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THE MYTHIC 43 MILLION AMERICANS WITH DISABILITIES

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ABSTRACT

Although Congress stated in its first statutory finding that it intended the Americans with Disabilities Act (ADA) to protect at least 43 million Americans from disability discrimination, the Supreme Court has interpreted this statute so that it covers no more than 13.5 million Americans. More importantly, this Article demonstrates through the use of Census Bureau data that the ADA's employment discrimination provisions have been eviscerated to the point that the ADA protects virtually no Americans who are both disabled and able to work.

This Article places that problem in the larger context of the Court undermining Congress's efforts to protect discrete and insular minorities from employment discrimination. Although Congress has

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sometimes responded to that hostility by enacting "restoration legislation," this Article argues that such restoration efforts should be unnecessary. The Court should correct its errors and engage in a respectful relationship with Congress so that Congress can move on to new items on its legislative agenda rather than revisit prior items.

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INTRODUCTION

In recent years, the Supreme Court has narrowly interpreted the scope of protection[1] provided under federal civil rights law while also increasingly disavowing the usefulness of legislative history to interpret these statutes.[2] Left only with the legislative text, the Court has imposed an interpretation on these statutes that can only be described as "dissing Congress,"[3] because it flouts both the statutory language and congressional intent as reflected in the legislative history. Hence, the civil rights community has had to persuade Congress to enact key civil rights legislation *twice*—first as a pathbreaking statute, and then again as a "restoration act"[4]—to attain the intended scope of statutory protection.[5]

The Americans with Disabilities Act (ADA)[6] has been a victim of this problem. When Congress enacted the ADA in 1990, it adopted an "anti-subordination" model[7] under which it protected a class of

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1. Statutes will necessarily contain ambiguities that the courts must resolve. Focusing on fundamental interpretive issues—such as the scope of coverage, which Congress can be expected to resolve in its basic design of a statute—this Article argues that the Court has been consistently disrespectful of Congress's resolution of basic issues in the civil rights context, requiring Congress to amend the statutes to restore its original intentions. This Article does not, however, seek to suggest that Congress foresees or resolves all policy matters when enacting legislation.

2. For an excellent empirical analysis of the Court's declining use of legislative history in workplace-related statutes, see James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

3. *See generally* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001) (discussing the Supreme Court's invalidation of governmental action based on its own conception of what federal power requires).

4. *See infra* Part I.

5. Ironically, one of the only exceptions to this pattern of narrow construction of statutory coverage was forged when the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 to cover whites as well as African Americans. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-96 (1976). That decision has ultimately narrowed statutory protection for African Americans by limiting the ability of employers to use race-conscious methods to redress a prior history of race discrimination. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (recognizing the Court's reliance on legislative history in *McDonald*).

6. Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C. §§ 12101-12213 (2006)).

7. For a discussion of the anti-subordination approach, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-08 (1986):

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individuals it concluded had faced a history of discrimination.[8] The statute provided that only those who met the definition of "disability"[9] attained protection, that reasonable accommodations would be available to such individuals,[10] and that "reverse" discrimination lawsuits would not be permitted.[11] This approach stood in contrast to an anti-differentiation approach, under which *anyone* in society would have a cause of action if she demonstrated different treatment on the basis of a physical or mental condition irrespective of whether that condition fit her within a category of people who had historically faced discrimination.[12]

In addition, Congress carefully structured the ADA around three titles that would address the major areas in which a history of

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> Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities. From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy.

Id. (footnote omitted).

8. *See generally* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397 (2000) (noting the ADA's findings that individuals with disabilities face similar difficulties in social participation). Congress specified this approach in its seventh congressional finding by stating that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society...." 42 U.S.C. § 12101(a)(7) (2006).

9. *See* 42 U.S.C. § 12102(2) (2006) (defining "disability" as, among other things, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"). For an excellent discussion of the history of the derivation of the word "disability" under the ADA, see Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000). Feldblum's article does an outstanding job of describing how Congress chose a definition of disability under the ADA that it understood was consistent with the way that term had been used in previous disability civil rights laws. That evidence is very relevant to Congress's intention in enacting the ADA. This Article focuses more narrowly on the 43 million figure cited in the ADA's first finding, which the Supreme Court discussed extensively in *Sutton*. *See infra* Part III.A. This particular topic is not discussed by Feldblum in her article on the legislative history of the term "disability."

10. *See* 42 U.S.C. § 12112(b)(5)(A) (2006) (requiring reasonable accommodations for qualified individuals with disabilities in the workplace).

11. § 12112(b)(5)(B).

