Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability

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“When I use a word, it means just what I choose it to mean—neither more nor less.”

When the Americans with Disabilities Act was enacted in 1990 supporters heralded it as a broad and even transformative piece of legislation. Senator Tom Harkin, one of the Act’s chief sponsors, asserted that the ADA was “the most important legislation Congress will ever enact for persons with disabilities.” No less enthusiastic, President George Bush signed the bill into law stating: “[W]ith today’s signing of the landmark Americans for [sic] Disabilities Act, every man, woman and child with a disability can now pass through once closed doors into a bright new era of equality, independence and freedom.”

Central to their enthusiasm was a belief that the new Act would promote the independence and economic self-sufficiency of millions of people with disabilities. As Jane West has noted, to achieve these lofty goals, the ADA “require[d] us to change our thinking about people with disabilities. The ADA demands that we focus on people, not on disabilities; that we focus on what they can do, not on what they cannot do.”

Yet as the papers in this symposium convincingly demonstrate, the impact of the ADA has been less dramatic than predicted. An overwhelming number of plaintiffs have lost their claims. In part, this is because much of the focus in ADA

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3. See THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE, at back cover (Jane West ed. 1991) [hereinafter West].


5. As the Act’s preamble states, “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous....” 42 U.S.C. § 12101(a)(9) (1994).


8. See Ruth Colker, Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and
litigation has been on what people cannot do, rather than what they can do. Frequently courts have assumed that the ADA is only available, and only appropriately applicable, when the plaintiff demonstrates substantial inabilities. When, instead, the plaintiff appears to be perfectly capable of leading an independent and productive life, courts have too often been reluctant to find a disability. In a sense, a plaintiff who can do does not appear to be truly disabled.

This reluctance to apply the ADA when individuals are able to overcome the effect of their impairments was dramatically evident in three cases decided by the Supreme Court last term. In *Sutton v. United Airlines*, *Murphy v. United Parcel Service, Inc.* and *Albertsons, Inc. v. Kirkingburg*, the Supreme Court held that the beneficial impact of medication and other mitigating measures should be considered in determining whether an individual has a disability within the meaning of the ADA. According to the Court, if an individual is not substantially limited in a major life activity when the impairment is mitigated, that individual does not have a disability and is not entitled to the protections of the ADA.

In so holding, the Court followed a path set by many lower courts in reading the ADA’s definition of disability narrowly to apply only to individuals with irremediable impairments.

What is striking about the Supreme Court’s decisions, as well as the lower court cases that preceded them, is the Court’s refusal to follow both the Act’s legislative history and guidance provided by the enforcing administrative agencies. Indeed, only by starkly dismissing an extraordinarily rich legislative history as well as a voluminous set of administrative materials, can a court conclude that individuals with impairments that have been mitigated do not have disabilities.

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10. See infra text accompanying notes 241-46. Of course, this leads to the great Catch-22. If the plaintiff can demonstrate what she cannot do, she is in danger of being found to be “unqualified” for the job in a Title I action. See Robert Burgdorf, Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 425-26 (1997).
15. See *Sutton*, 119 S. Ct. at 2139. Such individuals may still have a disability under other “prongs” of the definition of disability.
16. Most lower courts, however, ruled differently on this particular issue. See infra note 149.
17. See infra text accompanying notes 53-56.
18. See infra text accompanying notes 97-103.
This paper discusses the mitigating measures issue and the role that different sources for and methods of statutory interpretation have played in the courts' analysis of the issue. The courts' treatment of the mitigating measures issue, I argue, results in large part from many courts' refusal to defer to either the ADA's legislative history or the administrative interpretations that have been drafted to guide the statute's implementation. That refusal, in turn, reflects the increasing preference among federal judges for textualism as a method of statutory interpretation. Textualism, I suggest, relies heavily upon "plain meaning" understandings of terms that bring the interpreter back to the colloquial and stereotypical meanings which the statute was designed to transform. Thus the rise of textualism presents a formidable obstacle to the realization of the broad goals shared by those who fought for the ADA.

To explore the relationship between the ADA and textualism, I begin in Part I by briefly reviewing the history of the ADA and the vision of social discrimination which informed it. In Part II, I consider more specifically the problem of mitigating measures. I review both the legislative history pertaining to the issue and the administrative guidance on the subject. In Part III, I discuss the current debates over methods of statutory construction and the rise of the so-called "new textualism." I then relate this debate to the courts' analysis of the mitigating measures issue to demonstrate the close affinity between textualism and an insistence that the determination of disability be made with regard to the impact of mitigating measures. In so doing, I look not only to the Supreme Court's recent cases, but to earlier lower court opinions on the subject. Even though many of these cases have been superceded by the Supreme Court's analysis, they provide a larger sample for analyzing the relationship between textualism and the interpretation of the mitigating measures issue. In Part IV, I attempt to probe the issue further and ask why textualism leads to the conclusion that only individuals with irremediable impairments have disabilities. The answer, I suggest, lies in the common or colloquial understanding of disability upon which the textualist relies. By utilizing pre-existing meanings of social conditions, textualism makes it difficult to implement truly transformative legislation without first transforming wider understandings. With textualism ascendant, advocates for disability rights will need to look beyond the legislature and federal bureaucracy in order to achieve the goals that inspired the ADA.

I.
A BRIEF HISTORY OF THE ADA'S DEFINITION OF DISABILITY

A. A New Conception of Disability

What it means to have a disability—or to be a person with a disability—is

20. See infra text accompanying notes 123-27.
critical to the implementation of the ADA. Unlike other civil rights statutes, the ADA generally protects only those who fall within its protected class. In contrast to Title VII, the ADA does not so much prohibit discrimination on the basis of disability as it does discrimination against individuals with a disability on that basis. Hence cases brought under the statute must face the initial, gatekeeping question, what does it mean to be a person with a disability?

For much of Western history, religious views shaped the answer to that question. Disability was associated with moral failing. Those who had disabilities were often assumed to have committed some sin that warranted their condition. Early in this more secular century, perspectives changed and disability was conceptualized in medical terms. Individuals with disabilities were now seen as having medical "problems" that could be diagnosed, treated, and sometimes, but not always, "cured" by medical practitioners. From this perspective, treatment, care, and pity were the typical social responses.

Slowly, in the wake of World War II and the concomitant backlash against Nazi eugenist policies, as well as the rise of the civil rights movement, a new disability rights movement emerged. This movement decried both discrimination and paternalism. Instead, it had as its goal independent living and the full recognition of the capacities of all individuals with disabilities. Building upon understandings gleaned from the civil rights and feminist movements, the disability rights movement suggested that the difficulties faced by individuals with disabilities were caused not so much by the physical attributes of affected


22. In fact, while this requirement of being within the class appears to have textual support in Title I and Title II of the ADA, it is arguable that Title III makes no such requirement. See 42 U.S.C. § 12182(a) (1994). Nevertheless, courts continue to assume that plaintiffs under Title III must show their inclusion within the class. See Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 1296 (1998) (reviewing whether a plaintiff with HIV disease has a disability and is therefore entitled to protection under Title III).


24. Burgdorf chronicles how this came to be. See Burgdorf, supra note 10, at 415-451. In contrast, cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, pay little attention to whether the plaintiff is of, or has, a certain race. Rather, the question is whether the plaintiff’s treatment was based upon race. As a result, white plaintiffs can bring race discrimination claims, even though they are not, in a sense, in the protected class.

25. Note that the very question presumes that some individuals are those without a disability. See infra text accompanying notes 256-57.


27. See Drimmer, supra note 26, at 1347; Silvers, supra note 26, at 59-63; see also Mary Crossley, The Disability Kaleidoscope, 74 NOTRE DAME L. REV. 621, 649-653 (1999) (describing the medical model of disability).

individuals, nor anything they had done, but rather by the social treatment they encountered. This perspective was elegantly articulated in 1969 by Leonard Kriegel in *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro.* In that seminal work, Kriegel compared the individual with a disability to the “Negro.” In both cases, the individual’s experience, and identity, was formed as much (if not more) by social conditions and his or her status as an outsider, rather than by the actual physical attributes (paralysis of the limbs or skin color) that were used to identify the condition. From this perspective, disability was not so much a biological as a social phenomenon.

Remarkably, this vision of disability found its way into some of our earliest disability rights laws. Consider, for example, the 1968 Architectural Barriers Act, which required that all new facilities built with federal money be made accessible to people with disabilities. This Act sought to achieve accessibility not merely by prohibiting the exclusion of a discrete class of individuals, but by modifying future building designs to ensure universal accessibility. Thus, rather than focusing on the particular attributes or character of those to be protected, the Act recognized the problem of disability as a problem of building designs which (inadvertently) created barriers. Disability, therefore, was not so much within the individual as within the design.

The importance of this social vision of disability became more apparent with the enactment of Section 504 of the Rehabilitation Act of 1973. Originally, the Rehabilitation Act provided financial support for vocational programs for individuals with disabilities. As such, the program assumed that disability was an individual characteristic that interfered with an individual’s ability to hold a job. The training provided, therefore, would help compensate the individual for his or her own incapacities.

In 1973 the Rehabilitation Act was substantially amended. With little debate, Congress included a new provision that prohibited all recipients of federal financial assistance from discriminating against “otherwise qualified” individuals with a handicap “solely by reason of . . . handicap.” Exactly what that would mean was

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29. See Richard K. Scotch, *Disability as the Basis for a Social Movement: Advocacy and the Politics of Definition,* 44 J. SOC. ISSUES 159, 159-163 (1988); Joan Susman, *Disability, Stigma, and Deviance,* 38 SOC. SCI. MED. 15, 16 (1994); see also Crossley, *supra* note 27, at 653-665 (describing the social and minority group models of disability); Eichhorn, *supra* note 8, at 1414 (noting that the disability rights movement sees disability as a “socially-constructed phenomenon.”).


31. As Scotch has written, activists helped redefine disability as “impairments that are limiting only to the extent that constraints are imposed by the physical and social environment.” Scotch, *supra* note 29, at 166.


33. From the start, federal disability rights law has integrated conceptions of reasonable accommodation, disparate impact, and a social conception of disability. See, e.g., Southeastern Comm. College v. Davis, 442 U.S. 397, 413 (1979).


left, in large part, to the Department of Health, Education and Welfare to decide through the regulatory process.37

Although fundamentally a civil rights statute, Section 504 originally relied upon the narrow definition of disability associated with the broader statute's emphasis on vocational programs.38 This definition, which focused on an individual's inherent inability to work, made little sense in conjunction with a civil rights statute that precluded discrimination. Recognizing this incongruity, in 1974 Congress amended that Act to include a new definition of disability that would apply solely to the Act's nondiscrimination provisions.39 The new definition stated that an individual with a disability was: "Any individual 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."40 By adding this amendment, Congress opened the door to Section 504's application to individuals whose disability does not necessarily affect their ability to work, but rather their ability to engage in some other important life endeavor, such as being educated. At the same time, by inserting the second and third prongs to the definition, Congress recognized that discrimination on the basis of disability could extend not only to those who actually have a current disability, but also to those who either previously had a disability, or were erroneously assumed to have one.41 In effect, Congress had adopted a social conception of disability.42

B. The ADA's Definition

By the mid-1980s, the federal government had made a significant, albeit partial, commitment to guaranteeing the rights of individuals with disabilities. Discrimination, however, remained rampant.43 Individuals with disabilities remained disproportionately poor, unemployed, and undereducated.44 Legal protections remained scattered. Most glaring was the absence of any federal law pertaining to private sector employers who did not receive government contracts.

