including Abbott) from wanting to have children; that risk was therefore enough to constitute a substantial limitation. In dissent, Chief Justice Rehnquist argued that the Court's decision created an unduly broad disability category, one that would embrace all individuals with genetic markers for harmful diseases.<sup>4</sup>

But in its next four cases—*Sutton v. United Air Lines*,<sup>5</sup> *Murphy v. United Parcel Service*,<sup>6</sup> *Albertson's, Inc. v. Kirkingburg*,<sup>7</sup> and *Toyota Motor Manufacturing v. Williams*<sup>8</sup>—the Court seemed to reverse course and emphasize that it regards the threshold “disability” determination as an important device for cabining the reach of the ADA.<sup>9</sup> The Court made the point explicit in its unanimous decision in *Toyota*. Ruling against an individual with carpal tunnel syndrome, the Court held that a plaintiff can establish a substantial limitation in the major life activity of “performing manual tasks” only by showing that her impairment “prevents or severely

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<sup>4</sup> See *id.* at 661 (Rehnquist, C.J., dissenting).

<sup>5</sup> 527 U.S. 471 (1999).

<sup>6</sup> 527 U.S. 516 (1999).

<sup>7</sup> 527 U.S. 555 (1999).

<sup>8</sup> 534 U.S. 184 (2002).

<sup>9</sup> See, e.g., *Sutton*, 527 U.S. at 495 (Ginsburg, J., concurring) (discerning congressional “intent to restrict the ADA’s coverage to a confined, and historically disadvantaged, class”).

restricts [her] from doing activities that are of central importance to most people’s daily lives.”<sup>10</sup> The Court reversed a lower court decision that held that the inability to perform manual tasks associated with a single job was sufficient. In so doing, the Court emphasized that the terms “substantially limits” and “major life activities” are terms that “need to be interpreted strictly to create a demanding standard for qualifying as disabled.”<sup>11</sup>

The significant effects of the Court’s narrow reading of the disability definition are particularly evident in the 1999 trilogy of definition-of-disability cases: *Sutton*, *Murphy*, and *Albertson’s*. In *Sutton*, the Court addressed the so-called mitigating measures issue. Many people with disabilities use various measures to mitigate the limiting effects of their impairments. A person with epilepsy, diabetes, or schizophrenia might take medication; a person with an amputation might use a prosthetic; and so forth. *Sutton* presented the question whether “disability” determination should look to the limitations the plaintiff’s condition imposes in its unmitigated state or whether, instead, that determination should take account of the effects of whatever mitigating measures the plaintiff uses.

If the “disability” determination looked to the condition in its unmitigated state, the statute would likely have broader coverage. The whole

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<sup>10</sup> *Toyota*, 534 U.S. at 198.

<sup>11</sup> *Id.* at 691.

point of using mitigating measures, after all, is to mitigate the limitations imposed by a disability.

The Court in *Sutton* ultimately ruled against that broad position. In determining whether a plaintiff satisfies the ADA's present-disability prong, the Court ruled, the proper inquiry is whether--even after the application of mitigating measures—the plaintiff's condition substantially limits major life activities.<sup>12</sup> Accordingly, to the extent that the plaintiff was taking a medication or using a device that removed any substantial limitation imposed by her impairment (without imposing a substantial limitation of its own), she would not be covered under the ADA's present-disability prong.<sup>13</sup>

The Court applied this principle in *Sutton* to reject the claims of twin sisters who had uncorrected vision of 20/200 in one eye and 20/400 in the other, because their vision improved to 20/20 in both eyes when they used corrective lenses.<sup>14</sup> Although the Sutton sisters' visual limitations might, before mitigating measures were used, have substantially limited the major life activity of seeing, their impairments imposed no substantial limitation once they put on glasses. In *Murphy*, the Court applied the same principle to hold that an individual with severe hypertension was not substantially limited in any major life activity, because his condition was currently

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<sup>12</sup> *Sutton*, 527 U.S. at 488–89.

<sup>13</sup> *See id.* at 481–89.

<sup>14</sup> *Id.* at 488–89.

controlled by medication.<sup>15</sup> And in *Albertson's*, the Court stated that the lower court was “too quick”<sup>16</sup> to find that the plaintiff’s monocular vision substantially limited the major life activity of seeing, because the lower court did not take account of the way in which the plaintiff’s brain adapted to the condition.<sup>17</sup>

In all of these cases, the employers denied opportunities to the plaintiffs based on their physical impairments notwithstanding the fact that the plaintiffs were able to control the effects of their impairments through corrective measures.<sup>18</sup> Yet in all of these cases, the Court said that the plaintiffs’ use of such corrective measures could remove them from the protection of the ADA. Although the corrective measures did not protect the plaintiffs from discrimination, those measures did deprive them of the right to show that they were in fact qualified for the positions at issue and that their employers had acted on the basis of prejudice or stereotypes.

Many advocates and academics with a disability rights bent have sharply criticized the *Sutton* Court’s holding that the present-disability inquiry must take account of mitigating measures. They have argued that the Court’s ruling (which rejected specific statements in the legislative history and in the interpretive guidance issued by the Equal Employment

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<sup>15</sup> *Murphy*, 527 U.S. at 521.

<sup>16</sup> *Albertson's*, 527 U.S. at 564.

<sup>17</sup> *Id.* at 564–66.

<sup>18</sup> *See id.* at 558–60; *Murphy*, 527 U.S. at 518–20; *Sutton*, 527 U.S. at 475–76.

Opportunity Commission)<sup>19</sup> would leave unprotected a large number of people with conditions that Congress clearly intended to cover: epilepsy, diabetes, amputated limbs, and severe hearing impairments, for example.<sup>20</sup> As I discuss below, Congress reversed the *Sutton/Murphy* mitigating measures ruling in the ADA Amendments Act.

But the critics have responded even more sharply to a different aspect of *Sutton* and *Murphy*—the Court’s restrictive interpretation of the perceived-disability prong of the statute’s “disability” definition. In both cases, the employers plainly believed that the plaintiffs’ physical conditions disqualified them from performing the jobs at issue. But because the employers did not perceive those conditions as substantially limiting the plaintiffs’ ability to work generally, the Court held that the perceived-disability prong was not satisfied.<sup>21</sup> Thus, the *Sutton* Court stated, “When the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege

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<sup>19</sup> See *Sutton*, 527 U.S. at 480 (quoting EEOC and Department of Justice interpretive guidance); *id.* at 499–501 (Stevens, J., dissenting) (quoting the House and Senate committee reports to the bill).

<sup>20</sup> See, e.g., Arlene Mayerson & Matthew Diller, *The Supreme Court’s Nearsighted View of the ADA*, in *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions* 124 (Leslie Pickering Francis & Anita Silvers eds., 2000); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 *UCLA L. Rev.* 1279, 1299–1307 (2000); Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 *Ala. L. Rev.* 321, 325–26, 372–73 (2000).

<sup>21</sup> See *Murphy*, 527 U.S. at 524–25; *Sutton*, 527 U.S. at 491–92.

they are unable to work in a broad class of jobs.”<sup>22</sup> “If jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available,” the Court continued, “one is not precluded from a substantial class of jobs.”<sup>23</sup> Applying that standard, the Court held that the plaintiffs (airline pilots excluded from flying global jets for United) were not substantially limited in the major life activity of working, because “there [we]re a number of other positions utilizing [their] skills” available in the workforce generally; and they were not “regarded as” substantially limited in working, because there was no reason to believe United doubted that they could perform those other jobs.<sup>24</sup> And in *Murphy*, the Court held that the employer’s perception that the plaintiff’s hypertension disqualified him under federal law from driving a commercial motor vehicle was insufficient to show a perceived substantial limitation in working. Although disqualification from driving such a vehicle would have excluded the plaintiff from literally millions of jobs,<sup>25</sup> the Court found it more significant that the plaintiff (a mechanic) was still eligible to work in mechanic’s jobs that did not require commercial motor vehicle certification.<sup>26</sup>

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<sup>22</sup> *Sutton*, 527 U.S. at 491.