12. *See* Colker, *supra* note 7, at 1007 (distinguishing between anti-subordination and anti-differentiation approaches).

disability discrimination existed: the workplace,[13] the public sector,[14] and accommodations open to the public.[15] Its statutory findings paralleled this approach by indicating that a history of discrimination existed "in such critical areas as employment, housing, [and] public accommodations."[16] By listing "employment" first in its description of "critical areas," and by addressing the problem of employment discrimination in the first title of the ADA, Congress clearly marked redressing employment discrimination as one of its top priorities. Finally, Congress's last finding highlighted the importance of improving employment opportunities for individuals with disabilities when it identified the goal of "economic self-sufficiency" for individuals with disabilities.[17] In drafting the ADA, Congress could not have been clearer in endorsing an anti-subordination approach and expressing the conviction that this approach would help redress the historical problem of employment discrimination in our society against individuals with disabilities.

Unfortunately, the Supreme Court has historically been hostile to an anti-subordination perspective in the employment discrimination context.[18] Although the history underlying the enactment of Title VII of the Civil Rights Act of 1964 suggests that Congress intended to adopt an anti-subordination perspective to redress the historical problem of discrimination against racial minorities,[19] the Supreme Court has often interpreted this statute under an anti-differentiation approach by permitting "reverse" discrimination lawsuits and often prohibiting "affirmative action."[20] Similarly, the

13. *See* ADA Title I, 42 U.S.C. §§ 12111-17 (2006).

14. *See* ADA Title II, 42 U.S.C. §§ 12131-65 (2006).

15. *See* ADA Title III, 42 U.S.C. §§ 12181-89 (2006).

16. 42 U.S.C. § 12101(a)(3) (2006).

17. 42 U.S.C. § 12101(a)(8) (2006).

18. *See* Colker, *supra* note 7, at 1014. This argument could also be extended outside the employment context to the voting and housing contexts, in which the Court arguably has also not respected Congress's anti-subordination approach, but those examples are beyond the scope of this Article.

19. Undoubtedly, African Americans led the Civil Rights movement of which the Civil Rights Act of 1964 was a major advancement. Its passage was part of a movement to redress historical discrimination faced by African Americans. *See generally* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) (concluding that the granting of equal rights does not guarantee a better quality of life and recognizing the Act's focus on African Americans).

20. *See, e.g.*, Firefighters Local v. Stotts, 467 U.S. 561 (1984) (permitting white firefighters

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Court has undermined the ADA's anti-subordination approach by construing the term "disability" so narrowly that the statute is unable to provide meaningful protection to individuals with disabilities who face employment-related discrimination. Under the guise of the statutory tool of "plain meaning," the Court has transformed Congress's first finding—that it intends to cover *at least* 43 million Americans[21]—to mean that Congress intends to cover *no more* than 43 million Americans. In fact, the approach chosen by the Court only results in about 13.5 million Americans receiving statutory coverage, with those individuals typically being so disabled that they are not qualified to work even with reasonable accommodations.[22] This narrow interpretation, which contradicts the plain statutory language of the ADA, essentially erases the statute's employment discrimination provisions.[23]

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to challenge an affirmative action plan that tried to minimize the disproportionate impact of layoffs on minority firefighters). The Court has also limited the availability of "disparate impact" lawsuits, which would be an important tool under a group-based anti-subordination approach. *See* Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642, 657, 659 (1988). Nonetheless, the Court's hostility to an anti-subordination approach has, in some instances, been limited. For example, it has permitted a cause of action for sexual harassment in ways that further an anti-subordination approach. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986); *see also* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 704 (1997).

21. *See* 42 U.S.C. § 12101(a) (2006) ("The Congress finds that—(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.").

22. Throughout this Article, I talk about those who are mildly disabled and able to work, and I contrast them with those who are severely disabled and often unable to work. By offering this distinction between severe and mild disability, I do not mean to suggest that no individuals with severe disabilities are able to work. I also do not mean to suggest that a clear distinction exists between a mild and severe disability; but those are two categories used by the Census Bureau and are useful for the sake of this discussion. The Census data reveals that around 13.5 million Americans, at the time the ADA was enacted, reported that they were both disabled and unable to work. *See* discussion *infra* Part II. Another 21 million Americans reported that they had mild disabilities and were able to work. *See id.* While acknowledging that the ADA could be useful to those in the severe disability category, my primary argument is that the statute has been entirely ineffective in assisting those in the mild disability category. How the employment discrimination title could be interpreted to provide better protection for the 13.5 million Americans who report that a disability precludes them from working is beyond the scope of this Article.