This was altered with the enactment of the ADA.

40. Id.
42. According to Professor Scotch, the Rehabilitation Act's new definition was functional. "In other words, disability is whatever laws and implementing regulations say it is." Scotch, supra note 29, at 168.
44. See Jane West, The Social and Policy Context of the Act, in West, supra note 3, at 4-5.
To remedy this defect, several attempts were made during the 1970s and 80s to amend the Civil Rights Act of 1964 to provide just such protection. Initially these efforts were opposed by many civil rights advocates who feared that reopening the 1964 Act could lead to its general weakening. Yet, slowly, a coalition of previously disparate groups united to endorse comprehensive, federal legislation.

The original supporters of the ADA saw disability as a broad and malleable concept, with deep social roots. The Act's initial blueprint appeared in a 1984 article by Robert Burgdorf Jr., an attorney for the United States Commission on Civil Rights, and Christopher Bell, an attorney for the Equal Employment Opportunity Commission. Their Article began by surveying the diversity that exists among individuals with disabilities. Rather than treating disability as a discrete and inherent characteristic, the law, they argued, "must...acknowledge the existence of functional impairments, but it must also focus on ways society can reasonably adapt to a wider range of mental and physical differences than the handicapped-or-normal dichotomy has permitted."

As support for the ADA developed in the 1980s, the idea of disability as a social condition merged with a call for "independence" that was quite consonant with the individualism of the Reagan 80s. From this perspective, social discrimination against individuals with disabilities impeded their ability to function independently and be economically self-sufficient. What people with disabilities needed, therefore, was not government benefits, but freedom from the discrimination that turned their physical or mental attributes into disabilities. The focus, therefore, was not on physical incapacities affecting individuals, but on the social dimensions of disability.

This perspective is reflected in the ADA's legislative history. As Professor Feldblum notes, Robert Burgdorf's original draft of the ADA did not create a class of individuals with disabilities; rather it prohibited discrimination on the basis of disability. The draft that was ultimately adopted, however, used a definition which mirrored, almost exactly, the definition employed by the Rehabilitation Act. This approach, it was felt, had the advantage of incorporating all of the case

45. See Burgdorf, supra note 10, at 417-18.
46. See id.
47. See id.
49. Id. at 68.
50. See, e.g., NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE (1986).
51. See id. at 12, 18.
52. See, e.g., Richard K. Scotch, Politics and Policy in the History of the Disability Rights Movement, 67 MILBANK Q. 380 (1989) ("[T]he disability rights movement has promoted the idea that prejudicial attitudes and exclusionary practices are far greater barriers to societal participation for many disabled people than are their physical or mental impairments.").
law and precedent developed under the Rehabilitation Act.\textsuperscript{55} That this was the intent was made explicit by the enactment in Title V of a specific provision directing that the ADA be interpreted not to provide lesser protections than were previously available under the Rehabilitation Act and its regulations.\textsuperscript{56}

As of 1990 both the case law construing that definition and the model regulations issued pointed towards a broad understanding of disability. Indeed, what is striking in reviewing the case law of the 1970s and 1980s is how seldom the question of disability was litigated.\textsuperscript{57} For the most part, courts simply assumed that the plaintiff had a disability.\textsuperscript{58} Moreover, in the only Supreme Court case on the issue, \textit{School Board v. Arline},\textsuperscript{59} the Court, per Justice Brennan, provided a broad interpretation of disability, finding that the Rehabilitation Act’s definition could apply to a non-traditional disability such as a contagious disease.\textsuperscript{60} In dicta, Justice Brennan went further, suggesting that under the third, “regarded as” prong of the definition, an individual could have a disability if the individual was hindered due to fear of her condition.\textsuperscript{61} Thus Justice Brennan signaled approval of a social understanding of disability.

This was the backdrop from which Congress decided to employ the Rehabilitation Act’s definition in the ADA. Indeed, the evidence that the ADA’s drafters and supporters understood the definition’s potential breadth is overwhelming. Perhaps most apparent is the statute’s own preamble, with its estimate that there are 43 million Americans with disabilities.\textsuperscript{62} Moreover, in apparent recognition of the statute’s wide scope, Congress took care to explicitly exclude some disfavored conditions from the definition.\textsuperscript{63} That the definition was to be expansive, moreover, was evident from a series of committee reports discussing the construction of the term.\textsuperscript{64} True, the application of the definition to

\textsuperscript{55} See generally Feldblum, supra note 53.


\textsuperscript{57} See Parmet & Jackson, \textit{No Longer Disabled}, supra note 11, at 16-20 (discussing judicial consideration of whether HIV was a disability under the Rehabilitation Act). A good example is \textit{Davis v. Meese}, 692 F. Supp. 505 (E.D. Pa. 1988). That case concerned an individual with insulin-dependent diabetes who wished to be a FBI special agent. In considering the application of the Rehabilitation Act, with almost no analysis the court asserted that insulin-dependent diabetes is “clearly” a handicap within the meaning of the Rehabilitation Act. \textit{Id}. at 517.


\textsuperscript{60} \textit{Id}. at 286.

\textsuperscript{61} \textit{Id}. at 284.


\textsuperscript{63} For example, the statute specifically excludes from the definition of disability “transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.” 42 U.S.C. § 12211(b) (1994). The Act also strikes a compromise with respect to homosexuality declaring that “homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.” \textit{Id}. at § 12201(a). This provision ensures that the statute does not prohibit discrimination on the basis of sexual orientation without treating sexual orientation as “an impairment.”

\textsuperscript{64} See, e.g., \textit{REPORT OF HOUSE COMMITTEE ON EDUCATION AND LABOR}, H. REP. 101-485, Pt. 2, at 50-53
certain specific conditions was not fully delineated. However, that uncertainty was inevitable, given an understanding of disability as a socially constructed phenomenon. If we accept that disability is as much a creation of the way society treats an individual as of concrete biological conditions, a list of disabilities cannot be provided. Nor, from the perspective of the ADA, was there any need to provide an all-inclusive list. The goal of the statute, after all, was the promotion of economic independence rather than the provision of scarce government benefits. Thus seeing disability broadly, the statute’s drafters were content to provide a general definition of disability, comfortable with the thought that it would help promote the self-sufficiency of some unspecified group of over 40 million Americans.

II.

MITIGATING MEASURES

A. What is at Stake

Central to understanding the nature of disability and the purpose of disability law is the question the Supreme Court answered in the negative last Term: whether impairments whose effects are mitigated by medication, assistive devices, or other creations of human ingenuity can still be disabilities. If we think of

(1990) (discussing the definition of disability); REPORT OF SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, S. REP. 101-116, at 21-24 (1989) (same). Indeed, the legislative history also shows that in recognition of the potential breadth of the ADA, some members of Congress sought to explicitly exclude certain impairments. See, e.g., 42 U.S.C. § 12208 (1994); 135 CONG. REC. 19864 (1989) (discussing exclusion of transvestites); 136 CONG. REC. 10,911 (1990) (discussing proposed exclusion of individuals with infectious diseases from prohibition of discrimination by food industry).

65. Congress was aware of the need to address discrimination based on societal prejudices: For example, severe burn victims often face discrimination. In such situations, these individuals are viewed by others as having an impairment that substantially limits some major life activity (e.g., working or eating in a restaurant) and are discriminated against on that basis. Such individuals would be covered under the Act under the third prong of the definition.


67. Disability theorist and activist Irving Kenneth Zola wrote in 1989, the year before the ADA was enacted, that “What we need are more universal policies that recognize that the entire population is ‘at risk’ for the concomitants of chronic illness and disability.” See Irving Kenneth Zola, Toward the Necessary Universalizing of a Disability Policy, 67 Milbank Q. 401 (1989).


70. See Colker, supra note 8, at 231; see also Michael J. Puma, Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC’s Analysis of Controlled Disabilities, 67 Geo. Wash. L. Rev. 123 (1998); Maureen R. Walsh, What Constitutes a ‘Disability’ Under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures, 55 Wash. & Lee L. Rev. 917 (1998); William Brent Shellhorse, The Untenable Stricture: Pre-
disability as a narrow category, as an exception to a norm of independence and self-sufficiency, then the term should apply infrequently, only to those individuals who by virtue of their condition are incapable of living an independent, economically productive life. From such a perspective, an individual whose condition is mitigated or controlled by medication, surgery, or an assistive device, is in a sense, no longer disabled. Because of the mitigating measure, that individual has "overcome" his or her physical incapacity and is now able to be self-sufficient. Such an individual, it may be argued, no longer requires reasonable accommodations and is no longer in need of the protections of disability law.

If on the other hand, we conceptualize disability more liberally, applying the term to individuals who encounter unnecessary hindrances in their quest for self-sufficiency due to the interaction of their biological selves and the social world around them, the existence of mitigating measures should not preclude a finding of disability. Indeed, from this perspective, individuals with disabilities are rarely physically incapable of self-sufficiency, rather it is the social reaction to their conditions that are the problem and the proper focus of the law. Thus the very fact that an individual's condition can be mitigated does not mean that the person no longer has a disability. Rather, the assumption is that all, or almost all, disabilities may be mitigated substantially if society responded differently to human difference. From this view, a person with a disability is not necessarily, indeed is rarely, one who is incapable of independence. The fact that the condition has been mitigated somewhat simply demonstrates why society must go further (by ending discrimination) in removing additional (often attitudinal) barriers the


71. This view of disability helps to explain the stigma associated with disability. See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963) In this classic work, Goffman argued that stigma arises when an individual is perceived as deviant, i.e. different from the prevailing conceptions of normalcy.

72. Fine and Asch write that because disability evokes feelings of vulnerability and death, people without disabilities tend to focus on the helplessness and dependence of people with disabilities, thereby confirming the comforting (if false) view that those without disabilities are strong and independent. Michelle Fine & Adrienne Asch, Disability Beyond Stigma: Social Interaction, Discrimination, and Activism, 44 J. Soc. Issues 3, 16 (1988).

73. This argument is well presented by Erica Worth Harris in Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability," 73 WASH. L. REV. 575, 596 (1998), where she argues that the reasonable accommodation provisions of the ADA should not apply to those whose conditions are controlled. Harris concedes that such a person may still have a disability under the second or third prongs of the definition, which apply to individuals who have a record of or are perceived as having such an impairment, see 42 U.S.C. § 121101, but she then goes on to argue for a narrow construction of those prongs, vitiating their impact. Fundamental to Harris' perspective, and to that of many of the courts that have considered the issue, is the idea that some one whose condition is controlled is not "really disabled." Disability, thus, is seen as a limited, almost pathetic category, a term that must be applied sparingly, to those upon whom nature has dealt a very cruel hand.

74. One may criticize the ADA for fostering an ideal of self-sufficiency that ignores the fact that dependency and vulnerability to both biological and social conditions are universal human traits. See Fine & Asch, supra note 72, at 16 (making the point that we are all interdependent).

75. See Scotch, supra note 29, at 166 (discussing how the disability rights movement perceived disability); Fine & Asch, supra note 72, at 7 (discussing how the "minority-group perspective" leads to the realization that impairments cannot be understood without giving due weight to the environment).
individual faces. To insist that mitigation denies disability, then, is to treat
disability as total incapacity, and to deny both the abilities of individuals with
disabilities as well as the way in which in social responses (or inadequate
mitigations) have created the problem in the first place.