<sup>23</sup> *Id.* at 492.

<sup>24</sup> *Id.* at 493.

<sup>25</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 Va. L. Rev. 397, 512 (2000).

<sup>26</sup> See *Murphy*, 527 U.S. at 524–25.

Critics have seen this aspect of *Sutton* and *Murphy* as confirming and endorsing the trend in the lower courts to limit ADA protection to a relatively small group of severely disadvantaged people, a group the courts occasionally call “the truly disabled.”<sup>27</sup> Since the Supreme Court’s 1999 trilogy, lower courts have often referred to the ADA’s supposed purpose “to protect the truly disabled, but genuinely capable.”<sup>28</sup> Building on the influential pre-*Sutton* critiques of the “truly disabled” idea by Robert Burgdorf and Arlene Mayerson (both of whom played major roles in drafting and lobbying for the ADA),<sup>29</sup> commentators have urged that the Court’s narrow reading of the “disability” definition “seriously undermine[s] the purposes and goals of the

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<sup>27</sup> See, e.g., *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986). For an argument that the decisions in the *Sutton* trilogy reflect an endorsement of the “truly disabled” cases, see Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 *Yale L. & Pol’y Rev.* 1, 3 (1999).

<sup>28</sup> *Heiko v. Columbia Savings Bank*, F.S.B., 434 F.3d 249, 258 (4th Cir. 2006). For other post-*Sutton* examples, see *Fraser v. Goodale*, 342 F.3d 1032, 1041 (9th Cir. 2003); *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 113 (2d Cir 2001); *McGuire v. Dobbs Intern. Servs., Inc.*, 232 F.3d 895 (9th Cir. 2000). For a review of post-*Sutton* law in the lower courts, see Ruth O’Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* 210–17 (2001). In its principal brief in *Toyota* (written by now Chief Justice John Roberts), the employer argued extensively that the ADA’s disability definition should be read as covering only “the truly disabled,” and that this limitation is inherent in the Court’s decisions in the *Sutton* trilogy. See Brief for Petitioner at 3, 10- 11, 18, 29–30, *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002) (No. 00-1089). Although the Court did not use that precise language, its statement that the ADA must “be interpreted strictly to create a demanding standard for qualifying as disabled,” *Toyota*, 534 U.S. at 197, will not dispel the influence of the “truly disabled” idea. For an early criticism of *Toyota*, along the same lines as the academic criticisms of the *Sutton* trilogy, see Ruth O’Brien, *The Supreme Court’s Catch-22, Ragged Edge*, Nos. 2 & 3, at 13 (2002).

<sup>29</sup> See Robert L. Burgdorf Jr., “*Substantially Limited*” *Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 *Vill. L. Rev.* 409, 536–46 (1997); Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 47 *Vill. L. Rev.* 587, 609 & n.99 (1997).

ADA.”<sup>30</sup> Or, more colorfully, “the Supreme Court has taken many people with disabilities back to the dark ages, by permitting employers and program administrators to discriminate against such individuals at will based on irrational stereotypes and prejudice.”<sup>31</sup>

These commentators decry the Court’s implication that an employer could defend an irrational refusal to hire an individual with a disability “by indicating that the individual would be capable of working at other jobs at other companies or in other fields.”<sup>32</sup> If that implication is correct, they contend, the Court is betraying the core principles of the disability rights movement. It is treating the ADA as a disability benefits program like Social Security Disability Insurance that provides redistributive largesse to a disadvantaged class rather than as a civil rights law.<sup>33</sup> As Matthew Diller puts it, the implicit message “that rather than demanding accommodations, the plaintiff should simply find a job where no alteration of the workplace would be necessary” in the end “defeats the goal of establishing equal access to the job market.”<sup>34</sup> Encapsulating the views of these advocates, Linda

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<sup>30</sup> Tucker, *supra* note 20, at 370.

<sup>31</sup> *Id.* at 373. For an equally harsh criticism of the *Sutton* trilogy, see Soifer, *supra* note 20, at 1299–1312.

<sup>32</sup> Tucker, *supra* note 20, at 372; *see also* Mayerson & Diller, *supra* note 20, at 125 (“Imagine this logic in any other area of civil rights and it does not pass even the laugh test. ‘No we don’t hire women, Jews (fill in the blank) but you can get a job somewhere else, so what’s the beef?’”).

<sup>33</sup> *See, e.g.*, Burgdorf, *supra* note 29, at 568.

<sup>34</sup> Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 Berkeley J. Emp. & Lab. L. 19, 29 (2000).

Krieger argues that the fundamental disconnect between the disability benefits orientation of decisions like *Sutton* and *Murphy* and the purported civil rights focus of the ADA arises from the fact that judges and members of the public “completely fail to understand the ADA’s anti-disparate treatment agenda. They do not understand that the ADA, even with its redistributive reasonable accommodation provisions, is an anti-discrimination statute, not a social welfare benefits program like social security disability, which seeks to provide a safety net for the non-working disabled.”<sup>35</sup> As I discuss below, the ADA Amendments Act attempts to reverse this aspect of *Sutton* and *Murphy* as well, though it remains to be seen how effective the new law will be in that effort.

### *Problems with the Critique*

As I explain later in this chapter, I have significant criticisms of the Supreme Court’s definition-of-disability decisions myself. But the story of betrayal is far too pat. In fact, many of the decisions of the Supreme Court are consistent with a number of important strands of the thinking of disability rights activists in the 1970s and 1980s. Understanding the degree

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<sup>35</sup> Linda Hamilton Krieger, *Socio-Legal Backlash*, 21 Berkeley J. Emp. & Lab. L. 476, 516 (2000); see also Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, in *Americans with Disabilities*, *supra* note 20, at 126, 128 (arguing that the prevalence among people with disabilities of the view that “the ADA was meant to sweep away social practice that arbitrarily relegates people to inferior treatment or outcomes based on their being physically or mentally impaired” has created a “feeling of disorientation” surrounding the *Sutton* trilogy).

to which the Court’s decisions comport with those disability rights principles not only highlights the tensions within disability rights thinking; it also demonstrates the limits of some prominent conceptions of disability rights.

*“Independence” and the Definition-of-Disability Decisions*

The Supreme Court’s definition-of-disability decisions are in many ways quite consistent with the “independence” frame many disability rights advocates employed in arguing for the ADA in the late 1980s. As I showed in chapter 2, a key aspect of that frame—though hardly the only aspect—was the argument that disability rights laws would save people with disabilities (and society) from wasteful dependency on disability benefits programs.<sup>36</sup> If the ADA is understood, in accordance with this view, as a means of saving society money by moving people off disability benefits rolls and into the workforce, on whom should the statute bestow its protections? One obvious answer is that the statute should focus on protecting those people who would be unable to work—and thus dependent on public assistance—without antidiscrimination and accommodation protection. On such a view, the statute would not protect people who otherwise have a good chance of finding employment, even if discrimination and denial of accommodation deprives them of some opportunities they find very desirable. *Bragdon*, *Sutton*, *Murphy*, *Toyota*, and the lower court cases that limit ADA coverage to “the

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<sup>36</sup> See chapter 2, *supra*.

truly disabled” can be read as drawing a very similar line between those who could find work without the ADA and those who need ADA protection to avoid dependency on disability benefits programs. Indeed, some of the most objectionable aspects of these cases seem to rely on this very distinction.