23. This Article emphasizes the importance of the ADA providing workplace protection for individuals with disabilities under ADA Title I. *See* 42 U.S.C. §§ 12111-17 (2006). Workplace protection is only one of the three fundamental areas protected by the ADA. Title II prohibits discrimination by public entities. *See* 42 U.S.C. §§ 12131-65 (2006). Title III prohibits discrimination at places of public accommodation. *See* 42 U.S.C. §§ 12181-89 (2006).

When the Supreme Court has resisted an anti-subordination approach, Congress has often responded by amending the relevant civil rights statute to restate its anti-subordination perspective.[24] Although one might argue that in many instances such give and take between the judicial and legislative branches is appropriate due to ambiguous statutory language,[25] in this case such an argument would not apply; the ADA could not be clearer. Its findings, its overall structure, and its statutory language follow an anti-subordination approach that is consistent with a "protected class" model and highlights the importance of redressing a history of disability-based discrimination in the workplace for this protected class.

Although a "restoration act" has been introduced in Congress to correct the Court's interpretation of the term "disability,"[26] such legislative action should be unnecessary. The Supreme Court should correct the error itself and allow Congress to devote its time to considering other legislative matters. In fact, the Supreme Court should apply the "civil rights canon"[27] to interpret the ADA consistently with its remedial anti-subordination perspective, thereby offering protection for individuals with disabilities who need workplace protection. In the instances when the Court did interpret other civil rights statutes consistently with an anti-subordination approach, the civil rights canon was an important interpretive tool

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The Court's narrow interpretation of disability has not had the dramatic effect on Titles II and III that it has had on Title I because individuals can benefit from Titles II and III even if they are too disabled to work. Because the scope of Title I is limited to the problem of employment discrimination, it can only be used by those who are both disabled and seeking employment. This Article argues that Congress's shrinking of the scope of coverage from 43 to 13.5 million Americans has rendered Title I ineffective. Whether this shrinkage of coverage has had a negative effect on Titles II and III is beyond the scope of this Article.

24. *See infra* Part I.

25. The text of Title VII, for example, does not explicitly follow a "protected class" model because it creates a cause of action for anyone on the basis of race, gender, national origin or religion. The Court was therefore faced with the interpretive question of whether Congress intended to employ a protected class model even though the statutory text does not create that explicit requirement. The Court ruled that statutory protection was available to whites as well as racial minorities given this statutory text. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-96 (1976).

26. For example, Representative Sensenbrenner introduced H.R. 6258, entitled the Americans with Disabilities Act Restoration Act of 2006. H.R. 6258, 109th Cong. (2006).

27. *See infra* Part I.B.

that helped the Court attain that scope of protection.[28] In its proposed revision to the ADA, Congress has stated that the courts should employ the civil rights canon when interpreting the ADA.[29] The civil rights canon should go hand in hand with Congress's remedial purpose in enacting the ADA.

When Congress decided to adopt a "protected class" anti-subordination approach under the ADA, it had to make several important, fundamental decisions: Who did it want to protect under this protected class model? Did it want to cover only individuals with severe disabilities who are too disabled to work but who would benefit from curb cuts and other societal accommodations? Or did it also want to cover individuals with mild disabilities who, with or without accommodations, might be able to secure and maintain employment? Fortunately, the statutory language answered that question by setting 43 million as the floor rather than as the ceiling, and by specifying that a basic intention of the statute was to redress the historical problem of employment discrimination.[30] Yet the Court's interpretation of the ADA has made it an extension of the Social Security laws for the severely disabled rather than a workplace protection act for the mildly disabled. As will be discussed in Part II, the Census Bureau drew a distinction between those with severe and mild disabilities, as had the Social Security Administration.[31] Aware of that distinction, Congress explicitly chose to protect both those with mild and severe disabilities. Yet the Court has interpreted the ADA as if Congress chose only to protect those with severe disabilities.

Under the ADA, Congress chose a definition of disability similar to the one used by the Census Bureau,[32] which includes individuals

28. *See infra* Part I.

29. Representative Sensenbrenner's proposed amendment to the ADA includes a "rule of construction" that states that the "provisions of this Act shall be broadly construed to advance their remedial purpose." H.R. 6258, 109th Cong. § 6(e) (2006). The Court has refused to adopt the civil rights canon during a period in which it has become increasingly fond of substantive canons. *See* Brudney & Ditslear, *supra* note 2.

30. *See* 42 U.S.C. § 12101(a)(1) (2006).

31. *See supra* note 22 (discussing the severe versus mild disability distinction).

32. The name of the Census Bureau changed in 1986 to the "Bureau of the Census," and then in 2006 to the "U.S. Census Bureau." To avoid confusion, the bureau will be referred to as the "Census Bureau" throughout this Article's text.