It is, of course, possible to contend that even if mitigated impairments are not
"real disabilities" falling within the parameters of the first prong of the definition of
disability, they can nevertheless "be regarded" as "such impairments" and therefore
qualify as a disability under the third prong of the statutory definition. After all,
the insertion of the third prong of statutory definition was made in the recognition
that disability is, in part, a social condition, and that discrimination may occur
even when an impairment does not in and of itself substantially limit a major life
activity.

In practice, however, the narrow understanding of disability that excludes
mitigated conditions under the first prong will often also exclude them under the
third prong. If the impact of an impairment can be mitigated, then the fact that an
individual "is regarded as having such impairment" will usually not be seen as
qualifying as a disability, because "such impairment" can be mitigated. Only when
a defendant subjectively misunderstands the impact of mitigation, as for example,
when an employer fails to understand that insulin may control diabetes and enable
some one with diabetes to continue working, will the third prong apply. But if the
employer understands the impact of insulin, but still feels uncomfortable, perhaps
for irrational reasons, with hiring an individual with diabetes, the narrow
conception of disability that precludes inclusion of controlled diabetes under the
first prong of the definition of disability will generally prevent inclusion under the
third prong.

Thus if mitigating impacts are considered, few, if any, of the millions of
individuals who depend upon medication, prosthetic devices, or other means to
function independently and successfully despite their impairments will be entitled
to the benefits of the ADA. A statute that was conceived broadly will be applied
only to those with impairments that neither medical science nor human ingenuity
can overcome.

76. See 42 U.S.C. § 12102(2)(C) (1994); Harris, supra note 73, at 596.
77. See Scoth, supra note 52, at 380.
78. That was the case in Sutton v. United Airlines, Inc., 527 U.S. ___, 119 S. Ct. 2133, 2139, and almost every
other case that has considered the issue.
discrimination due simply to irrational dislike of an impairment is not covered by the ADA). One can still argue that
the plaintiff should qualify as having a disability within the meaning of 29 C.F.R. § 1630.2(l)(2) which states that the
third prong applies when an individual is limited in major life activities only due to the "attitudes of others toward such
impairment." However, the courts have seldom applied this provision and for the reasons discussed below, see infra
text accompanying notes 214-85, it seems unlikely that a court would find that it applies to a mitigated condition
without first assuming that the mitigated condition itself was a "real disability." Moreover, the Sutton court's
questioning of the authority of the EEOC to define the definition of disability cases serious doubt over the validity of
this regulation. See 119 S. Ct. at 2145.
80. See id. at 2158-59 (Stevens, J., dissenting) (describing who will be excluded from the ADA's protection
under the Court's ruling).
B. The Legislative and Administrative Record

The drafters of the ADA were remarkably cognizant of the mitigating measures issue. The matter was addressed explicitly in several committee reports. For example, the Report of the Senate Committee on Labor and Human Resources stated clearly 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."

Identical language appeared in the Report of the House Committee on Education and Labor. That report further stated that:

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.

The House Committee on the Judiciary made similar observations.

This is not to say that there is no ambiguity in the legislative history. For example, the drafters were clear that the ADA should be generally read in accordance with the Rehabilitation Act precedent. Yet, while most cases decided under that Act either interpreted the definition of disability broadly, or simply assumed the existence of a disability, by the late 1980s a few courts had begun to parse the statute's definition of disability, questioning its application to certain "non-traditional" disabilities. None of these courts, however, appears to have relied explicitly upon the existence of mitigating measures as a rationale for rejecting a finding of disability.

Still the ADA's drafters did not intend that every conceivable condition would constitute a disability. As both Justice O'Connor and Justice Ginsburg discussed in

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83. Id.
86. See Feldblum, supra note 53, at 15.
88. See Forrisi v. Bowen, 794 F.2d. 931, 932-933 (4th Cir. 1986); E.E. Black Ltd. v. Marshall, 497 F. Supp. 1088, 1099-1101 (D. Haw. 1980). These cases focused particularly on what it means to be "substantially limited" in the major life activity of working.
89. See Wallace v. Veterans Admin., 683 F. Supp. 758 (D. Kan. 1988) (finding rehabilitated drug addict an individual with a handicap without considering impact of rehabilitation); Trembly v. City of Calumet City, 1987 WL 1664 (N.D. 111. 1987) (plaintiffs with myopia do not have a handicap within the meaning of the Rehabilitation Act, in reaching this conclusion court does not explicitly rely upon the fact that plaintiffs wear corrective lenses); see also Rezza v. United States Dept. of Justice, 1998 WL 48541 (E.D. Pa. 1998) (discussing whether recovering gambler has a handicap without explicitly considering whether recovery precludes a finding that plaintiff has a disability if mitigating measures are not considered). But see Stephanie F. Miller, Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability, 85 CAL. L. REV. 701, 712 (1997) (claiming that Rehabilitation Act cases did consider the impact of mitigating measures). All of the cases cited, however, appear to post-date the enactment of the ADA).
their opinions in the *Sutton* case, the ADA’s drafters clearly did not assume that every individual, or even a majority of individuals, had a disability at least under the first prong of the statutory definition. The House Judiciary Committee’s report stated that “[p]hysical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural or economic disadvantages, such as having a prison record, or being poor. Age is not a disability.” Moreover, the legislators did not believe that their definition would cover “minor, trivial impairments, such as a simple infected finger . . . .” They insisted that in order for a condition to constitute a disability under the first prong of the statutory definition, it must be an impairment (not a social condition) that restricts an individual’s major life activities “as to the conditions, manner, or duration under which they can be performed in comparison to most people.” Hence, the drafters seemed to have assumed that in order to find a disability under the first prong, at least, a condition must be a “real” impairment which can restrict an individual substantially in a major life activity. Still, the legislators assumed that the definition would encompass many millions of individuals including those who relied upon mitigating measures. After all, the statute was enacted to mandate mitigating measures (or reasonable accommodations). If the possibility of such measures undermined the existence of disability, the statute would apply to a null set.

The federal agencies which were authorized to enforce the statute quickly reached a similar conclusion. The EEOC, which has authority under Title I of the Act, adopted regulations defining the term disability. For the most part, these regulations follow the model set forth by the Department of Health and Education in its earlier model regulations for the Rehabilitation Act. The EEOC regulations do not explicitly address the issue of mitigation. However, the Appendix to the regulations, known as the Interpretative Guidance, states that “[t]he determination of whether an individual is substantially limited in a major life activity must be


91. The drafters were far more comfortable in assuming that the third prong pertained to purely social instances of disability, in other words, to situations in which social reactions are the only impediments to an individual’s functioning. *See* H. R. REP. NO. 101-485, at 52-53 (1990), reprinted in 1990 U.S.C.C.A.N. 302, 335.


93. *See* id. at 23.

94. H. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334. The committee went on to make the observation that an individual who “can walk for ten miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing discomfort.” *Id.*

95. In her opinion for the Court in *Sutton* Justice O’Connor focused heavily on the fact that the statute’s preamble states “some 43,000,000 Americans have one or more physical or mental disabilities.” 119 S. Ct. at 2147-49. For a further discussion of this issue, see *infra* text accompanying notes 194-96.

96. *See supra* notes 72-76 and accompanying text.


made on a case by case basis, without regard to mitigating measures, such as medicines, or assertive or prosthetic devices." The Technical Assistance Manual published by the EEOC to assist employers is even more emphatic. It states, "[a] person's impairment is determined without regard to any medication or assistive device that s/he may use." The manual goes on to give the following example: "A person who has epilepsy and uses medication to control seizures, or a person who walks with an artificial leg would be considered to have an impairment, even if the medicine or prosthesis reduces the impact of that impairment."

The Department of Justice, which has administrative jurisdiction over Titles II and III of the Act, has taken a similar view. The Department states that:

Whether a person has a disability is assessed without regard to the availability of mitigating measures, such as reasonable modifications, auxiliary aids and services, services and devices of a personal nature, or medication. For example, a person with severe hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that, if untreated, would substantially limit a major life activity, are still individuals with disabilities under the ADA, even if the debilitating consequences of the impairment are controlled by medication.

Of course, this guidance was not meant to imply that every controlled condition constitutes a disability. Although the Departments were insisting that the effect of an impairment should be determined without regard to mitigating measures, they still presumed that in order for there to be a disability under the first prong of the definition, there had to be a "real impairment," and that impairment would be one that in the absence of mitigating measures would substantially limit an individual in a major life activity. Thus gray hair would not be a disability not because it can be mitigated through dying, but because it is not generally, even in the absence of hair-coloring, an impairment that can substantially limit one or more major life activities. Minor vision problems, that are no worse than those experienced by the average person in the population, might well be analyzed similarly. Still, according to the Departments, the fact that an impairment's impact can be ameliorated, due either to the mandates of the statute, or the wonders of medicine, does not in itself negate a finding of disability or protection under the law. An individual in a wheelchair does not cease to have a disability merely because he or she can be mobile in the chair.

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101. Id.
104. See, e.g., 29 C.F.R. app. § 1630.2(j) ("Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled.").
III: STATUTORY CONSTRUCTION AND JUDICIAL INTERPRETATION OF THE ROLE OF MITIGATING MEASURES

A. The Interpretative Debates

In the last two decades federal judges and commentators have waged a lively debate about the proper methods of statutory interpretation. Although courts have traditionally begun the task of construing a statute by looking at its text, for much of this century, their reliance on text was limited at best. Seeing the task of statutory construction as an endeavor to determine and fulfill the intent of Congress, courts would quickly and readily turn to a wide variety of non-textual sources. Chief among these were legislative history, conceived broadly, as well as the interpretations and opinions of administrative agencies.

This mixed method of statutory construction, that may be termed intentionalist, was well exemplified by Justice Brennan's opinion in School Board v. Arline. The chief question in Arline was whether a teacher with tuberculosis has a handicap within the meaning of the Rehabilitation Act. Writing for the Court, Justice Brennan began his analysis not with the textual definition of "handicap," but with statements by Senator Humphrey in the Congressional Record describing the statute's goal as sharing "with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that..."
other Americans take for granted." Only after framing the issue in that light did Justice Brennan turn to the actual statutory definition of "handicap," which he quickly noted was enacted in 1974 to "reflect Congress's concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from archaic 'attitudes and laws'" and from the "fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps."

After setting forth the statute's text and legislative history, Justice Brennan turned to the regulations promulgated by the Department of Health and Human Services, finding them of "significant assistance," in helping to determine whether an individual has a handicap within the meaning of the statute. Having thus laid the foundation for the proposition that the Rehabilitation Act's definition should be construed broadly to support the statute's goals, Justice Brennan spent little time demonstrating that the actual words of the text supported his conclusion that tuberculosis was a handicap. Indeed, what is striking about the opinion is its ambiguity as to which prong of the definition of handicap was the basis for the decision. For while Justice Brennan briefly noted that Arline's previous hospitalization "suffices" to establish a "record of ... impairment," suggesting that he was relying upon either the first or second prong of the definition, he also spent considerable time discussing the third, "regarded as" prong, explaining how it reflected Congress' concern "about the effect of an impairment on others ... ." From a contemporary perspective, Justice Brennan's discussion was remarkably conclusory. All he told us was that Arline had a respiratory infection that once required hospitalization. To Brennan, that was sufficient to demonstrate either the present or past substantial limitation of a major life activity.