An example is *Sutton*’s statement that “[i]f 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”<sup>37</sup> and hence has no “disability” embraced by the ADA.<sup>38</sup> The Court further stated that an individual cannot satisfy the “regarded as” portion of the disability definition simply by “say[ing] that if the physical criteria of a single employer were imputed to all similar employers one would be regarded as substantially limited in the major life activity of working only as a result of this imputation.”<sup>39</sup> These statements make no sense if the goal of the ADA is to provide protection against prejudice and stereotypes. If taken seriously, they would shield the employer who harbors the most extreme prejudices or acts on the most idiosyncratic stereotypes. And indeed, critics of *Sutton* have made precisely that point.

If, however, the ADA is seen as an effort to move people from disability benefits rolls into the workforce, then these statements in *Sutton* seem less

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<sup>37</sup> *Sutton*, 527 U.S. at 492.

<sup>38</sup> *See id.* at 491 (stating that the ADA definition of disability’s “substantially limits” prong is fulfilled if “at a minimum . . . plaintiffs allege they are unable to work in a broad class of jobs”).

<sup>39</sup> *Id.* at 493.

incongruous. “If jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available,”<sup>40</sup> then the ADA is not necessary for the plaintiff to avoid dependency. She can stay off the disability benefits rolls by taking one of the available jobs. The ADA’s protection of such a plaintiff, therefore, does nothing to reduce the cost of disability benefits programs to public budgets. Similarly, there is no reason to impute one employer’s exclusion to other employers, because an individual will not be forced to the dependency rolls on the basis of a single employer’s misperceptions.

Linda Krieger and Matthew Diller have criticized decisions like *Sutton* for assuming that the ADA is simply another disability benefits program.<sup>41</sup> When the ADA is viewed as a disability benefits program, Diller has written, “the case law has a certain coherence, although not the coherence intended by the framers of the law.”<sup>42</sup> But my discussion should suggest that Krieger and Diller’s point is misplaced. If courts took seriously the “independence” argument articulated by the statute’s framers and supporters in the campaign to enact the ADA, decisions like *Sutton* would not be justified simply on the ground that the ADA is “just another benefits program” that had to be limited to sufficiently needy and morally worthy recipients. Instead,

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<sup>40</sup> *Id.* at 492.

<sup>41</sup> See Diller, *supra* note 34, at 48–49; Krieger, *supra* note 35, at 516–17. For excellent discussions of the necessity and moral worth criteria applied to disability benefits programs, see Deborah A. Stone, *The Disabled State* (1984); Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 *UCLA L. Rev.* 361 (1996).

<sup>42</sup> Diller, *supra* note 34, at 48.

such decisions would be justified on the ground that the ADA is a regime enacted in significant part as a cost-saving *alternative* to existing benefits programs. An “independence” approach would treat the ADA as a way of getting people out of benefits programs and into the workforce, not as a way of getting job accommodations for people who would be in the workplace anyway. Such an approach would adopt a narrow interpretation of “disability,” but not simply because of a general societal view that disability benefits programs should be kept within tightly cabined bounds. It would adopt a narrow interpretation of disability to focus the statute on its target population. Much of the case law fits this model very well.

To be sure, the Supreme Court’s definition-of-disability cases are not explicit on this point.<sup>43</sup> Indeed, at least two aspects of the Court’s jurisprudence suggest that the Court has not had the “independence” argument in mind in reaching its outcomes. First, the Court has been quite reticent to hold that working is a “major life activity” under the statute.<sup>44</sup>

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<sup>43</sup> Some of the attitude I discuss, however, seems to lurk just below the surface in some lower court cases, which both Diller and I have criticized, that pejoratively characterize accommodation requests by people with relatively minor impairments as requests for a “handout” or an unfair “competitive advantage.” See Bagenstos, *supra* note 25, at 470 & n.277 (quoting *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1460 (7th Cir. 1995) (affirming denial of relief to medical resident who sought to be excused from working long shifts as an accommodation for his strabismus (crossed eyes) and explaining that the court would not “allow[] an individual with marginal impairment to use disability laws as bargaining chips to gain a competitive advantage”)); Diller, *supra* note 34, at 48 & n.170 (quoting *Hileman v. City of Dallas*, 115 F.3d 352, 354 (5th Cir. 1997) (“We refuse to construe the . . . Act as a handout to those who are in fact capable of working in substantially similar jobs.”) (alteration in original) (footnote omitted)).

<sup>44</sup> See *Toyota*, 534 U.S. at 200 (“Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much,

Second, in the *Toyota* case the Court rejected the Sixth Circuit’s attempt to tie the major life activity of “performing manual tasks” to tasks performed at the workplace.<sup>45</sup> The Court explained that the ADA’s definition of disability applies not only in employment discrimination cases but also in cases involving public transportation and places of public accommodation.<sup>46</sup> This broad application, the Court believed, “demonstrates that the definition is intended to cover individuals with disabling impairments regardless of whether the individuals have any connection to a workplace.”<sup>47</sup> In its words, at least, the Court thus has seemed to reject the notion that statutory coverage should be tied to an individual’s need for accommodation to remain in the workforce.

But my point is not about the intentions of the justices who joined these opinions. It is about what the Court’s holdings tell us about the notion of “independence” proffered by disability rights activists. If the Supreme Court decisions that have been so strongly criticized by activists and academics are in fact broadly consistent with that notion—and I think they are—this suggests the problem is not that the Supreme Court has betrayed

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and we need not decide this difficult question today.”); *Sutton*, 527 U.S. at 492. The *Sutton* Court reserved the question of whether “working” is a major life activity but noted: “[T]here may be some conceptual difficulty in defining ‘major life activities’ to include work, for it seems ‘to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you’re asking is, whether the exclusion itself is by reason of handicap.’” *Id.* (alterations in original).

<sup>45</sup> See *Toyota*, 184 U.S. at 200–201.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

the promises made in the ADA. Instead, the problem is one that lies within the disability rights notion of “independence”—and the emphasis on avoiding welfare and public benefits—itsself.

*The Minority Group Model and the Definition-of-Disability Decisions*

The overall pattern of the Supreme Court’s definition-of-disability decisions is also consistent with an understanding of disability as defining a discrete, stigmatized minority group.<sup>48</sup> Indeed, it would be hard to come up with a pattern of decisions that fit that understanding better than the bottom lines the Court has actually reached. The Court’s five definition-of-disability cases have involved plaintiffs with five different conditions: asymptomatic HIV (*Bragdon*); vision of 20/200 and 20/400, correctable to 20/20 (*Sutton*); high blood pressure (*Murphy*); monocular vision (*Albertson’s*); and carpal tunnel syndrome (*Toyota*). HIV disease is highly stigmatized, and the Court held that it was a disability. Correctable poor vision—in other words, the need to wear glasses—and treatable high blood pressure are not, and the Court held that they were not disabilities. As Justice Ginsburg explained, “[P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce

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<sup>48</sup> See chapter 2, *supra*.

as historical victims of discrimination.”<sup>49</sup> Monocular vision and carpal tunnel syndrome are somewhere in between those two poles, and the Court issued in-between rulings: The Court said in *Albertson’s* that most cases of monocular vision will probably count as disabilities, but that the lower court was “too quick to find a disability” in the case before it; and the Court held in *Toyota* that the court of appeals had engaged in the wrong analysis in concluding that the plaintiff’s carpal tunnel syndrome was a disability, but it remanded for further proceedings on the question.<sup>50</sup>

A minority-group model also supports the much-maligned mitigating measures ruling of *Sutton* and *Murphy*. The ability to use mitigating measures will often make an enormous difference in the way society responds to an impairment; a view of disability as defining a discrete, stigmatized minority group could hardly ignore those measures. The facts of *Sutton* illustrate the point. Uncorrected, the *Sutton* plaintiffs had vision that fell below the threshold of “legal blindness.” A person with uncorrectable “legal blindness” would surely be regarded by a broad swath of society as abnormal and “disabled.” But if she could improve her vision to 20/20 by wearing eyeglasses, as the *Sutton* plaintiffs could, she would instantly become “normal” and have no need for any special remedy to protect her against systematic disadvantage. Corrective lenses are a readily available, easy to

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<sup>49</sup> *Sutton*, 527 U.S. at 494 (Ginsburg, J., concurring).