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with *both* mild and severe disabilities,[33] to arrive at the 43 million figure.[34] The Census Bureau estimated in 2002 that more than 51 million Americans have mild disabilities that impose functional limitations on their lives.[35] Today, one would thus expect the ADA's definition of disability to cover at least 50 million Americans, including the nearly 30 million who the Census Bureau found are mildly disabled and able to work. Although Congress justified its enactment of the ADA with the hope that the statute would improve the employment opportunities of individuals with disabilities,[36] the data suggest that the ADA has had no positive effect on those opportunities.[37] This result is not surprising because the Court has largely limited the coverage of the statute to the approximately 13.5 million Americans who are so "severely disabled" that both the Social Security Administration and Census Bureau categorize them as generally unable to work.[38]

The Supreme Court's decision in *Sutton v. United Air Lines*[39] has been the major vehicle to undermine Congress's intentions to cover those with mild disabilities who are qualified to work. In a case involving individuals with a correctable visual impairment who

33. *See, e.g.*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, DISABILITY, FUNCTIONAL LIMITATION, AND HEALTH INSURANCE COVERAGE: 1984/85, at 1-2 (1986), *available at* http://www.sipp.census.gov/sipp/p70-8.pdf [hereinafter CENSUS BUREAU, DISABILITY] (inquiring whether individuals have difficulty with: seeing words and letters in ordinary newsprint; hearing what was said in a normal conversation; having his or her speech understood; walking a quarter of a mile; walking up a flight of stairs without resting; lifting or carrying something as heavy as a full bag of groceries; moving around inside and outside the house; and getting into and out of bed).

34. Congress drafted the ADA based on a report from the National Council on Disability. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484-85 (1999). This report, in turn, relied on Census Bureau data for its estimate of the number of individuals with disabilities. *See* NAT'L COUNCIL ON DISABILITY, TOWARDS INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS 2-4 (1986), *available at* http://www.ncd.gov/newsroom/publications/1986/pdf/toward.pdf. *See* discussion *infra* Part II.

35. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AMERICANS WITH DISABILITIES: 2002 HOUSEHOLD ECONOMIC STUDIES (2006), *available at* http://www.census.gov/prod/2006pubs/p70-107.pdf [hereinafter CENSUS BUREAU, 2002 STUDIES].

36. Employment is the first area of discrimination that Congress lists in its findings. 42 U.S.C. § 12101(a)(3) (2006).

37. *See infra* notes 123-24.

38. The other reasons why the ADA has not had a positive effect on the employment opportunities of individuals with disabilities are beyond the scope of this Article.

39. 527 U.S. 471 (1999).

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brought suit under the ADA's "actually disabled" theory of disability,[40] the Court focused on the fact that coverage of *all* individuals with a correctable visual impairment could result in 100 million Americans being covered by the ADA.[41] Rather than interpret the term "disability" in a manner that would not cover *everyone* with a correctable visual impairment, through what this Article will term a "statistical significance approach," the Court constructed an exceedingly narrow definition of disability that only covered the approximately 13.5 million Americans who are typically too disabled to work.[42]

The Court's narrow interpretation of the "actually disabled" theory of disability might not be problematic if the Court interpreted the other two theories of disability—the "record of"[43] or "regarded as"[44] theories—more broadly. But the *Sutton* Court also interpreted the "regarded as" theory so narrowly that it could not be effective for individuals with mild impairments who face discrimination when an employer exaggerates the consequences of their impairments.[45]

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40. The ADA provides three potential theories of "disability." An individual can have a physical or mental impairment that substantially limits the performance of major life activities ("actually disabled"), have a "record of" disability, or be "regarded as" disabled. 42 U.S.C. § 12102 (2) (2006).

41. *Sutton*, 527 U.S. at 487.

42. *See infra* Part III.A.

43. The term "disability" can mean having a "record of such an impairment." This Article will not discuss interpretation of subsection 42 U.S.C. § 12102(2)(B) (2006), in part, because it has received little attention from the courts. Others might consider whether broader interpretation of subsection (B) could also help solve the 43 million undercounting problem. For some discussion of narrow interpretations of subsection (B), see *infra* note 263.

44. The term "disability" can mean being "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C) (2006).

45. Part IV of this Article documents the difficulties that plaintiffs have had using subsection (C) in employment discrimination cases brought under ADA Title I. By contrast, narrow interpretation of the "regarded as" prong has had little effect on cases brought under ADA Title II, 42 U.S.C. §§ 12131-65 (prohibiting discrimination by state or local government and, in particular, creating extensive rules with regard to the accessibility of public transportation) or ADA Title III, 42 U.S.C. §§ 12181-89 (prohibiting discrimination by various private entities such as hotels, restaurants, places of entertainment, private schools, professional offices, and stores).