Even in 1987, however, Justice Brennan's approach was not without its critics. Throughout the 1980s, intentionalism, with its great reliance on legislative history, came under sharp attack from a variety of critics. Leading the attack within the judiciary was Justice Antonin Scalia. To Scalia

113. See id. at 277 (citing 123 CONG. REC. 13515 (1977) (statements of Sen. Humphrey)).
114. 480 U.S. at 280.
115. Id. at 279 (quoting S. REP. NO. 93-1297, at 50 (1974)).
116. Id. at 280. In footnote 5, Justice Brennan supported his broad reading of the regulations by citing a regulatory appendix that explained why the regulations do not provide for a comprehensive list of handicaps. See id. (citing 45 C.F.R. pt. 84 app. A at 310 (1985)).
117. Id. at 281.
118. Id. at 282.
119. See id. at 281.
120. The dissents in Arline, however, were narrow and did not broadly condemn Justice Brennan's mode of statutory construction. See id. at 291-93.
121. See Eskridge, supra note 19, at 641.
122. See id. at 641-42.
and other so-called textualists, statutory interpretation must depend primarily upon the "plain meaning" of the statute in question. When the particular words at issue are not completely clear, their meaning may be discerned by analysis of the statute's text as a whole, dictionaries, grammar books, and the traditional common law canons of statutory construction. Legislative history is to be used sparingly, if at all, and reliance upon such lofty notions as "statutory goals" is condemned as an illegitimate imposition of a judge's own values and policy preferences into the supposedly "neutral" task of applying the law as written by the legislature.

Justice Scalia's attitude toward administrative interpretation is somewhat more complex. Because he questions the legitimacy of judges citing statutory goals, he has at times been a strong advocate of judges deferring to administrative agencies thereby eschewing their own policy choices. On the other hand, the textualists' insistence on textual supremacy and critique of extra-textual considerations may result in a reluctance to defer to administrative interpretations in the face of what the textualist believes to be a clear statutory meaning, particularly when the statutory source for such deference is not absolutely explicit. Thus the textualist judge may often appear to disregard the so-called Chevron doctrine, under which courts are obligated to defer to an administrative agency's interpretation of the statute it is charged with enforcing. This refusal to defer to administrative interpretations has been most apparent with respect to the EEOC, the agency charged with enforcing title I of the ADA.

127. See Eskridge, supra note 19, at 649.
131. This new textualists are particularly reluctant to defer to agency interpretations which do not appear in true regulations that have been promulgated pursuant to clear statutory authority to define statutory terms. See Public Employees Retirement Sys. of Ohio v. Bette, 492 U.S. 158 (1989).
133. For a discussion of judicial attitudes toward the EEOC, see Rebecca Haner White, The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation, 1995 UTAH L. REV. 51, 54-56 (arguing that the courts have given less deference to the EEOC than to other administrative agencies).
Although textualism is by no means fully triumphant in the courts, its influence has been substantial. According to Professor Eskridge, textualism has become "agenda-setting." At the Supreme Court, the method's influence may often be discerned, even when the methodology is not fully embraced. With respect to the ADA, this was evident in the Court's recent opinion in *Bragdon v. Abbott.* In writing the Supreme Court's first case construing the definition of disability under the ADA, Justice Kennedy took an approach strikingly different from that employed in *Arline.* Although Justice Kennedy found that the definition of disability could apply to HIV infection, he did so without resorting at all to the underlying goals or policies behind the ADA. Indeed, his discussion of the disability issue is telling for the lack of any mention, whatsoever, about the statute's remedial goals. And while he relied heavily upon administrative interpretations, he did so only after establishing a clear textual support for such reliance. Citing 42 U.S.C. § 12201, Justice Kennedy noted that Congress explicitly stated that the ADA should be construed in light of the Rehabilitation Act and its regulations. Therefore the administrative precedent Justice Kennedy relied upon was, in his mind, effectively codified in the text of the ADA. Moreover, while he did cite to legislative history, he did so narrowly, avoiding consideration of broad Congressional goals, and focusing instead upon rather explicit references in the legislative history to the very specific issue before the Court. And even then, in contrast to Justice Brennan, Justice Kennedy turned to this history only after he established his text-based conclusion. To Justice Kennedy, legislative history served to confirm textual interpretation, not to guide it.

Many lower federal courts have been even more insistent on the importance of text. For the plaintiff who uses mitigating measures to limit the impact of an impairment, this preference for text over extra-textual material has been devastating.

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134. As Professor Eskridge notes, Justice Scalia's textualism has often been treated skeptically by his fellow justices. Moreover, it has been widely condemned by academics. See Eskridge, supra note 125, at 1513.


136. See Eskridge, supra note 125, at 1514.

137. For a discussion of the increasing influence of textualism on the Supreme Court, see Pierce, supra note 130.


139. The statute's goals are only noted briefly in the Court's rejection of the defendant's position that the direct threat defense should be based upon a good faith standard. See 524 U.S. at 649.

140. See id. at 632.

141. See id.

142. See infra text accompanying notes 185-228.

143. Of course, it may be claimed that the methodology employed in an opinion is used after-the-fact to justify a result that the court was determined to reach no matter what approach to statutory construction was used. In claiming here that there is a relationship between a court's attitude toward text and the outcome of an opinion, I seek to make no claim about causality. Indeed, I suspect that the causation goes in both directions, and that attitudes toward disability run deep and have a profound impact upon both one's views about the mitigating measures issue and one's choice of methodologies. For a further discussion of this issue, see infra text accompanying notes 232-275.
B. The Sutton Case

The question whether mitigating measures should be considered in determining disability and, more particularly, whether an impairment whose effects are mitigated may still be substantially limiting within the meaning of the first prong of the definition of disability was before the Supreme Court in three cases last spring. The lead case, *Sutton v. United Airlines, Inc.*,44 concerned twins with severe myopia who wished to be commercial airline pilots.45 The District Court had dismissed the twins' complaint, finding that they did not have a disability within the meaning of the Act because their visual impairments were not substantially limiting when they wore corrective lenses.46 The District Court also found that the plaintiffs did not qualify as having a disability under the third prong of the definition of disability because the defendant did not regard the plaintiffs as substantially limited in engaging in a class of jobs, but rather merely as being unable to do the single job of being a commercial airline pilot.47 The Court of Appeals for the Tenth Circuit affirmed, accepting the lower court's analysis of the third prong issue and also finding that the determination of disability under the first prong should be made with regard to the beneficial impact of the twins' corrective lenses.48

In considering the impact of the plaintiffs' corrective lenses on the determination of disability, the Tenth Circuit parted company from a majority of the appellate courts that had considered the issue.49 The Court of Appeals' decision, however, was affirmed by the Supreme Court, in an opinion written by

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145. The two other ADA cases decided at the same time relied heavily on the analysis contained in *Sutton*. *Murphy v. United Parcel Serv., Inc.*, 527 U.S. __, 119 S. Ct. 2133 (1999), involved a UPS mechanic with high blood pressure. The Court in *Murphy* relied on its analysis in *Sutton* to determine that the plaintiff did not have a disability because his condition was controlled and his employer did not believe that he was unable to engage in a wide class of jobs. See id. at 2137-39. *Albertsons, Inc. v. Kirklingburg*, 119 S. Ct. 2162 (1999), concerned a truck driver with monocular vision. The Court in that case reiterated its holding in *Sutton* and also emphasized that the determination of disability must be made on a case by case basis. See id. at 2169. In addition, the Court held that the employer's reliance on Department of Transportation regulations setting forth the vision requirements of commercial drivers did not mean that the employer regarded the plaintiff as having "such impairment" within the third prong of the definition of disability. See id. at 2173-74.
147. *See id.* The Supreme Court noted that the plaintiffs failed to allege that the defendant regarded them as substantially limited in the major life activity of seeing. See id. at 2150. Thus the question whether the plaintiffs' complaint could have survived dismissal if they had raised such a claim was not answered by the case.
149. Most Courts of Appeals had held that the determination of disability should be made without regard to mitigating measures. *See Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 863 (1st Cir. 1998); *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 328-29 (2d Cir. 1998); *Baert v. Euclid Beverage Ltd.*, 149 F.3d 626, 630 (7th Cir. 1997); *Muczak v. Frankford Candy Chocolate Co.*, 136 F.3d 933, 937-38 (3d Cir. 1997); *Hollihan v. Lucky Stores, Inc.*, 87 F.3d 362, 363 (9th Cir. 1996). The Fifth Circuit's initial discussion of the issue, in dicta, appeared to favor consideration of mitigating measures. *See Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996). In a later case, the court adopted an intermediate position, holding that some, but not all, mitigating measures should be considered. *See Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998), *vacated and remanded sub nom*, HCA Health Serv. of Texas v. Washington, 199 S. Ct. 2388 (1999).
Justice O'Connor and joined by six of her colleagues.\textsuperscript{150} Justices Stevens and Breyer dissented.\textsuperscript{151}

Although Justice O'Connor never used the word, her opinion for the Court vividly demonstrated textualism's influence. Like any good textualist, she began with the statute's text,\textsuperscript{152} and relied heavily upon rules of grammar.\textsuperscript{153} She pointed out that the statute's definition of disability used the term "substantially limits" in the "present indicative verb form," and hence could not apply when an impairment "might," 'could' or 'would' be substantially limiting if mitigating measures were not taken."\textsuperscript{154} She also noted that the statute's preamble claimed that 43 million Americans had disabilities, thereby making the inclusion of the many more millions of individuals with hypertension, diabetes and other controlled chronic impairments incompatible with the statute's text.\textsuperscript{155}

Equally revealing were the sources of interpretation that Justice O'Connor rejected. She refused to accept the administrative guidance on the subject,\textsuperscript{156} as well as the legislative history specifically on point.\textsuperscript{157} Nor did she worry much about the impact of her decision on the statute's ability to realize its goals. In short, she rejected firmly, although not explicitly, the basic tools of intentionalist interpretation.

In contrast, Justice Stevens' dissent provides a striking illustration of intentionalist decision making. He relied heavily on Congressional "purpose,"\textsuperscript{158} as well as the legislative history on the subject.\textsuperscript{159} He also looked to the guidance of the enforcing agencies.\textsuperscript{160} In essence, he used an approach far more similar to the one Justice Brennan used in Arline\textsuperscript{161} than to the one Justice O'Connor used for the majority.

The disparity between the methods of statutory interpretation used by the majority and dissent in Sutton echoes the division found in the lower courts. Indeed, the courts' conclusions about the mitigating measures issue have been correlated closely with their views about administrative guidance, legislative history, the importance of searching for Congressional purpose, and the weight to

\textsuperscript{150} See 119 S. Ct. at 2143.
\textsuperscript{151} See id. at 2152 (Stevens, J., dissenting); id. at 2161 (Breyer, J., dissenting).
\textsuperscript{152} See id. at 2144.
\textsuperscript{153} See id. at 2146. Justice O'Connor also employed the textualist technique of relying upon the dictionary for her interpretation of the third prong of the definition of disability. See id. at 2150.
\textsuperscript{154} Id. at 2146.
\textsuperscript{155} See id. at 2147-49.
\textsuperscript{156} See id. at 2146.
\textsuperscript{157} See id. Indeed, Justice O'Connor's total unwillingness to consider any discussion of the specific legislative history on the mitigating measures issues is particularly striking.
\textsuperscript{158} See id. at 2152 (Stevens, J., dissenting).
\textsuperscript{159} See id. at 2153-55.
\textsuperscript{160} See id. at 2155-56. The role of the administrative agencies was particularly important to Justice Breyer. In his brief dissent, he noted that if exclusion of mitigating impacts from the determination of disability caused a floodgates of frivolous claims, that problem could be solved by the agencies issuing different regulations. See id. at 2161 (Breyer, J., dissenting).
\textsuperscript{161} See supra text accompanying notes 112-119.
be given to the plain meaning of a text. In the discussion that follows, I consider the weight given by the courts to each of these sources of interpretation, by looking more closely to the opinions in *Sutton* as well as the earlier lower court decisions on mitigating measures.