<sup>50</sup> See *Toyota*, 534 U.S. at 202–3.

use mechanism that eliminate the limiting effect of the impairment at no appreciable cost. The mitigating measures, in that case, make all the difference regarding whether individuals are in or out of a discrete and stigmatized minority group.

That is not to say that every person who successfully mitigates the immediate effects of an impairment is no longer stigmatized as “disabled.” People with epilepsy, diabetes, or schizophrenia may take medications that control their symptoms, but they are still considered disabled by many people in society at large. People who use prosthetic legs for mobility or hearing aids to enhance their auditory sense are also considered disabled by many, even if they can perform any activity.

Although much of the commentary criticizing *Sutton* treats that decision as excluding people with these correctable but stigmatized conditions from ADA coverage—and many lower courts have read *Sutton* that way—nothing in the Court’s decisions require such a result. Indeed, the Court left open two clear pathways for coverage of conditions like these. The first pathway would have relied on the present-disability prong of the ADA’s definition. As the Sutton Court explained, the “use of a corrective device does not, by itself, relieve one’s disability. Rather, one has a disability . . . if, notwithstanding the use of a corrective device, that individual is

substantially limited in a major life activity.”<sup>51</sup> And the measures taken to mitigate the effects of an impairment may themselves impose substantial limitations.<sup>52</sup> *Bragdon* demonstrates that a “substantial limitation” in an activity need not be a complete inability to perform that activity: although HIV places no physical obstacle in the path of reproduction, it imposes a condition on reproduction that most people would not want to assume—and the Court found that condition sufficient to constitute a substantial limitation.<sup>53</sup>

Applying the *Bragdon* analysis to medicated epilepsy, diabetes, and schizophrenia—as well as the use of prosthetic limbs, hearing aids, and the like—should be straightforward. People with medicated epilepsy and schizophrenia often cannot perform any major life activities—including, especially, the major life activity of caring for one’s self—without taking medication that itself imposes substantial physical consequences most people would not want to accept. *Sutton* itself cited a study that “catalog[ed] serious negative side effects of new antiepileptic drugs.”<sup>54</sup> The side effects of

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<sup>51</sup> *Sutton*, 527 U.S. at 488.

<sup>52</sup> *See id.* at 482 (holding that “both positive and negative” effects of mitigating measures must be considered in the substantial limitation inquiry); *id.* at 484 (arguing that ignoring mitigating measures would “lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects” of those measures).

<sup>53</sup> *See Bragdon*, 524 U.S. at 641.

<sup>54</sup> *Sutton*, 527 U.S. at 484 (citing Curry & Kulling, *Newer Antiepileptic Drugs*, Am. Family Physician, Feb. 1, 1998).

antipsychotic medications are even more notorious.<sup>55</sup> As for people with diabetes, many will be unable to perform any meaningful activity if they do not monitor their blood sugar levels, follow strict diets, and take insulin on a regular basis. These are conditions that intrude frequently on the diabetic individual's day; they frequently clash with work schedules and other obligations designed without people with diabetes in mind, and they can themselves be quite stigmatizing.<sup>56</sup>

If one takes full account of the notion of stigma, the substantial-limitation element of the disability definition could have been read capaciously even under the Court's jurisprudence. One might say that Bill Demby, the Vietnam veteran from the DuPont television commercial of a few decades ago, is "substantially limited" in the major life activity of walking, even though his two prosthetic legs permit him to "play[] a spirited game of

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<sup>55</sup> See Laura Lee Hall, *Making the ADA Work for People with Psychiatric Disabilities, in* Mental Disorder, Work Disability, and the Law 241, 256 (Richard J. Bonnie & John Monahan eds., 1997).

<sup>56</sup> In *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997), two of the three judges applied a similar analysis and concluded that, even in its medicated form, the plaintiff's insulin-dependent diabetes might actually impose substantial limitations on his major life activities—in part because of the burdensome nature of the treatment regime. *See id.* at 767–68 (Kennedy, J., concurring in part and dissenting in part); *id.* at 768 (Guy, J., concurring in part and dissenting in part). For a nondiabetes case holding that the mitigating measures may themselves be stigmatizing and thus substantially limiting, see *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998) (holding that plaintiff presented sufficient evidence to survive summary judgment on the question of whether her intermittently symptomatic psoriasis was a "disability" and noting that plaintiff "receives weekly medication and treatment" that "sometimes causes her to lose her hair and fingernails, and occasionally causes her skin to peel").

basketball on an urban blacktop.”<sup>57</sup> He can walk only on the condition that he wears prosthetic legs--a stigmatizing condition that most people need not experience and that those who have designed our social institutions and physical structures are likely not to have considered.<sup>58</sup> A person who wears a hearing aid ought to have been considered substantially limited in the major life activity of hearing for the same reason: she can hear, but only on the condition that she adorn herself with one of the classic “stigma symbols.”<sup>59</sup> In each case, mitigating measures may reduce the physical symptoms, but they do not eliminate the stigma that can lead to systematic exclusion. They may even feed that stigma.

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<sup>57</sup> Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 35 (1993). A more recent television commercial for Nike shoes features a woman with two prosthetic legs running a sprint.

<sup>58</sup> See *Sutton*, 527 U.S. at 488 (“[I]ndividuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run.”); see also *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946, 950 (8th Cir. 1999) (holding post-*Sutton* that a person who experienced residual effects of polio but could “walk and engage in many physical activities with the use of his leg brace” was substantially limited in the major life activity of walking: “The full range of motion in his leg is limited by the brace, and his gait is hampered by a pronounced limp.”).

<sup>59</sup> Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* 43–44 (1963) (describing “stigma symbols” as “signs which are especially effective in drawing attention to a debasing identity discrepancy, breaking up what would otherwise be a coherent overall picture, with a consequent reduction in our valuation of the individual”); *id.* at 92 (“It should be noted that since the physical equipment employed to mitigate the ‘primary’ impairment of some handicaps understandably becomes a stigma symbol, there will be a desire to reject using it.”); see also *id.* at 20 (suggesting the stigma attached to hearing aid use). See generally R. C. Smith, *A Case about Amy* 106–7 (1996) (contrasting the stigma attached to hearing aid use with the lack of stigma attached to wearing eyeglasses). By suggesting that *Sutton* dictates that a hearing impairment “corrected” through use of a hearing aid might no longer be a disability, the Fifth Circuit disregarded these crucial points in *Ivy v. Jones*, 192 F.3d 514 (5th Cir. 1999) (remanding the “disability” question for consideration by the district court).