Plaintiffs rarely use the "regarded as" theory outside of the Title I context. I have only been able to find three appellate decisions since *Sutton* was decided in 1999 in which the plaintiffs used the "regarded as" theory outside of the ADA Title I context: *Marlon v. W. New England Coll.*, 124 Fed. Appx. 15 (1st Cir. 2005) (former law student failed to establish that she met the "regarded as" definition of disability in case challenging university's alleged failure to provide reasonable accommodations); *MX Group, Inc. v. Covington*, 293 F.3d 326 (6th Cir.

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Due to the odd "class of jobs" rule[46] imposed in these cases, plaintiffs have to introduce evidence of the defendant's attitude about their ability to perform other jobs—beyond the specific one for which they applied. Not surprisingly, such evidence is virtually never available and results in courts concluding that defendants do not regard plaintiffs as disabled. Although prior commentators have focused on the problems with the narrow definition crafted in *Sutton* under the "actually disabled" theory,[47] the Court's discussion of the "regarded

2002) (former drug addicts found to meet the "regarded as" definition of disability under ADA Title II for the purpose of challenging the denial of a zoning permit to a methadone clinic based on a fear that they would cause harm to the community); *Betts v. Rector & Visitors of Univ. of Va.*, 18 Fed. Appx. 114 (4th Cir. 2001) (university found to have "regarded" student as disabled when it allowed him a double-time accommodation for his exams).

Plaintiffs rarely lose Title II or III cases on the grounds that they are insufficiently disabled to attain statutory coverage. If one cannot access public transportation or cannot enter a hotel or restaurant due to a disability, one is typically "actually" disabled under subsection (A) of the ADA and does not seek to use subsection (C)'s "regarded as" definition of disability. In contrast with the numerous unsuccessful ADA Title I cases heard by the Supreme Court, several cases brought under ADA Titles II and III have been successful. Any problems in these cases have not been related to the definition of disability. *See, e.g.*, United States v. Georgia, 546 U.S. 151 (2006) (applying ADA Title II to a case involving a paraplegic inmate in the state prison system); Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119 (2005) (applying ADA Title III to foreign-flag cruise ships in U.S. waters); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (applying ADA Title III to a case involving the availability of a golf cart to a professional golfer with a degenerative circulatory disorder); Olmstead v. L.C., 527 U.S. 581 (1999) (applying ADA Title II to cases involving medical treatment of individuals with mental disabilities); *see generally* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807 (2005) (documenting the comparative success of cases brought under ADA Titles II and III).

46. *See infra* Part IV.A.

47. The critiques of *Sutton* are legion. *See, e.g.*, Melissa Cole, *The Mitigation Expectation and the* Sutton *Court's Closeting of Disability*, 43 HOW. L.J. 499 (2000); Arlene B. Mayerson & Kristan S. Mayer, *Defining Disabilities in the Aftermath of* Sutton*: Where Do We Go From Here?*, 27 HUM. RTS. 13 (2000); Kevin L. Cope, Comment, Sutton *Misconstrued: Why the ADA Should Now Permit Employers To Make Their Employees Disabled*, 98 NW. U. L. REV. 1753 (2004); Robin L. Henderson, Comment, *Civil Rights: The Americans with Disabilities Act: Turning a Blind Eye Towards Legislative Intent,* Sutton v. United Air Lines, Inc., 52 FLA. L. REV. 849 (2000); Molly M. Joyce, Note, *Has the Americans with Disabilities Act Fallen on Deaf Ears? A Post-*Sutton *Analysis of Mitigating Measures in the Seventh Circuit*, 77 CHI.-KENT L. REV. 1389 (2002); Rateb (Ron) M. Khasawneh, Note, Sutton v. United Air Lines, Inc.: *Limiting the Protections Available to Disabled Individuals Under the ADA*, 29 CAP. U. L. REV. 761 (2002); Julie McDonnell, Note, Sutton v. United Airlines*: Unfairly Narrowing the Scope of the Americans with Disabilities Act*, 39 BRANDEIS L.J. 471 (2000); Mary Nebgen, Casenote, *Narrowing the Class of Individuals with Disabilities:* Sutton v. United Air Lines, Inc., 31 MCGEORGE L. REV. 1129 (2000); Ashley L. Pack, Note, *The Americans with Disabilities Act After* Sutton v. United Air Lines—*Can It Live Up to Its Promise of Freedom for Disabled Americans*?, 89 KY. L.J. 539 (2001); Christopher M. Sacco, Comment, *Civil Rights: Narrowing*

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as" disabled standard has been largely ignored and is equally problematic.