**C. The Role of Administrative Interpretations**

Given the fact that the text of the ADA is itself silent about the issue of mitigating measures, but that the administrative agencies which enforce the statute have addressed the matter explicitly, it should not be surprising that the amount of deference that courts are willing to give to agency interpretations is often critical to determining the outcome of the mitigating measures issue. Indeed, the correlation is striking. Almost every court that has decided to exclude the impact of mitigating measures in the determination of disability has done so by relying heavily upon the interpretative guidelines issued by the EEOC and Department of Justice. As was noted above, these guidelines are quite explicit and appear to provide a strong basis for excluding the impact of mitigating measures.

Deference to administrative guidance was clearly evident in the two dissents to *Sutton*. In the lead dissent, Justice Stevens noted that:

> "Each of the three Executive agencies charged with implementing the Act has consistently interpreted the Act as mandating that the presence of disability turns on an individual's uncorrected state. We have traditionally accorded respect to such views when, as here, the agencies 'played a pivotal role in setting [the statutory machinery in motion].""

Justice Breyer's dissent gave even greater weight to the enforcing agencies. Justice Breyer noted that the EEOC had regulatory authority with respect to the definition of disability, and that the agency could, if it wanted to, "draw finer definitional lines." In other words, for Justice Breyer, the question whether or not mitigating measures should be considered was one to be left largely to the administrative agencies. Because the relevant agencies had concluded that mitigating measures should not be considered, the courts should follow suit.

The views of the administrative agencies were also critical to those lower courts which prior to *Sutton* had determined that mitigating measures should not be considered. For example, in *Roth v. Lutheran General Hospital*, the Seventh Circuit in dicta simply accepted the EEOC's interpretation of the matter, without providing substantial discussion of either the amount of deference properly given to

162. See *supra* text accompanying notes 97-104.
163. See *Puma*, *supra* note 70, at 127-28; *Walsh, supra* note 70, at 932-933.
165. *119 S. Ct. at 2155* (Stevens, J., dissenting).
166. *See id.* at 2161-62 (Breyer, J., dissenting). On this point, Justice Breyer explicitly disagreed with Justice O'Connor's conclusion that the EEOC lacked authority over the definition of disability. *See infra* text accompanying notes 188-89.
167. *119 S. Ct. at 2161.*
168. 57 F.3d 1446 (7th Cir. 1995).
the agency nor the textual validity of the agency’s interpretation. Other courts provided a fuller explanation of why they should accept the EEOC’s position. For example, in one of the earliest court of appeals decisions on point, the Eleventh Circuit began its discussion of the issue stating that “[a]t first glance, it is difficult to perceive how a condition that is completely controlled by medication can substantially limit a major life activity.” The answer to that paradox, according to the court, lay in the fact that under the Supreme Court’s *Chevron* doctrine, courts are to give “considerable weight” to an administrative agency’s interpretation of the statute it is entrusted to enforce. Thus because the EEOC had taken a clear position on the matter, the agency’s view should be followed as long as it was not in “direct conflict” with the language of the statute. Looking then at the language of the statute and its legislative history, the court was able to conclude that the EEOC’s position could not be “disregarded” as it was based on a “permissible construction of the statute and is supported by the statute’s legislative history.”

For some courts, the fact that the EEOC’s construction appears in interpretative guidelines, rather than actual regulations, proved troubling. The weight to be given to such “non-binding” administrative materials has been a much-mooted question since the articulation of the *Chevron* doctrine. For courts construing the *ADA*, this has been an especially important question as both the EEOC and Department of Justice have relegated much of their interpretative content to informal guidelines and technical assistance manuals, as opposed to actual regulations.

169. See id. at 1454. Perhaps the court was able to bypass these issues because of the *Chevron* doctrine. *Chevron* U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984). However, it may well be that the Seventh Circuit’s acceptance of the EEOC’s position in *Roth* was so quick and uncontested because the matter was not really outcome-determinative in the particular case before the court. Indeed, the Seventh Circuit cited the EEOC’s interpretative guidelines primarily to buttress the conclusion that Roth (a physician with strabismus) did not have a disability, for the court noted that even if it disregarded the mitigating measures used by the plaintiff, he still could not show a substantial limitation to a major life activity. Hence the court’s surprisingly uncritical acceptance of the EEOC’s guidelines was simply dicta designed to demonstrate that even under the most generous pro-plaintiff approach, this particular plaintiff (whom the court clearly did not like) would not have a disability.


171. See id. at 520.


173. See 102 F.3d at 521.


175. Not surprisingly courts that have rejected the position adopted by the guidelines have noted this deficiency. See, e.g., *Murphy v. United Parcel Serv., Inc.*, 141 F.3d 1185 (10th Cir. 1998); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *Moore v. City of Overland Park*, 950 F. Supp. 1088 (D. Kan. 1996). The rejection of deference to the EEOC by these courts is considered below. See infra text accompanying notes 161-166.

The Third Circuit considered the problem in *Matczak v. Frankford Candy and Chocolate Co.*,

noting that the guidelines pertaining to mitigating measures appear only as an "appendix" to the regulations. Hence the guidelines, the court concluded, are not entitled to full "Chevron deference," although they would still be given "controlling weight" unless they were plainly erroneous. Likewise, the District Court in *Sicard v. City of Sioux City,* noted that the deference accorded to mere interpretative regulations is less than that offered to true regulations. Rather than simply accepting the guidelines as binding, the court suggested, the weight to be given to the EEOC's interpretation should depend upon a variety of factors, including the validity of the agency's reasoning, the consistency of the agency's position, and temporal relationship between the statute's enactment and the promulgation of the agency's position. But after looking to all of those factors in the case before it, the court concluded that the EEOC's position was entitled to "substantial deference."

In her majority opinion in *Sutton,* Justice O'Connor went even further in questioning whether deference should be given to the relevant administrative interpretations. According to Justice O'Connor, the EEOC's authority over the definition of disability was questionable because the definition of disability appears in the statute structurally outside of Title I, the Title over which the EEOC is granted regulatory authority. In other words, even though the ADA's text specifically gives the EEOC authority to administer Title I, and the definition of disability clearly and explicitly applies to that title, Justice O'Connor felt free to disregard the agency's guidance on the subject because the definition of disability sits outside Title I. This novel, clearly textualist reading of the agency's authority was reached even though the Court had relied heavily upon agency interpretations of that very definition just the prior term in *Bragdon,* a point not discussed by the majority. Nevertheless, by questioning whether the agency had any authority over the issue whatsoever, the Court was able to buttress its subsequent rejection of the agency's position.

Justice O'Connor, however, challenged more than just the agency's authority. She also rejected the validity of its position. Employing textualist

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177. 136 F.3d 933 (3d Cir. 1997).
178. Id. at 937.
179. Id.
180. Id.
182. See id. at 1435.
183. Id.
184. Id.
185. See 119 S. Ct. at 2145.
187. 524 U.S. at 642.
188. While no lower court denied that the EEOC had some authority over the definition of disability, the district court in *Murphy v. United Parcel Serv., Inc.*, claimed that the agency's position itself was ambiguous and therefore not deserving of deference. See 946 F. Supp. 872, 881 (D. Kan. 1996), aff'd, 141 F.3d 1185 (10th Cir. 1998), aff'd, 527 U.S. ___, 119 S. Ct. at 2133 (1999).
methodology, and in sharp contrast to Justice Breyer, O'Connor refused to accept that there could be inherent ambiguity justifying deference to the administrative interpretations. To her the statute clearly answered the mitigating measures question by requiring consideration of mitigating impacts. Because the statute was clear, deference to the EEOC would be inappropriate.¹⁸⁹ In using that reasoning, Justice O'Connor followed the logic of the many lower court judges who similarly disregarded the EEOC's guidance based upon their perceptions of the statute's textual dictates.

D. Statutory History and the Search for Congressional Intent

Given the clarity of the legislative history regarding mitigating measures,¹⁹⁰ it should not be surprising that a court's attitude toward legislative history and the importance of congressional intent should weigh heavily in the court's analysis of the issue. Several of the lower courts that had determined that the impact of mitigating measures should be excluded from the determination of disability did so relying largely on the clear legislative history.¹⁹¹ Other courts that concluded that mitigating measures must be considered either ignored that history, or declined to follow it, finding that the history contradicts the statute's plain meaning.¹⁹²

In Sutton, for example, Justice O'Connor quickly dismissed reliance upon the legislative history specific to the mitigating measures issue stating: "Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."¹⁹³ Interestingly, however, she did delve deeply into the legislative history of the reference in the ADA's preamble to "43,000,000" Americans with disabilities.¹⁹⁴ Without explaining why that resort to legislative history was more appropriate than consideration of the specific committee reports discussing the mitigating measures issue, Justice O'Connor argued that the history of the preamble's "43,000,000" reference suggested that Congress assumed a functional definition of disability that was incompatible with coverage of the many tens of millions of individuals with controlled impairments.¹⁹⁵

But perhaps even more revealing than a court's treatment of the parts of the legislative history pertaining to mitigating measures is a court's attitude toward a broader exploration of congressional intent. Should the issue of mitigating

¹⁸⁹. See 119 S. Ct. at 2145-46.
¹⁹⁰. See supra text accompanying notes 72-75.
¹⁹¹. See supra text accompanying notes 172-189. The legislative history and administrative positions are not unrelated, as the EEOC has relied upon the legislative history in formulating its interpretative guidelines. See 29 C.F.R. § 1630.2 (1998).
¹⁹³. 119 S. Ct. at 2146.
¹⁹⁴. See id. at 2147-49.
¹⁹⁵. See id. It could perhaps be argued that by making this argument, Justice O'Connor was herself engaging in a bit of intentionalism. However, her brand of intentionalism was far narrower than Justice Stevens'. Justice O'Connor focused solely upon Congress' intent in adopting the number cited in the preamble. She did not consider the goal of the statute as a whole or whether it could be effectuated with the interpretation she was giving.
measures be understood narrowly, based upon the text of the definition of
disability? Or, should the issue be considered in light of the general goals and
purposes behind the ADA? In other words, should a court rely on intentionalist
methodology, as Justice Brennan did in Arline, or should the court conduct a more
limited inquiry, as textualism would suggest?