The second pathway left open by *Sutton* would have relied on the past- and perceived-disability prongs of the ADA’s definition. Here, stigma again takes on particular importance. The ADA protects individuals who are “regarded as having” a substantially limiting impairment.<sup>60</sup> Although courts and commentators typically treat this provision as covering individuals who are regarded *by the defendant* as having a substantially limiting impairment, there is nothing in the statutory text that limits the provision in that way. To the contrary, the statute on its face appears to embrace anyone who is “regarded”—by significant segments of society at large if not by the defendant—as having a substantially limiting impairment. Under that analysis, stigmatized conditions like schizophrenia and epilepsy ought clearly to have been covered. Nothing in *Sutton*—which, after all, involved a basically nonstigmatized impairment—contradicts that point.

Perhaps more important, the *Sutton* and *Murphy* decisions did not at all address the past-disability prong of the ADA’s “disability” definition, which protects people from discrimination based on a “record of” a substantially limiting impairment.<sup>61</sup> *Sutton* and *Murphy* would have been particularly poor cases for invocation of the “record” prong: there appears to have been no suggestion in either case that the plaintiffs spent a substantial amount of time with their impairments before they began to use the

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<sup>60</sup> 42 U.S.C. § 12102(2)(C).

<sup>61</sup> 42 U.S.C. § 12102(2)(B).

mitigating measures at issue. The plaintiffs therefore could have had no “record” of a substantially limiting impairment, because their impairments were essentially always “controlled” and hence never (under the Court’s assumption) in fact substantially limiting.

Many people with now-controlled medical conditions at some point experienced substantial limitations, however. A person may have been hospitalized for tuberculosis but have fully recovered.<sup>62</sup> Another might have recovered after a year-long battle with cancer.<sup>63</sup> Still others might have experienced significant, limiting effects from diabetes or seizure disorders before their physicians discovered the appropriate treatment. If an employer denies a job to one of these individuals because of her prior diagnoses—whether by disqualifying her for all time or by disqualifying her until she has shown no symptoms for an arbitrarily fixed period—it seems clearly to have discriminated based on the individual’s “record of” a substantially limiting

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<sup>62</sup> See *School Bd. v. Arline*, 480 U.S. 273, 281 (1987) (holding such an individual protected under the Rehabilitation Act’s “record” prong).

<sup>63</sup> *Cf.* *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655–56 (5th Cir. 1999) (finding a jury question as to whether plaintiff whose cancer was in remission, but who had suffered prediagnosis effects, experienced thirty days of hospitalization, and required isolation from other persons after his hospitalization, had a “record” of a disability). *But cf.* *Ellison v. Software Spectrum*, 85 F.3d 187, 192 (5th Cir. 1996) (holding that a plaintiff who had recovered from breast cancer was not protected under the “record” prong, because nothing in her employment file suggested that her cancer ever substantially limited her in a major life activity, and because she “did not miss a day of work” during a month and a half of radiation therapy).

impairment.<sup>64</sup> The past-disability prong provides protection to people who face prejudice and stereotyping based on the lingering stigma of a once-active condition. It does so, however, without ignoring the effects of all corrective measures. Although lower courts did not always appreciate it, the Supreme Court’s definition-of-disability decisions left open these ways of protecting individuals whose “controlled” disabilities remain stigmatized.

### *Summary*

I hope I have shown that the wholesale criticism of the Supreme Court’s definition-of-disability decisions is misplaced. In both their broad outlines and many of their details, those decisions were consistent with two principles strongly urged by many disability rights advocates: (1) that disability rights law should seek “independence” for a group of people who would otherwise be dependent on welfare and charity; and (2) that people with disabilities constitute a stigmatized minority that needs protection against class- or caste-based prejudice, stereotyping, and neglect. The decisions were clearly inconsistent with another principle urged by many disability rights advocates—that “disability” is universal, because we all have a variety of abilities that exist on a spectrum<sup>65</sup>—but disability rights

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<sup>64</sup> *Cf.* Scheer v. City of Cedar Rapids, 956 F. Supp. 1496, 1502 (N.D. Iowa 1997) (assuming that a plaintiff who was denied a job until he was seizure-free for a certain period of time had a statutory “disability,” though finding his requested accommodation unreasonable).

<sup>65</sup> See chapter 2, *supra*.

advocates subordinated that universalist notion to the independence and minority-group arguments in the campaign to enact the ADA.

Indeed, one can pinpoint the moment at which disability rights supporters made the strategic decision to subordinate the universalist view. The original ADA bill introduced in 1988 omitted the “substantially limits” language and defined “handicap” (later changed to “disability”) to mean an actual, past, or perceived impairment—full stop.<sup>66</sup> That original proposal represented a conscious departure from the protected-class approach of the Rehabilitation Act, which defined handicap as a present, past, or perceived substantially limiting impairment. The National Council on the Handicapped, which drafted the language that formed the basis for the bills as originally introduced, expressly argued for such a departure in many of the same terms advocates of universalism use today.<sup>67</sup> But the Reagan administration objected to the breadth of the proposed “disability” definition.<sup>68</sup> When Democratic legislators and the disability rights

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<sup>66</sup> See S. 2345, 100th Cong. §§ 3(1), 4(a) (1988) (prohibiting discrimination “on the basis of handicap,” and defining “on the basis of handicap” to mean “because of a physical or mental impairment, perceived impairment, or record of impairment”); H.R. 4498, 100th Cong. §§ 3(1), 4(a) (1988) (same).

<sup>67</sup> See National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations* 19, A-22-A-25 (1986). Robert Burgdorf, who worked on *Toward Independence*, discusses the National Council’s recommendations in detail in 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, 443–45, 448–49 (1991).

<sup>68</sup> See National Council on Disability, *Equality of Opportunity: The Making of the Americans with Disabilities Act* 82–83 (1997) [hereinafter National Council on Disability, *Equality of Opportunity*].

community prepared the bill for reintroduction in the new Congress in 1989, they acceded to the prior administration's objections and reverted to the Rehabilitation Act model, complete with its "substantially limits" language.<sup>69</sup>

In broad outline, then, it is not fair to say that the Supreme Court's definition-of-disability decisions disregarded the principles of the disability rights movement. It is more accurate to say that those decisions took sides in a dispute within that movement. Those decisions, in my view, did fail to promote disability equality in a variety of ways. (I'll discuss those ways below.) But their failures must be attributed in significant part to the limitations of the independence frame and the minority group model of disability themselves.

Therein lies a cautionary lesson: there were good reasons at the time for movement activists to fasten on the independence frame and the minority group model when they were seeking enactment of the ADA. The independence frame, as I showed in chapter 2, had a great deal of appeal for political and fiscal conservatives. And the minority group model helped to align the ADA with the canonical civil rights laws of the 1960s and therefore

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<sup>69</sup> See S. 933, 101st Cong. § 3(2) (1989) (defining "disability" in the same terms ultimately enacted); H.R. 2273, 101st Cong. § 3(2) (1989) (same). *See generally* National Council on Disability, Equality of Opportunity, *supra* note 68, at 96–100 (discussing deliberations between disability rights activists and staffers for Senators Harkin and Kennedy, as well as their decision to use the Rehabilitation Act model in the 1989 ADA bill); Chai R. Feldblum, *The (R)evolution of Physical Disability Antidiscrimination Law: 1976–1996*, 20 *Mental & Physical Disability L. Rep.* 613, 617 (1996) (explaining that many disability rights advocates "did not expect [the National Council's] version of the ADA to move forward, given its significant divergence from several section 504 regulations" and describing the pragmatic decision to "parrot[] the section 504 regulations" in the 1989 bill).

appealed to moderates and liberals. Had the ADA been framed and defended differently—as a universal requirement of antidiscrimination and accommodation for any physical or mental difference—it almost certainly would not have passed. Indeed, disability rights advocates could not pass a universalist ADA Restoration Act; they ultimately had to settle for the more modest ADA Amendments Act. But the independence and minority-group framings may also have limited the effectiveness of the statute whose passage they secured. Passing judgment on the Supreme Court’s definition-of-disability decisions therefore entails passing judgment on the strategies and ideals of disability rights movement activists themselves.