Broader interpretation of the "regarded as" theory gives the courts an excellent opportunity to provide greater protection to those with mild disabilities who are capable of gainful employment without imposing costs on employers. "Regarded as" plaintiffs do not typically seek reasonable accommodations, as they are often victims of stereotypical thinking. Although they may have genuine physical or mental impairments, the only limitations imposed by those impairments may be the product of the attitudes of others. By narrowly interpreting the "regarded as" theory, the courts have precluded the ADA from having a positive impact on individuals with impairments who may be the most capable of working. Congress stated in its statutory findings that individuals with disabilities often face discrimination due to "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[48] Narrow interpretation of the "regarded as" theory has precluded the ADA from redressing such stereotypical assumptions in the workplace.

The Supreme Court has therefore failed to interpret the ADA to fulfill Congress's fundamental purpose of improving employment opportunities for individuals with disabilities. Coverage of a minimum of 43 million Americans, rather than 13.5 million Americans, is necessary to achieve that purpose. Part I of this Article will trace Congress's repeated enactments of "restoration" statutes following Supreme Court resistance to congressional legislation having an anti-subordination perspective. It will argue that such interaction is disrespectful of Congress's role in society and creates hurdles for groups that have been historically powerless and need to seek legislative redress. Individuals with disabilities should not need to lobby Congress twice to attain effective legislation. Part II will trace the use of the term "disability" under the ADA. It will show how Congress deliberately chose a broader meaning for that term than had previously existed under other federal laws when it enacted the ADA to protect at least 43 million

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the Scope of the Americans with Disabilities Act, Sutton v. United Air Lines, Inc., 52 FLA. L. REV. 839 (2000).

48. 42 U.S.C. § 12101(a)(7) (2006).

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Americans, in order to protect those with mild disabilities who could obtain employment with greater statutory protection. Part III will examine the leading Supreme Court cases interpreting the "actually disabled" theory of disability and argue that these decisions leave fewer than 13.5 million Americans protected by the ADA—most of whom are unlikely to be able to take advantage of the statute's employment protections. Part IV will argue that the "regarded as" theory *could* protect those with mild disabilities who face discrimination when employers exaggerate the consequences of their impairment, but that an inappropriate "class of jobs" rule precludes that result. Part V will conclude that the courts should construe the ADA broadly, consistently with the civil rights canon and consistently with Congress's original intent in enacting the ADA.

I. ONCE SHOULD BE ENOUGH

A. Congress's Reconstruction Efforts

The Supreme Court has consistently interpreted various civil rights laws so narrowly that they cannot provide meaningful protection under an anti-subordination perspective. Although Congress rarely amends statutes to overturn statutory interpretations,[49] it

49. Several studies have confirmed that Congress rarely overrides Supreme Court statutory interpretations of legislation. *See, e.g.*, Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 443-45 (1983) (examining labor and antitrust cases between 1950-72); Beth M. Henschen & Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J.L. & POL. 685 (1989) (examining cases between 1950-72); Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493 (1989); Harvey P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377 (1965); Note, *Congressional Reversal of Supreme Court Decisions: 1945-57*, 71 HARV. L. REV. 1324 (1958); Note, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143 (1992). *But see* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (examining cases decided between 1967-90 and concluding that 121 Supreme Court statutory decisions were overridden in the twelve Congresses under investigation). Although Professor Eskridge argues that he has uncovered a greater reversal rate than is commonly attributed to Congress, Professors Spiller and Tiller examine the same data and describe this reversal rate as a "relatively small percentage of all Supreme Court decisions during this period." Pablo T. Spiller & Emerson H. Tiller, *Invitations To Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996) (footnote omitted). Professor Eskridge concludes that overrides of civil rights legislation are more common than that of other subject

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has done so repeatedly in response to these civil rights decisions to restore some of the anti-subordination aspects of these statutes to provide meaningful protection to groups that have faced historical discrimination. Narrow interpretation of the ADA, which will be discussed in Parts III and IV, has undermined Congress's ability to achieve its core purpose—providing effective workplace protection for individuals with disabilities by protecting those with both mild and severe disabilities.