The answer to those questions appears to have been critical in resolving the
mitigating measures debate. Indeed, few courts openly adopted an intentionalist
approach to the issue. But those that did usually concluded that the impact of
mitigating measures should be excluded from the definition of disability.196

Justice Stevens' dissent in Sutton provides the clearest example. His opinion
began by noting that "in order to be faithful to the remedial purpose of the Act, we
should give it a generous, rather than a miserly, construction."197 He then went on
to say that "[a]s in all cases of statutory construction, our task is to interpret the
words of [the statute] in light of the purposes Congress sought to serve."198

With that directive in mind, Justice Stevens considered the mitigating
measures issue in light of the Congressional goal of ensuring that "individuals who
now have, or ever had, a substantially limiting impairment are covered by the
Act."199 He noted that "[t]here are many individuals who have lost one or more
limbs in industrial accidents, or perhaps in the service of their country in places like
Iwo Jima."200 If the aid of their prostheses was considered in determining whether
they had a disability, the statute would not prohibit discrimination against such
individuals, leading to 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."201 In other words, the statutory
goal of ensuring that those individuals with a disability who can work not be
thwarted by "irrational fear and stereotype" would be defeated.202

To Justice Stevens, these conclusions were buttressed by the various
legislative committee reports that were "replete with references to the
understanding that the Act's protected class includes individuals with various
medical conditions that ordinarily are perfectly 'correctable' with medication or
treatment."203 As for the statutory reference to "43,000,000" individuals with
disabilities, and the history of that number that Justice O'Connor relied upon,
Justice Stevens argued that while Congress may not have considered or
contemplated the possibility that individuals, such as the plaintiffs, with severe
myopia would fall within the protected class, it is a "familiar canon of statutory

196. See infra text accompanying notes 197-212.
197. 119 S. Ct. at 2152 (Stevens, J., dissenting).
198. Id. at 2153 (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)).
199. 119 S. Ct. at 2153.
200. Id.
201. Id. Justice Stevens also noted that the majority's reading means that individuals who have been completely
cured of an impairment have a disability under the second prong of the definition, while those who have an ongoing,
controlled impairment have no disability. See id.
202. See id. at 2158.
203. Id. at 2155.
construction that remedial legislation should be construed broadly to effectuate its purposes.\textsuperscript{204} So just as Title VII may be applied to whites, even though they were not the class Congress had in mind when the statute was enacted, the ADA should be applied to individuals with severe myopia, if they are the victims of irrational discrimination, even though they do not have the impairment Congress probably had in mind when the legislation was enacted.\textsuperscript{205}

In reaching these conclusions, Justice Stevens employed reasoning quite similar to that used in the First Circuit's earlier opinion in \textit{Arnold v. United Parcel Service, Inc.}\textsuperscript{206} \textit{Arnold}, which concerned an insulin-dependent diabetic, clearly proclaimed the validity and importance of legislative history, stating that if the text is "not unambiguously clear," the court is "obliged to look to other sources," including legislative history and administrative interpretations.\textsuperscript{207} Moreover, like Justice Stevens, the \textit{Arnold} court noted that the ADA is a "broad remedial statute," whose goal was to increase opportunities for individuals who are able to work and function.\textsuperscript{208}

The District of Columbia used a similar approach in \textit{Fallacaro v. Richardson},\textsuperscript{209} which, like \textit{Sutton}, concerned a plaintiff with a correctable vision impairment.\textsuperscript{210} Although that court felt that the EEOC guidance was not entitled to substantial deference, because it was not a proper regulation,\textsuperscript{211} the court nevertheless noted that "[i]t makes little sense to deprive an entire class of disabled individuals—the legally blind who have correctable vision—of the protections of the Act merely because it is so easy to accommodate their disability."\textsuperscript{212} In other words, if the goal of the statute is to promote the employment and independence of individuals with impairments, it makes no sense to deny protection to those individuals whose impairments can be controlled and are simply kept out of the workplace because of irrational discrimination.

\begin{itemize}
\item \textsuperscript{204} Id. at 2157 (quoting \textit{Tcherenpnin v. Knight}, 389 U.S. 332, 336 (1967)).
\item \textsuperscript{205} See 119 S. Ct. at 2157.
\item \textsuperscript{206} 136 F.3d 854 (1st Cir. 1998).
\item \textsuperscript{207} Id. at 858. In proclaiming the authority of legislative history, Judge Bownes acknowledged criticism of the "uncertainty about the value of legislative history." Id. at 860. From his perspective, however, the burden was clearly on those who would reject legislative history. The district court, Judge Bownes noted, provided no adequate explanation as to why it rejected the Senate Report's clear pronouncements on the mitigating measures issue. \textit{See id.}
\item \textsuperscript{208} See \textit{id.} at 861.
\item \textsuperscript{209} 965 F. Supp. 87 (D.D.C. 1997). A similar analysis is evident in the Court of Appeals' decision in \textit{Kirkingsburg}, although the court there did not explicitly address its intentionalist analysis to the mitigating measures issue. \textit{See 143 F.3d 1228 (9th Cir. 1998).}
\item \textsuperscript{210} Another case with a similar fact pattern is \textit{Wilson v. Pennsylvania State Police Dept.}, 964 F. Supp. 898 (E.D. Pa. 1997).
\item \textsuperscript{211} 965 F. Supp. at 92-3. The court erred in saying that the EEOC was not authorized by the ADA to promulgate regulations. The statute clearly gives the EEOC such authority, although as the Court noted in \textit{Sutton}, the statutory authority does not specifically refer to the definition of disability. \textit{See 119 S. Ct. at 2145; 42 U.S.C. § 12116 (1994).}
\item \textsuperscript{212} 965 F. Supp. at 93; \textit{see also} \textit{Erjavac v. Holy Family Health Plus}, 13 F. Supp. 2d 737, 744 (D. Ill. 1998) (finding that plaintiff with diabetes has a disability based upon \textit{Arnold} and the statute's legislative history).
\end{itemize}
E. Textualism

Given textualism's rise in the federal courts, it should not have been surprising that the technique would have been applied to the ADA. Indeed what may have been surprising is that the drafters of the ADA relied so heavily upon both legislative history and administrative guidelines to support the Act's interpretation. With textualism increasing as a favored mode of statutory interpretation, the idea that the courts would rely upon the statute's legislative history and the EEOC's guidance should probably have been questioned more than it was.

Textualism's impact on the mitigating measures issue was apparent long before the Sutton opinion. In 1996, in Ellison v. Software Spectrum, Inc, for example, the Fifth Circuit quickly concluded that the EEOC's guidelines should not be followed because "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under Sec. 12102(2)(A) for impairments that have the potential to substantially limit a major life activity." Interestingly, in reaching this conclusion about "congressional intent," the court did not look at the actual legislative history on the issue. Rather, following the textualist model, the court determined the "intent" of Congress by relying upon the statute's text. To the court, the fact that the first prong of the ADA's definition of disability required a "substantial limitation" of a major life activity and not a "potential limitation" of a major life activity was itself dispositive of the issue.

The importance of legislative history and its rejection was especially visible in the opinions issued by a divided Sixth Circuit in Gilday v. Mecosta County, a case concerning an emergency medical technician (EMT) with diabetes, who claimed that his condition caused the irritability which led to his being fired. In her opinion, Judge Moore found that the impact of mitigating measures should not be considered in determining disability. She reached this decision by looking not only at the case law and EEOC guidelines, but also by considering the "purpose of the ADA," as well as its legislative history. Citing the portions of the legislative history that pertain to the obligation to provide reasonable accommodations, Judge Moore concluded:

[that a person with a disability is able to use medical knowledge or technology to overcome the effects of his condition (in Gilday's case, by a continuing regimen of

213. See supra text accompanying notes 120-142.
214. See supra text accompanying notes 81-94.
215. 85 F.3d 187 (5th Cir. 1996).
216. Id. at 191 n.3.
218. 124 F.3d 760 (6th Cir. 1997).
219. See id. at 761.
220. See id. at 762-63.
221. See id. at 764-65.
222. See id. at 764 (citing H.R. REP. No. 101-485 Pt. II at 64 (1990)).
medicine, proper eating habits, and rest) may mean that he will, in practice, rarely require any sort of accommodation: but, his achievement should not leave him subject to discrimination based upon his underlying disability.\textsuperscript{223}

In contrast, Judge Kennedy, joined in his analysis by Judge Guy,\textsuperscript{224} rejected consideration of legislative history, understood either broadly or narrowly. While acknowledging that the "ADA's vast legislative history lends some support to the EEOC's position," he found that "[w]here the statutory text is unambiguous, . . . that ends the matter."\textsuperscript{225} Since the EEOC position "conflicts with the plain reading of the statute," Judge Kennedy concluded that the impact of medication must be considered in determining whether a plaintiff has a disability.\textsuperscript{226} Judge Moore's broader point, that the statute was aimed at protecting individuals who can benefit from reasonable accommodations or mitigating measures, was left unanswered by Judge Kennedy, except for the unremarkable assertion that the ADA does not protect everyone: "[The ADA] provides protection only for those whose impairments substantially limit their lives. I do not believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication."\textsuperscript{227} The question of how the judge could know what Congress intended, when he refused to consider what he admitted were the implications of the legislative history, was left totally unanswered.

Justice O'Connor, of course, adopted a similar approach in \textit{Sutton}. As has already been noted, she disregarded both the specific legislative history on point as well as the administrative guidance.\textsuperscript{228} Instead, she focused to a great degree on specific points in the ADA's text. Particularly important was the fact that the statutory definition of disability refers to a physical or mental impairment that "substantially limits . . . one or more major life activities."\textsuperscript{229} Because the phrase grammatically was "in the present indicative verb form" it could not, the Court concluded, be applied to those impairments which no longer substantially limit major activities thanks to the benefits of mitigating measures.\textsuperscript{230} Similarly the Court noted that the definition of disability requires that disabilities "be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.'"\textsuperscript{231} This too, the Court assumed, required that the determination of disability be made based upon the current actual physical status of the plaintiff, with the impairment controlled, rather than on an analysis of how the plaintiff would fare in the absence of

\begin{itemize}
  \item 223. 124 F.3d at 764.
  \item 224. See id. at 766 (Kennedy, J., concurring in part and dissenting in part).
  \item 225. \textit{id.} at 767 (Guy, J., concurring in part and dissenting in part).
  \item 226. Id. (Kennedy, J., concurring in part and dissenting in part).
  \item 227. Id. (emphasis in original). A similar analysis appears in \textit{Hodgens v. General Dynamics Corp.}, 963 F. Supp. 102, 107-08 (D.R.I. 1997).
  \item 228. See supra text accompanying notes 185-89; 193-95.
  \item 229. See 119 S. Ct. at 2146 (citing 42 U.S.C. § 12102(2)(A) (1994)).
  \item 230. See id.
  \item 231. Id. at 2147.
\end{itemize}
mitigation. To disregard the impact of mitigation, Justice O'Connor suggested, would be to consider individuals "as members of a group of people with similar impairments, rather than as individuals." Finally, as discussed above, the Court considered the text's reference to 43,000,000 Americans with disabilities and determined that it too was incompatible with disregarding the mitigating impacts of medication or other devices.

Left unconsidered in this analysis was the inherent ambiguity of the text upon which the Court was relying. Despite the Court's reliance upon textual clarity, the text is hardly crystal clear. For example, the use of the present indicative tense in the first prong of the definition of disability is not absolutely incompatible with a decision to ignore the impact of mitigating measures. An interpreter, after all, could conclude that the present verb form simply means that the court must determine the current status of the plaintiff without the mitigating measures (i.e. when the glasses are taken off). The present tense does not dictate the answer. Nor is the text's mandate to consider the impact of the impairment on "such individual" determinative of the question. Clearly a court must consider the status of the plaintiff, rather than of individuals not before court. The mandate to look at "such individual" does not necessarily indicate whether the plaintiff's ability to engage in major life activities should be considered in the mitigated or unmitigated state. Finally, the preamble's reference to 43,000,000 Americans with disabilities can hardly be considered conclusive. Not only doesn't the preamble mention the definition of disability, but as Justice Stevens noted, the number cited is as poor a fit with the Court's interpretation as it is with the EEOC's. Under the former interpretation the number is too high, under the latter it is too small. Neither fits, nor can they fit with any interpretation that recognizes the second and third prong of the definition of disability, which assuredly add an inherent uncertainty to any attempt to cite a number of people with disabilities.