### **The Failures of the Supreme Court’s Decisions—and the Independence and Minority-Group Models**

This is not to defend the Supreme Court’s decisions. They do fail in significant ways to promote disability equality. But their failure should be understood as a commentary on the independence frame and the minority-group model of disability. As the cases show, each of these orientations draws the focus of equality protection too narrowly.

#### *The Narrowness of the Independence Frame*

The cases clearly demonstrate the narrowness of the independence frame. Many individuals, like the plaintiffs in the cases the Supreme Court

has decided, have physical and mental conditions that employers and others use as the basis for arbitrarily limiting opportunities. Such individuals may be “independent”—they can hold jobs and live in the community without receiving welfare checks—but they face unfair restrictions on their opportunities. In particular cases, those limitations will result in individuals not receiving jobs and other benefits they would receive if they had no physical or mental impairments. In the aggregate, those limitations can substantially drag down the opportunity range of a broad class of people with their conditions. If the goal of disability rights law is to promote equal opportunity to participate in the economic and civic life of the community, the law must strike at those limitations, even if they do not compromise individual “independence.” Mere “independence,” without equality, is not what disability rights activists *really* seek, and a statute constrained by a focus on independence is unduly limited.

*The Minority-Group Model and the Perils of Targeting*

The minority-group model in some ways appears more promising. The model’s goal, after all, is to target for protection those individuals who are likely to experience the arbitrary limitations on opportunities that create a disadvantaged class of people with disabilities. If one cares about equal opportunity, the minority-group model appears a better fit than the goal of

“independence.” Yet the minority-group model is also too narrow as a basis for disability rights law, for a number of reasons.

First, even if one thinks that the *goal* of disability rights law is to provide protection to a particular class of people, achieving that goal through the *means* of limiting legal protection to that class has substantial costs. As the history of American social policy shows, programs that provide benefits to a particular class are far more politically vulnerable than are universal programs. People concerned about redistribution are therefore well advised to embed redistributive rules within broad universal programs wherever possible. (I return to this point in chapter 8.) A protected-class understanding of disability rights law makes the law more vulnerable to political attack, stigmatizes its supposed beneficiaries (just as disability welfare does), and encourages judges to see their job as vigorously policing the line between those who are in and those who are out of the protected class.

And vigorously police the line is exactly what the courts have done. The *Toyota* Court’s assertion that the ADA’s protected-class definition “need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled”<sup>70</sup> is the most overt example. The unanimous Court never explained why the definition “need[s]” to be read in a “strict[]” and “demanding” way. To the justices, it was just too obvious that when a law provides special protections to a particular class, judges must guard the

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<sup>70</sup> *Toyota*, 534 U.S. at 197.

boundaries of that class to assure that those who are undeserving do not partake of those benefits. The lower court cases limiting protection to “the truly disabled” express a similar view. Indeed, many of those cases are explicit in explaining that if the coverage of the ADA is extended too broadly, that will only harm the people who are “truly” in need.

Even if one thinks that disability defines a discrete, subordinated group, then, it does not make sense to target disability law’s protections to that group alone: the very act of targeting triggers political and judicial pressures to shrink the size of the protected class and to reduce the protections accorded to that class. A targeted disability law may ironically have exactly the opposite effect from the one the lower courts predict: it may reduce the chances that full protection will be provided to the full intended protected class.

### *The Minority-Group Model and the Nature of Disability Inequality*

But there is yet a deeper problem: the minority-group model misstates the very nature of disability inequality. Disability inequality does sometimes consist in society’s identifying a discrete class of people with disabilities and discriminating against them. The eugenics movement provides the most salient historical example, and the various stigmatized disability groups discussed above still experience that kind of discrimination. But disability inequality also consists in the neglect of people who differ, physically or

mentally, from the norms taken as a given by those who design institutions, and by those institutions' inflexibility in responding to difference. It will be impossible to identify in advance any class of people who are treated unequally in this way. Many will have conditions that are hidden, perhaps from themselves but certainly from others.

Consider the example of learning disability. Mark Kelman and Gillian Lester, the leading skeptics of accommodations for people with learning disabilities, find it "quite contestable" that "there is a great deal of group-based irrational devaluation of people with learning disabilities."<sup>71</sup> They note that "the supposedly 'bigoted' administrator judging the potential of a student with an LD may not even know he is dealing with such a student. He does not misperceive potential because he undervalues people with disabilities; on the contrary he does so for the very reason that he does *not* see that he is dealing with a disability."<sup>72</sup> To a large extent, I agree with that characterization.<sup>73</sup> But that hardly means that people with learning disabilities face no problem of disability inequality. In educational and professional licensing settings in particular, many tests are timed, even though (as Kelman and Lester themselves acknowledge) they purport to test

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<sup>71</sup> Mark Kelman & Gillian Lester, *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities* 220 (1997).

<sup>72</sup> *Id.*

<sup>73</sup> Andrew Weis shows that there is a not insignificant amount of prejudice against people with learning disabilities. See Andrew Weis, *Jumping to Conclusions in "Jumping the Queue,"* 51 *Stan. L. Rev.* 183 (1998).

for skills that have relatively little to do with speedy responsiveness.<sup>74</sup> Many people who have the skills for which these examinations purport to test will be unable to demonstrate those skills because their learning disabilities make it impossible to do so within the time allotted. A time limitation imposed for largely administrative purposes therefore ends up excluding people from the educational and professional opportunities to which standardized examinations serve as a gateway—even though they have all of the relevant skills for which the examinations purport to test. People with learning disabilities thus do not experience uniform group-based exclusion; they are excluded from opportunities when those opportunities are controlled by testing institutions that are inflexible to their inability to demonstrate their skills by conventional, timed, means.

Even among people whose conditions are overt neither they nor society at large may characterize their conditions as “disabilities.” The inequality inheres not in the targeting or ignorance of a group but in an accumulation of incompatibilities between individuals’ abilities and institutional structures. That, it seems to me, is a crucial lesson of the social model of disability.<sup>75</sup>

The Supreme Court’s case law, so strongly influenced by the minority-group model, has had a hard time including these individual incompatibilities in its conception of “disability.” An example appears in the Court’s

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<sup>74</sup> Kelman & Lester, *supra* note 71, at 176–80.

<sup>75</sup> See chapter 2, *supra*.

explanation for why it is “hesitant” to conclude that “working” is a “major life activity.”<sup>76</sup> According to the majority in *Sutton*, there is “some conceptual difficulty in defining ‘major life activities’ to include work, for it seems ‘to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you’re asking is, whether the exclusion itself is by reason of handicap.’”<sup>77</sup> To avoid that assumed circularity, the Court held that a person cannot be substantially limited in working unless she is “unable to work in a broad class of jobs.”<sup>78</sup> Indeed, as I have shown, the Court went on to say that the “broad class” standard cannot be met “[i]f jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available.”<sup>79</sup> These rulings excluded from the ADA’s coverage many people who were denied opportunities because their conditions were incompatible with the contingent structure of some employer’s workplace and work rules. (The ADA Amendments Act specifically states that working is a major life activity.)