The Supreme Court's repeated insistence on interpreting the scope of civil rights laws narrowly began in 1976, when it concluded that the prohibition against "sex discrimination" found in Title VII did not include a prohibition against pregnancy-based discrimination in *General Electric v. Gilbert*.[50] Because pregnancy-based discrimination lies at the core of impediments that women have faced in the workplace, this decision erased the "guts" of Title VII's protection with respect to women. Congress effectively reversed the *Gilbert* decision in 1977 by enacting the Pregnancy Discrimination Act (PDA), which defined "because of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."[51] The PDA was enacted by an overwhelming vote of Congress within two years of the *Gilbert* decision and reflected Congress's understanding that pregnancy-based protection was necessary to help women achieve equality at the workplace.[52]

The civil rights community was able to influence Congress to amend Title VII quickly to reverse *Gilbert* because of the devastating impact it had on the effectiveness of Title VII's workplace protections for women. The PDA was narrow, however, as it did not

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areas. Eskridge, *supra* at 344-45. The numbers within each category, however, are small, ranging from one to eighteen. He does not state whether those differences are statistically significant. Further, he also notes that the civil rights category was the leading override area for the period 1967-92 when data was collected. *Id.* at 345 n.31. Whether the 121 figure is high or low may therefore be a matter of dispute, but everyone seems to agree that the Court overrode an usual amount of civil rights legislation during that time period.

50. 429 U.S. 125 (1976).

51. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).

52. The Senate vote was 75 to 11. The House vote was 376 to 43. The issue that stalled passage of the bill was abortion. After passing different versions of the bill, conferees devised compromise language that passed the Senate by voice vote on October 13 and the House on October 15. 34 CONG. Q. ALMANAC 597-98 (1978). Under this compromise language, the bill did not apply to coverage of elective abortions in health insurance plans. *Id.* at 597.

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seek to resolve the highly controversial issue of paid pregnancy leave[53] or coverage of abortion under employer health insurance plans.[54] The feminist community argued that the *Gilbert* decision had "a vast potential of having it applied to any employer rule that has to do with child bearing."[55] Although the feminist community could not bring about the reversal of other, more controversial anti-feminist decisions,[56] the *Gilbert* decision was nearly universally condemned as potentially harming the employment opportunities of "thousands, perhaps millions of women"[57] who were pregnant or viewed as potentially pregnant.[58]

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53. *See, e.g.*, Maria O'Brien Hylton, *"Parental" Leaves and Poor Women: Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 493 (1991) (arguing that the "cost of providing some employees with parental leave will be borne by low-skill female employees who lose their jobs or fail to obtain employment because of the increased wage bill faced by the employer"); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 379 (1985) (arguing for gender-neutral parenting leave).

54. The PDA states: "This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 42 U.S.C. § 2000e(k) (2006). Many women's groups expressed "outrage" at this language, so the PDA cannot be viewed as a perfect victory for the feminist movement. 34 CONG. Q. ALMANAC, *supra* note 52, at 599. The PDA simply reversed the more narrow aspect of the *Gilbert* holding—coverage of pregnancy-related discrimination outside the abortion context.

55. Lesley Oelsner, *Recent Supreme Court Rulings Have Set Back Women's Rights*, N.Y. TIMES, July 8, 1977, at 8A.

56. The Supreme Court also ruled that federal Medicaid funds could constitutionally exclude coverage of abortions. Harris v. McRae, 448 U.S. 297, 323 (1980). The feminist community has never succeeded in persuading Congress to reverse that decision by directly funding abortions for poor women.

57. Oelsner, *supra* note 55.

58. This was a real, not theoretical, problem that could capture Congress's attention. Employers still had blanket rules discharging school teachers when they became pregnant, and health care and disability policies often treated pregnancy differently than all other conditions. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647-48 (1974) (pregnant public school teachers successfully challenged mandatory maternity leave laws).

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The most recent example[59] of Congress reversing the Supreme Court arose when it reversed or modified nine Supreme Court cases decided between 1986 and 1991 with the passage of the Civil Rights Act of 1991.[60] The initial impetus behind the bill's passage was the *Wards Cove* decision, in which the Court cut back on the availability of "disparate impact" discrimination—a longstanding basic tool for enforcing Title VII[61]—consistent with an anti-subordination principle by allowing class-based suits to go forward. Then, in response to the Anita Hill/Clarence Thomas hearing, Congress broadened the scope of this proposed amendment to permit limited money damages for victims of harassment or other intentional discrimination on the basis of sex, religion, or disability.[62] Such relief was already available on the basis of race under another statute without any financial limitations.[63] This focus on expanding remedies available for victims of sexual harassment was also consistent with an anti-subordination approach because it was responsive to an understanding of one of the major impediments that precluded equality for women at the workplace.