Thus the seemingly clear text the Court relied upon was actually not so clear at all. The question then arises as to why those courts that have emphasized textual over extra-textual sources have consistently determined that the determination of disability should be made based on an impairment's mitigated state. That issue is explored in Sections IV and V.

IV.
THE "PLAIN MEANING" OF DISABILITY

Textualism, it would seem, seldom supports the exclusion of mitigating measures from the determination of disability. For the most part, the courts that have decided to determine an individual's disability status without regard to mitigating measures, have done so relying upon extra-textual sources, particularly

232. Id. That the assessment must be individualized was also emphasized by Justice Souter in his opinion for the Court in Albertson's, Inc. v. Kirkingburg, 527 U.S. ____, 119 S. Ct. 2162, 2169 (1999).
233. See Sutton, 119 S. Ct. at 2147; see also supra text accompanying notes 194-95.
234. See id. at 2160 (Stevens, J., dissenting).
the EEOC’s interpretative guidelines and the statute’s legislative history.235 When courts have rejected these sources, they have often concluded that the “plain meaning” of the definition of disability requires a determination whether an impairment is substantially limiting despite the benefits provided by mitigating measures.236 In essence, these courts have argued that the plain meaning of the statute demands that the first prong of the definition of disability apply only to individuals who are substantially limited in a major life activity despite any medication or devices they might use.237

But why does reliance upon text require analysis of whether a plaintiff is substantially limited after the effects of mitigating measures are considered? After all, the text itself is silent on the issue. It does not explicitly say that a condition should be considered in its medicated or mitigated state. Given that ambiguity, it is tempting to suggest that textualism does not in fact necessitate the outcome adopted by textualist courts, that instead such courts use textualism to dispose of what they perceive to be non-meritorious claims at the summary judgment stage.238 Hence textualism simply serves as a useful device to enable courts to disregard the legislative history and EEOC guidelines that if followed, would make summary judgment on the question of disability less frequent.239 In other words, it is possible that conservative jurists, who are suspicious of ADA claims, adopt textualist rationales for the conclusions to which they are already predisposed.240

While such a hypothesis cannot be rejected entirely, it still does not fully explain the deep reluctance some courts have had in accepting the idea that someone whose impairment is controlled is a person with a disability. This reluctance was perhaps most vividly illustrated by the Fifth Circuit’s opinion in Washington v. HCA Health Services of Texas.241 In that case the court recognized that the statutory text was inherently ambiguous and that it was therefore appropriate for the court to consult the legislative history and administrative guidance.242 But that did not end the matter. While the court realized that both the legislative history and administrative guidance supported the view that conditions should be assessed in their unmitigated state, it nevertheless stated that “the most reasonable reading of the ADA” would be one that considers mitigating impacts.243

235. See supra text accompanying notes 139-183.
236. See supra text accompanying notes 187-230.
237. See 119 S. Ct. at 2146; Gilday v. Mecosta, Co., 124 F.3d 760, 765 (6th Cir. 1997); Puma, supra note 70, at 140-41.
238. See Locke, supra note 9, at 113-14.
240. Puma argues to the contrary that “[t]he textualist approach to statutory interpretation is an objective process. Rather than guessing at legislative intent, a judge asks what the words of a statute would have meant, at the time of enactment, to an ordinary reader.” Puma, supra note 70, at 144.
242. See id. at 467-69.
243. See id. at 469.
In other words, although the court was not honestly able to say that the text was unambiguous, thereby justifying the disregard of the legislative history and administrative interpretations contradicted the text, it was still uncomfortable accepting the conclusion that an individual with a mitigated condition could have a disability. So the court tried to split the difference by adopting what it thought was a more "reasonable" conclusion, that only "serious" impairments would be considered in their unmitigated state. In essence the court determined that the text, as construed by traditional modes of statutory interpretation, included within the definition of disability people who should not be considered disabled. As a result, the court used the methodology of the intentionalist judge, who strives to fulfill the policies and purposes of a statute, to serve the textualist's preference for "bedrock" or common understandings.

Most opinions are less candid than the Fifth Circuit's opinion in *Washington*. They never actually say that an individual with a mitigated condition does not fit within the common understanding of disability. Instead, like Justice O'Connor in *Sutton*, they point to various parts of the statute's text, without actually saying that what is driving their conclusion is not the phrases in the text they are pointing to, but the very word "disability" itself. To a textualist, it seems, textual fidelity is not the highest value; regardless of what the ADA's text says, "disability" has a clear meaning, and that does not include people with myopia or other controlled conditions.

Ultimately, these judges are relying upon a common or plain meaning of disability that does not include most of the conditions presented in the mitigating measures cases. For example, the dictionary, a favorite authority of the textualists, defines "disability" as "lack of adequate strength or physical or mental ability; incapacity." And social scientists who have studied perceptions of disability have found a deep resonance between this definition with its emphasis on

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244. See id. at 470-71.
246. It is of course possible that courts may at times believe that plaintiffs "really are" disabled, but were not really discriminated against. Under such a circumstance a court might be tempted to use the issue of disability to dismiss a claim that the court believes, but lacks authority to conclude, is non-meritorious on some other ground. However, given the close connection between perceptions of disability, and perceptions of entitlement, see infra text accompanying notes 248-252, it is likely that the court's views on the merits are not unrelated to the courts perception of whether a plaintiff has a disability within the plain meaning of that term. Importantly the focus here is on the ADA's term "disability." Originally the Rehabilitation Act employed the term "handicap" to connote what the term "disability" now means. It is interesting that many of the problems courts have had with the definition of disability did not arise with any of the frequency now encountered when the term used was "handicap." That term was replaced in 1990 by the word "disability" because it was felt to be less offensive to individuals with disabilities. See H. R. REP. No. 101-485, pt. 2, at 50-51 (1990), reprinted in 1990 U.S.C.A.A.N. 332-33. It is possible, however, that while the term "disability" was seen as less stigmatizing to the disability community than was the term "handicap," the term "disability" had other connotations not fully appreciated at the time which may have come to complicate the implementation of the ADA.
“incapacity” and cultural attitudes towards people with disabilities. For example, in our culture, it is widely understood that to have a disability is synonymous with needing help, passivity and dependency.\textsuperscript{249} People with disabilities, therefore, are “typically . . . seen as helpless and incompetent . . . .”\textsuperscript{250} They are thought of as those who are unable to succeed in the demands that contemporary life places upon individuals.\textsuperscript{251} Social scientists have found that society generally views individuals with disabilities as “damaged, defective, and less socially marketable than non-disabled persons.”\textsuperscript{252} As Marilynn J. Phillips has written:

Commercial advertising and the popular media establish and re-enforce such notions, powerfully influencing social attitudes and behavior toward persons with disabilities. Newspaper and magazine articles, as well as television interviews and editorial commentaries, abound with examples of disabled-as-damaged goods. . . .\textsuperscript{253}

This image of helplessness and incompetence appears integral to popular conceptions of disability. According to Anita Silvers, “[i]n contemporary Western culture, to be disabled is to be disadvantaged regardless of how much success one achieves individually. That is because costs are extracted if one is seen as a member of a poorly regarded group.”\textsuperscript{254} This tendency to magnify the helplessness of individuals with disabilities may serve psychologically to distinguish disability as a state of “otherness” from the supposed norm of independence and capacity.\textsuperscript{255} By viewing those with disabilities as dependent and needy, we “can view those without impairments as strong and as not having needs.”\textsuperscript{256} Thus by focusing on the dependency and incompetency of disability, we can forget, or at least try to forget, the universal vulnerability of the human state.\textsuperscript{257}

The equation of disability with incompetency also helps explain why disability is widely accepted as creating affirmative obligations on the part of society.\textsuperscript{258} In contemporary western culture, the individual with a disability is assumed to be a victim.\textsuperscript{259} Because that victimhood is thought to stem from reasons

\begin{itemize}
\item \textsuperscript{249} See Fine & Asch, supra note 72, at 12.
\item \textsuperscript{250} Scotch, supra note 29, at 161.
\item \textsuperscript{251} See Victor M. Parachin, Ten Myths About People with a Disability, 13 VIBRANT LIFE 28, 30 (1997). These myths include that “[p]eople with disabilities always need help,” and that “[t]here’s nothing one person can do to help eliminate the barriers confronting people with disabilities.” Id.
\item \textsuperscript{252} Susman, supra, note 29, at 18; see also Marilynn J. Phillips, Damaged Goods: Oral Narratives of the Experience of Disability in American Culture, 30 SOC. SCI. MED. 849, 850 (1990).
\item \textsuperscript{253} Phillips, supra note 252, at 850.
\item \textsuperscript{254} Silvers, supra note 26, at 54.
\item \textsuperscript{255} See Fine & Asch, supra note 72, at 15.
\item \textsuperscript{256} Id. at 16.
\item \textsuperscript{257} See id. Ruth Colker notes that the belief that independence is the norm is critical in our individualistic and capitalistic culture. See Colker, supra note 8, at 215 (“America’s version of capitalism needlessly relies on an individualistic philosophy without sufficiently considering the basic family and medical needs of workers in our society.”).
\item \textsuperscript{258} See Silvers, supra note 26, at 17-18 (arguing that our culture stresses the importance of work, but permits benefits to people with disabilities as a safety net, recognizing the fundamental value of human life); John M. Vande Walle, Note, In the Eye of the Beholder: Issues of Distributive And Corrective Justice in the ADA’s Employment Protection for Persons Regarded as Disabled, 73 CHI.-KENT L. REV. 897, 898 (1998).
\item \textsuperscript{259} See Fine & Asche, supra note 72, at 10.
\end{itemize}
beyond the individual’s control, the individual is often believed to be deserving of, and entitled to, assistance from others. Long before there was a modern welfare state, government programs provided financial relief to a variety of individuals with disabilities. Cultural disability was a condition that excused one’s inability to be self-sufficient and triggered obligations from others. Or, as Silvers has put it, identification with disability triggers a “paternalism similar to that which women once endured.”

This cultural relationship between disability, dependency, and entitlement may have been strengthened by other uses of the term disability in the law outside of the civil rights context. In other areas of the law, disability is used to signify an inability to be self-sufficient and a need for the support of others. This is most clearly seen by the definition of disability used in the Social Security Act. This Act, which frequently forms the basis for litigation in the federal courts, defines a person with a disability as one who is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment.” A condition that can be controlled and does not prevent some one from working, therefore, is not a disability within the meaning of the Social Security Act. Indeed, the idea that a condition as common and easily treatable as myopia would justify payment under the Social Security Act appears ludicrous; surely the work-ethic can have no meaning if disability and entitlement not to work is so widely dispersed.

But the idea that disability means both inability and yet entitlement is found in other areas of the law as well. The Individuals with Disabilities Education Act, for example, defines “children with disabilities” as children who have particular listed impairments or conditions and “who, by reason thereof, need special education and related services.” Thus the Act only applies to those children who require special services, the implication being that if the impairment is controlled, and does not lead the child to need any additional services, the child does not have a disability. At the same time, the entitlement to special educational services comes along only with the label of disability. Again, disability here means not only difference; it means inability and entitlement.