The Court’s analysis of the perceived-disability prong of the ADA’s disability definition shows the refusal to embrace individual incompatibilities even more clearly. In *Sutton*, United Air Lines had refused to hire the

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<sup>76</sup> *Toyota*, 534 U.S. at 200.

<sup>77</sup> *Sutton*, 527 U.S. at 492 (quoting Tr. of Oral Arg. 15, *Arline*).

<sup>78</sup> *Id.* at 491.

<sup>79</sup> *Id.* at 492.

plaintiffs for global airline pilot positions, because their *uncorrected* vision was worse than 20/100. The plaintiffs had argued that United “regarded” them as substantially limited in working, because they would in fact have been substantially limited in working if all global airlines had used United’s criteria. The Court, however, found it improper to speculate whether United’s vision requirements, if imposed by all global airlines, would make the plaintiffs “substantially limited” in the ability to work. The Court explained that “[a]n otherwise valid job requirement, such as a height requirement, does not become invalid simply because it would limit a person’s employment opportunities in a substantial way if it were adopted by a substantial number of employers.”<sup>80</sup> A contrary ruling, the court suggested, would call into question employers’ ability “to prefer some physical attributes over others and to establish physical criteria” for their employees; such a ruling would therefore override Congress’s decision to allow employers “to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.”<sup>81</sup>

But that analysis is flawed. For one thing, the well-documented “spread effect”—in which people often assume, for example, that a person with quadriplegia also has cognitive limitations—suggests that an employer who believes a person with a disability to be limited in one way will also

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<sup>80</sup> *Id.* at 493–94.

<sup>81</sup> *Id.* at 490–91.

believe that person to be limited in others.<sup>82</sup> More fundamentally, the Court’s analysis in *Sutton* was improperly driven by a strong desire to exclude from coverage individuals whose physical conditions were incompatible with explicit or implicit physical standards set up by particular employers. Despite the Court’s concerns, a decision to allow unsuccessful applicants to satisfy the “regarded as” prong by demonstrating that they failed the employer’s physical standards would not necessarily render those standards “invalid.” It would merely subject them to scrutiny under the ADA’s substantive provisions. By the plain text of those provisions, if the selection criteria at issue were “job related for the position in question” and “consistent with business necessity,”<sup>83</sup> and if the plaintiffs who failed those criteria were unable, “with or without reasonable accommodation, [to] perform the essential functions of the employment position,”<sup>84</sup> then the employer would be free to maintain them. The “regarded as” finding has only a limited effect: it requires the employer to justify general physical criteria that disqualify people with impairments without regard for their individual abilities.<sup>85</sup> Such a result directly advances the cause of disability equality. But the Court, focused on a group-based harm, failed to appreciate that point.

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<sup>82</sup> See, e.g., Beatrice A. Wright, *Physical Disability—A Psychosocial Approach* 32–39 (2d ed. 1983).

<sup>83</sup> 42 U.S.C. § 12112(b)(6).

<sup>84</sup> *Id.* § 12111(8).

<sup>85</sup> Justice Stevens made a very similar point in his *Sutton* dissent, where he argued that the case raised only the question “whether the ADA lets petitioners in the door” to obtain “basic

*The Minority-Group Model and Essentializing Disability Identity*

The effort to identify a class of people who have “disabilities” and separate them from the nondisabled does not just misunderstand the nature of disability *inequality*. It also misunderstands the nature of disability *identity*. As I showed in chapter 2, the creation of a pan-disability identity served an important political purpose for disability rights activists. It expanded the power base of the movement, helped people with divergent impairments find a sense of common cause, and helped avoid the internecine struggles between impairment-specific groups that had hampered earlier disability advocacy.

But in crucial ways the notion of a single disability identity fails to track the phenomenology of people who have conditions often identified as disabilities. People with some “disabilities” may not consider themselves “disabled” at all. The culturally Deaf, who believe themselves to be a linguistic minority persecuted because they use sign language, are an example. Others may see their problems as diseases rather than disabilities. Still others may understand their conditions as a type of disability but not want their conditions lumped with others in a single pan-disability identity. Here, members of the National Federation of the Blind (whose support for the ADA was at best lukewarm) are the best example. By contrast, some (such as

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protection from irrational and unjustified discrimination because of a characteristic that is beyond a person’s control.” *Sutton*, 527 U.S. at 504 (Stevens, J., dissenting).

those with “hidden” conditions like chronic fatigue syndrome or learning disabilities) may seek out a disability label as validation of their experience and struggles.<sup>86</sup> Some will prefer civil rights to cure, others vice versa, still others in between. For some people in each of these categories, their affiliation with other people with (the same or different) impairments may be the dominant influence in their lives, for others it may be nonexistent, and for still others it may be one of a set of overlapping and even conflicting affiliations.

In an article published several years ago, I argued that even if there was no natural disability identity, society had created an identifiable class of people with disabilities by its prejudice, stereotypes, and neglect.<sup>87</sup> I still believe that the ADA, given its most attractive reading, is premised on such a view of disability. But I no longer believe that such a view is the correct one. Disability identity is too multifarious, society’s responses to conditions identified as disabilities too diverse, for the notion of a societally created disability category to offer much traction.

The “disability” category in the ADA is obviously an administrative proxy designed to target the statute’s protections to the intended beneficiaries. I have tried in the past few sections to show that it is not a good proxy—that it keeps disability discrimination law from reaching a great

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<sup>86</sup> See Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* 25 (1996).

<sup>87</sup> Bagenstos, *supra* note 25.

deal of conduct about which we ought to be concerned if we care about disability inequality. But even if the ADA's disability category were a perfect proxy for the people we wanted to protect, the statute's view of disabled identity would still lead to serious problems.

As a number of critics of identity politics have recently argued, legal protections for particular identity groups can at the same time operate to regulate the individual members of those groups. Such laws effectively force group members to conform with the identity script that is dominant within their group at the pain of being denied protection.<sup>88</sup> The ADA's minority-group model, by forcing people with disabilities who want protection to cast themselves as part of a discrete and insular group of outsiders, has done just that. The more integrated a person with an impairment is in the community, and the less she conforms with a stereotypical disabled role, the less likely is she to obtain the ADA's protections. That is a clear lesson of the line of cases from *Bragdon* to *Toyota*, and it is one that sheds negative light on the effort to treat disability as a discrete minority-group status.

### ***Possible Solutions?***

For those who are critical of the Supreme Court's definition-of-disability decisions, the standard move at this point is to argue that the disability community erred in 1989 when it accepted the "substantial

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<sup>88</sup> See, e.g., Richard Thompson Ford, *Racial Culture: A Critique* (2005); Madhavi Sunder, *Cultural Dissent*, 54 *Stan. L. Rev.* 495 (2001).

limitation” formula, and that the error should be corrected by going back to the language of the original 1988 ADA bill (which defined “disability” as a present, past, or perceived “impairment”).<sup>89</sup> That is essentially the tack disability rights supporters in Congress took in the proposed “ADA Restoration Act.”<sup>90</sup> Political exigencies, however, forced disability rights supporters to retreat to a much more minimal “ADA Amendments Act” that would overturn *Sutton*’s mitigating measures ruling, expand protection under the “regarded as” prong in disparate treatment cases, and affirm (contrary to *Toyota*) that the disability definition should be broadly construed. I believe the ADA Amendments Act, which was enacted into law in the waning days of the George Walker Bush Administration, is a worthy effort that is likely to make things somewhat better—though its retention of a protected class obviously puts it quite far from what I would prefer. But even if the original ADA Restoration Act were to be adopted, it would be wise not to get one’s hopes up too high.