The ADA, in contrast, employs a more functional definition of disability that departs significantly from these legal ancestors. As an antidiscrimination statute,

262. Silvers, supra note 26, at 254.
266. For a fuller discussion of the distinctions between the ADA's use of the term and federal disability programs, see Diller, supra note 66, at 1016.
269. This helps to explain why some have argued that "gifted" children have a disability.
the ADA was not designed simply to provide benefits to those who are unable to be self-sufficient. Indeed, while the Act does not completely reject the notion that disability creates entitlement (for the statute does require that reasonable accommodations and other affirmative measures be taken to assure equal access for individuals with disabilities), the ADA also prohibits differential and invidious treatment of individuals with disabilities, premised upon the belief that such individuals, more often than not, can be economically independent. While it makes no sense to say that an individual whose impairment is completely controlled should be found to have a disability within the meaning of the Social Security Act, it is completely consistent with the goals of the ADA to find such an individual protected by the ADA. This individual—the one who has a condition which is controlled but may nevertheless be the subject of invidious or irrational discrimination—is precisely one type of person for whom the ADA was enacted.

To the textualist judge, however, the common lay and legal meaning that denotes incapacity and entitlement is inconsistent with applying the statute to frequent or controlled conditions. From a “commonsense” perspective, individuals with conditions as common as myopia do not have “true” or “real disabilities,” precisely because they are neither incapacitated nor deserving of forgiveness from the ethos of self-sufficiency.

This idea that disability must mean something quite different from what the ADA’s legislative history and the interpretative guidelines (not to mention disability activists) says it means, appears in the many cases in which the courts seem to say that the plaintiff’s condition is not “bad enough” to warrant being treated as a disability. For example, in Cline v. Fort Howard Corp., the court rejected the conclusion that an individual who was nearsighted and visually impaired had a disability within the meaning of the ADA. The court admitted that

270. See 42 U.S.C. §§ 12111(9), 12112(b) (1994); Vande Walle, supra note 258, at 919-23.
272. The textualist would also object to applying the ADA to plaintiffs who cannot point to a wide class of jobs and positions which are not open to him to her because of an impairment. Courts have repeatedly denied relief to plaintiffs who can show discrimination where the plaintiffs can only show an inability to work without accommodations at a particular job. This, the courts hold, is not sufficient to establish a substantial limitation to the major life activity of working. The leading case setting forth this view was Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) (Rehabilitation Act case); see also Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996); Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996); Heilweil v. Mount Sinai Hosp., 32 F.3d 718 (2d Cir. 1994). For a discussion of this issue, see Burgdorf, supra note 10, at 438-439, 539-546; Wendy E. Parmet et al., Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for Understanding the ADA, 12 J. L. & HEALTH 1, 27-28 (1997).
273. See Forrisi, 794 F.2d at 934 (“It would debase this high purpose [of the Rehabilitation Act] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.”) (emphasis added). For a further discussion of the cultural assumption that the ADA should be reserved for the “truly disabled,” see Parmet et al., supra note 272, at 22-24.
274. Erica Worth Harris argues that the ADA provides an entitlement to special treatment, which encourages employees to search for a basis to claim protection to enable them to do a lesser job than they would otherwise do. See Harris, supra note 73, at 584-85.
275. See supra text accompanying notes 49-68.
the plaintiff need not be "totally blind," to have a disability, but suggested that the plaintiff's impairments were not serious enough. "[A] visual impairment which hinders, or makes it more difficult for an individual to function at a full visual capacity, does not amount to a substantial limitation of one's ability to see where the evidence suggests the individual can otherwise conduct activities requiring visual acuity." In other words, a condition as common and "normal" as the plaintiff's cannot be considered a disability. Likewise, in Schluter v. Industrial Coils, Inc., the court opined that the ADA does not create a type of "job tenure for an employee with slightly impaired eyesight simply because she suffered insulin dependence and insulin reactions having no relation to the adverse employment action, while leaving unprotected employees with similar vision problems resulting from aging or generally poor eyesight." In effect, the court assumed that the granting of disability status was the equivalent to an entitlement to the job ("tenure"), which surely should not be awarded to all individuals with conditions as common as those proffered by the plaintiff.

Similar sentiments help to explain the Sutton Court's concern with numbers. The 43,000,000 figure in the statute's preamble was important to the Court for it suggested that disability was a minority phenomenon. As Justice Ginsburg said in her concurrence, the ADA applies only to a "confined" class. If the statute applied to myopia, then "in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a 'discrete and insular' minority." Disability, it seems, is only worthy of discrimination protection if it is both rare and extreme.

277. See id. at 1078-80.
278. Id. at 1080. The court in this case refused to preclude consideration of the plaintiff's corrective lenses. See id. at 1080 n.6.
279. For a discussion of cases which assume that myopia is simply too common to be considered a disability, see Carolyn V. Counce, Corrective Devices and Nearsightedness Under the ADA, 28 U. MEM. L. REV. 1195, 1195-1205 (1998).
281. This argument was made by Erica Worth Harris. She claims that the EEOC position, in effect, would give "just cause" employment protection to any one who has a controlled condition. See Harris, supra note 72, at 584. What this argument forgets is that a plaintiff in a Title I case still must show that he or she is "qualified" for the position at issue. See Sutton v. United Airlines, Inc., 527 U.S. ___, 119 S. Ct. 2139, 2159-60 (1999) (Stevens, J., dissenting).
283. Id.
284. See id. Although Justice Ginsburg cautioned that there were no constitutional dimensions to the case, her use of the term "discrete and insular minority" suggests that she, at least, may believe that the ADA enforces constitutionally-required principles only to the extent that it utilizes a narrow definition of disability. This conclusion may be important to the question now before the Supreme Court—whether Congress had the power under the Fourteenth Amendment to abrogate state sovereign immunity for ADA claims. See Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), cert. granted in part sub nom., Alsbrook v. Arkansas, No. 99-423, 2000 U.S. LEXIS 996 (Jan. 25, 2000); Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), cert. granted sub nom., Florida Dep't of Corrections v. Dickson, No. 98-829, 2000 LEXIS 991 (Jan. 21, 2000).
V.

TEXTUALISM AND DISABILITY RIGHTS

The rise of textualism and the increasing judicial insistence on interpreting statutes in light of their plain meaning creates a major dilemma for the disability rights movement. In order to confront and prohibit disability discrimination, that phenomenon must be named. Disability as an identity must be recognized and the discrimination that targets it must be outlawed. In order to do that, the category must be reconceptualized. Disability must be redefined as capacity, rather than incapacity, otherwise the discrimination that is to be prohibited would be justified.

But the very process of naming and identifying disability as a category is not, it seems, risk free. While Humpty Dumpty may have the luxury of saying that a word means only what he says it means, civil rights advocates and legislators are not so fortunate. When they use a word, such as "disability," they invariably invite consideration of much of the baggage, or stigma, that comes with that word. In the case of "disability," the result is that the stigma the ADA sought to dispel winds up influencing the interpretative process.

Are there ways out of this conundrum? The most obvious would be for Congress to amend the statute to make explicit the novel meaning intended. To an important extent, this was done by Congress in 1974 when it amended the definition of handicap in the Rehabilitation Act, to make absolutely clear that an individual can have a handicap even when he or she was not limited in the ability to work. Unfortunately, no definition can be all-encompassing. As a statute is implemented ambiguities, such as whether the effect of an impairment is to be determined in the pre or post-medicated state, are bound to arise.

Recognizing this inevitability, the drafters of the ADA turned to other time-tested tools designed to guide the interpreter's task. In order to ensure interpretation faithful to the idea of disability as a broad socially constructed phenomenon, the backers of the ADA provided the statute with a legislative history unusually rich in its detail. Moreover, they granted the EEOC and the Department of Justice explicit statutory authority to promulgate regulations and to provide technical

285. See Zola, supra note 1, at 167-68.
286. See Scotch, supra note 29, at 382.
288. See Zola, supra note 1, at 161-173.
289. See supra text accompanying note 1.
290. For the classic discussion of stigma, see E. GOFFMAN, supra note 71.
291. See supra text accompanying notes 36-42.
292. Even textualists concede the impossibility of eliminating all textual ambiguities. It is precisely because of this impossibility that they rely upon devices such as the common law cannons of construction. See Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction," 17 HARV. J.L. & PUB. POL'Y, 401, 472 (1994).
293. See supra text accompanying notes 53-68.
assistance to entities subject to the Act. With respect to the mitigation issue, all of these factors were critical to the willingness of many pre-Sutton courts to determine the existence of disability without regard to the effects of ameliorative measures. Indeed, some courts, such as the Fifth Circuit, went so far as to follow, at least narrowly, the directions set forth by the legislative history and administrative interpretations even while believing that those views are contrary to a reasonable interpretation of the statute.

What the ADA’s drafters did not count on, however, was the significant growth of textualism in the last decade and the increasing reluctance upon the part of many federal courts, and especially the Supreme Court, to heed either legislative history or administrative interpretations. To the textualist, the meaning of disability (or, each of the prongs of its statutory definition) must be understood with reference to the term’s plain meaning, even if the statute was designed to alter that plain meaning. Thus the textualist clings closely to the pre-existing images of disability that the statute identified and tried to change, ignoring the transformative images elucidated in the legislative history.

Given the rise of textualism, disability advocates must reassess their reliance on legislative history to guide statutory interpretation. While legislative history is useful, it can all-too-easily be disregarded. As much as possible, those who seek to transform social images must rely on textual devices to achieve their aims. Explicit statutory statements of intention (such as exist in the ADA’s preamble) help, as do devices explicating that the statute should be interpreted in light of explicit extra-textual standards. Thus, as was evident in the Bragdon case, specific statutory incorporations of extra-textual references can be critical in making a court feel comfortable departing from plain meaning.

But can these devices suffice? The Sutton case suggests otherwise. The stigmas and images surrounding disability are powerful. And there may be no way for a law that wishes to change those images to avoid using the terms that conjure them.

In closing, consider the following hypothetical. What if the Americans with Disabilities Act had never used the term “disability?” What if the Act had simply forbidden discrimination based upon the status of some absurd, meaningless word, perhaps “conditionism.” And what if the statute then went on to define, “conditionism” as being: “a physical or mental impairment that substantially limits a major life activity, the record of such impairment, or being regarded as having such impairment.” Would that textual definition have made any difference?

296. See supra text accompanying notes 149.
297. See Washington v. HCA Health Serv. of Texas, 152 F.3d 464, 467-71 (5th Cir. 1998), vacated and remanded sub nom, HCA Health Serv. of Texas v. Washington, 199 S. Ct. 2388 (1999).
298. See supra notes 123-145 and accompanying text.
301. See supra text accompanying notes 140-41.
Would courts still find that plaintiffs are not "truly" "conditionistic"?

It is tempting to think that such an approach could have severed the statute from the stigma of disability, thereby disabling courts from falling back upon the plain meaning of the colloquial term. But before advocates for persons with disabilities attempt to adopt such an approach in future legislative endeavors, some caution is in order. First, we may wonder if it is that easy to escape plain meaning. While we can dispense with the word "disability" in favor of the term "conditionism," might we not find that the plain meaning of other terms such as "impairment," will infect the construction of "conditionism" as significantly as the plain meaning of the term "disability" now impedes the application of the ADA? In other words, is there any way to enact an intelligible statute without appending the baggage we wish to leave behind?

But more disturbing is the possibility that a truly stigma-free statute could not be enacted. How was it in a conservative era, in a society that values independence and self-sufficiency as much as ours does, that a civil rights statute as broad and transformative as the ADA was enacted? One distressing and partial answer may be that disability's stigma of dependence and victimhood were essential, albeit unrecognized, members of the ADA coalition. Thus the statute designed to eradicate the effects of stigma may well have depended upon disability's stigmatic association with dependency and entitlement to be enacted. If so, the challenge of how to now use that same statute to exorcize the demon that bore it will be exceedingly complex. In this era of textualism, it will undoubtedly require exiling the stigma from the broader culture from which judges draw their plain meaning.