For one thing, I doubt that a mere change in language would overcome the powerful momentum of the minority-group model and the independence frame. One might expect judges who feel the “need[]” to interpret the ADA “strictly” to feel the same way under a differently worded statute. Under a statute with the 1988 definition of disability, “impairment” would be the

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<sup>89</sup> For a pre-*Sutton* example, see Burgdorf, *supra* note 29.

<sup>90</sup> H.R. 3195, 110th Cong., 1st Sess. (2007); S. 1881, 100th Cong., 1st Sess. (2007). The more modest Harkin-Hatch ADA Amendments Act is S. 3406, 110th Cong., 2d Sess (2008).

ticket to ADA coverage. Judges who now read “substantially limits” and “major life activities” narrowly would most likely shift their narrowing constructions to the “impairment” term under such a statute. And indeed, even existing ADA jurisprudence gives judges tools to read “impairment” parsimoniously. Prior to the Supreme Court’s decision in *Bragdon*, for example, some courts held that asymptomatic HIV was not even an “impairment.”<sup>91</sup> *Bragdon* rejected those holdings, but it did so by emphasizing the serious harm HIV disease does to the body “from the moment of infection.”<sup>92</sup> Judges could easily ratchet up the harm required for an impairment finding and thereby reintroduce much of the limiting jurisprudence that a return to the 1988 formulation would be intended to overturn.

To avoid this problem, one might follow the model of Australia’s Disability Discrimination Act (DDA) and write a broad disability definition in such detail that judges would have a very hard time narrowing it. The Australian DDA covers anyone who has, once had, “may . . . in the future” have, or is believed to have any of the following: “total or partial loss of the person’s bodily or mental functions,” “total or partial loss of a part of the body,” “the presence in the body of organisms causing disease or illness,” “the presence in the body of organisms capable of causing disease or illness,” “the

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<sup>91</sup> See, e.g., *Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156, 169–70 (4th Cir. 1997) (*en banc*).

<sup>92</sup> See *Bragdon*, 524 U.S. at 633–37.

malfunction, malformation or disfigurement of a part of the person's body," "a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction," or "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour."<sup>93</sup>

The Australian definition thus goes beyond the ADA's in several respects. First, like the original ADA bill, it imposes no substantial limitation requirement. Second, it includes not only present, past, or perceived impairments, as does the ADA; it includes possible future impairments as well. Third, unlike the ADA, it does not require that the impairment (or "disorder," or "malfunction," or "disfigurement," or "illness," and so forth, or organisms that cause or might cause these things) have any immediately harmful effect on an individual's body.<sup>94</sup>

Australian advocates certainly believe that the broader definition of disability in their DDA "is empowering, because individuals do not need to prove their outsider status in order to use the act."<sup>95</sup> These advocates argue that a narrower definition, which had been used in a number of pre-DDA

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<sup>93</sup> Disability Discrimination Act, 1992 § 4 (Austl.); see Glenn Patmore, *The Disability Discrimination Act (Australia): Time for Change*, 24 Comp. Lab. L. & Pol'y J. 533, 541 (2003).

<sup>94</sup> Compare *Bragdon*, 524 U.S. at 637 ("In light of the immediacy with which the [HIV] virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection."), with DDA (Austl.) § 4 (disability includes not only "the presence in the body of organisms causing disease or illness" but also "the presence in the body of organisms capable of causing disease or illness").

<sup>95</sup> Melinda Jones & Lee Ann Bassar Marks, *A Bright New Era of Equality, Independence and Freedom: Casting an Australian Gaze on the ADA*, in *Americans with Disabilities*, *supra* note 20, at 371, 374.

state antidiscrimination laws, “creates unnecessary confusion and limits the effectiveness of the legislation.”<sup>96</sup> The broader definition, by contrast, “affirms the individual’s experience of impairment” and avoids the “anomaly” that an individual whom an employer rejects as too disabled for a job may be deemed not disabled enough to challenge the employer’s action.<sup>97</sup>

But the Australian Productivity Commission’s recent review of the DDA casts somewhat sobering light on this issue. While the statute’s broad disability definition plainly does remove a barrier to the success of discrimination claims, it does not appear to have had as significant an empowering effect as its advocates might have wanted. Victims of disability discrimination remain extremely reluctant to file complaints under the Australian DDA. The tangible costs of pursuing a claim, the time it takes to do so, and the stress of participating in the complaints process are all likely reasons.<sup>98</sup>

Even if an Australian-style law would be more successful than the current ADA, one might doubt that such a law could actually be adopted in the United States anytime soon. The quick retreat from the broad ADA Restoration Act seems to confirm that doubt. There is a reason (in addition

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<sup>96</sup> *Id.* at 375.

<sup>97</sup> *Id.*

<sup>98</sup> See Australian Gov’t Productivity Comm’n, Review of the Disability Discrimination Act 1992 at 367–75 (2004). It should be noted in this regard that under the Australian DDA—unlike under the ADA—complainants who lose may be required to pay their opponents’ attorneys’ fees. See *id.* at 367.

to their sincere agreement with these positions) why many American disability rights activists accepted an ADA that implemented a minority-group model of disability and why they sold that statute using an independence frame. A minority-group model of disability emphasizes the continuity between the ADA and earlier civil rights laws; it makes the ADA appear as the natural next step in the expansion of “We the People” marked by the civil rights movement.<sup>99</sup> For those who are not persuaded by that suggestion, the independence frame gives disability rights law a role that is different from (and more conservative than) other civil rights laws--the role of moving people off welfare and into work.

A universalist approach to disability rights is much more challenging to the status quo than are the minority-group model and the independence frame. Despite substantial assaults in recent decades, the background principle of American employment law remains the principle of employment at will. Unless they act on the basis of an individual’s membership in an identifiable race, gender, or religious group, employers generally may refuse to hire people for whatever reason they prefer—rational or irrational. A universalist version of the ADA would impose a requirement of rationality on employers whenever they refuse to hire someone because of any present, past, or perceived physical characteristic. That would go far beyond existing intrusions into managerial prerogatives, and it is exactly what the Supreme

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<sup>99</sup> See Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”*: *The Disability Rights Cases*, 104 Colum. L. Rev. 49 (2004).

Court seemed determined to resist in *Sutton*. Indeed, a universalist version of the ADA would go even farther than that; its accommodation requirement would demand that employers design physical and institutional structures (including work schedules and work tasks) in a way that reasonably takes account of the largest possible range of physical and mental abilities, and that they provide reasonable flexibility to all potential employees whose physical or mental abilities still are not taken into account.

That would be a truly radical change in American law. Despite the evident costs of not following the universalist course, it is easy to understand the choice of disability rights advocates to tie their cause to the mainstream liberalism of the civil rights movement and the neoliberalism and neoconservatism of the welfare reform movement. A case for a universalist disability rights law would be well worth making, but its prospects are very doubtful politically.

### ***Conclusion***

It is understandable that the Supreme Court's definition-of-disability decisions have generated controversy, yet much of that controversy is misplaced. Those decisions are deeply flawed, but the flaws do not belong to the Supreme Court alone. Instead, they flow directly from the minority-group model and the independence frame that disability rights activists themselves formulated and promoted. The definition-of-disability decisions

highlight the limitations of these core disability rights concepts, but they also create a dilemma for disability rights activists. It is easy in theory to envision a more universalist ADA, but it is likely to be difficult to achieve it in the near term. To achieve it will require extensive *political* work, both within and outside of the disability rights movement. A mere statutory change, while welcome, is unlikely to solve the problem.