Congress expressed its frustration with the Court's narrow interpretations of the Civil Rights Acts by proposing a "rule of

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59. There are many other examples of congressional reversal of decisions by the Supreme Court that undermined the basic effectiveness of civil rights statutes. *See, e.g.*, Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (overturning the narrow interpretation of the ADEA); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (2006)) (overturning the narrow interpretation of the phrase "program or activity" in various federal civil rights statutes). Professor Brudney has extensively discussed this congressional override. *See* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 11-20 (1994) (discussing the Older Workers Benefit Protection Act); 44 CONG. Q. ALMANAC 63 (1988) (discussing the Civil Rights Restoration Act and Congress's override of President Reagan's veto).

60. *See generally* 47 CONG. Q. ALMANAC 251-61 (1991). The overturned or revised decisions include *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Evans v. Jeff D.*, 475 U.S. 717 (1986).

61. *See Wards Cove*, 490 U.S. at 662 (Stevens, J., dissenting).

62. *See* 42 U.S.C. § 1981a(b) (2006) (authorizing limited compensatory and punitive damages under Title VII).

63. *See* Johnson v. Ry. Express Agency, 421 U.S. 454, 460 (1975) (describing remedies under § 1981).

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construction" in the 1991 Act,[64] which applied to disability nondiscrimination laws as well as those laws that applied to race, color, nationality, origin, sex, religion, and age.[65] The proposed rule stated that "[a]ll federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies."[66] This language was adopted by the House but, without any explanation in the legislative history, was not in the final version adopted by the Senate. Had the Court followed the civil rights canon on its own volition, Congress would not currently be in the position of having to restore the ADA to its original intentions.

The year 1991 marked the last time Congress was able to forge a coalition to "restore" an anti-subordination interpretation of civil rights legislation. Although the lower courts began to interpret the ADA broadly, and occasionally invoked the civil rights canon,[67] the Supreme Court did not endorse a broad reading of the statute. While rendering lip service to Congress's first finding that it intended to cover at least 43 million Americans with disabilities, the Court's narrow readings of the ADA have led to no more than 13.5 million Americans being covered by the statute and rendered the employment discrimination aspects of the statute ineffective.[68]

One could respond to this series of events by remarking that the Court can legitimately interpret civil rights legislation narrowly because Congress has the final word, and thus can reverse the Supreme Court. Civil rights coalitions, however, are notoriously treacherous to organize, and the civil rights community should not have to expend its political capital on dictating the basic scope of legislation *twice* through the use of both the enactment and amendment processes.[69] The civil rights community was only able

64. Congress also took the highly unusual step of defining, by statute, the parts of the legislative history that were relevant to its interpretation. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 3(2), 105(b), 105 Stat. 1071, 1075 (1991).

65. H.R. 1, 102d Cong. (1991) (proposed § 1107(c)).

66. H.R. 1, 102d Cong. (1991) (proposed § 1107(a)).

67. *See infra* Part II.

68. *See infra* Parts III and IV.

69. *See generally* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984) (discussing the difficulty of enacting legislation on behalf

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to persuade Congress to reverse *Gilbert* because the notion that sex discrimination did not inherently include pregnancy-based discrimination was considered outrageous. The 1991 Civil Rights Act would probably not have been enacted but for the unusual point in time during which both a Supreme Court nominee was accused of sexual harassment and an avowed racist was nominated for Governor of Louisiana.[70] Such unusual moments should not be necessary for the courts to honor Congress's basic policy preferences about an anti-subordination perspective.

Further, it is inappropriate that civil rights legislation—but not other legislation—has to continually resist efforts to limit its scope of coverage. Although Congress has attempted "restoration efforts" in response to other Supreme Court decisions, these other restoration efforts have not involved restoring basic policy matters that Congress clearly resolved at the time of enactment.[71] In fact, some conclude that many other overrides were actually *foreseen* and *addressed* by the Court in response to ambiguous legislative text, resulting in the Court inviting Congress to amend statutes to attain

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of individuals with disabilities); WHALEN & WHALEN, *supra* note 19 (chronicling the difficulty of enacting the Civil Rights Act of 1964; the book's title reflects that the Civil Rights Act was passed after a year-long debate culminating in a very close vote and the longest filibuster in Senate history). The connection between enfranchisement and the passage of the 1964 Civil Rights Act is clear: When African Americans were disenfranchised in the South, civil rights legislation had no chance of passage in Congress. For an excellent discussion of the relationship between enfranchisement of African Americans and the passage of the Civil Rights Act of 1964, see Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 959-61 (2005). *See also* MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS (2003) (chronicling the difficulty of enacting disability rights legislation); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993).

70. Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1210 (1995) ("On October 22, [1991,] one week after the Senate voted to confirm [Clarence] Thomas, and four days after former Ku Klux Klan Grand Wizard David Duke was named the Republican candidate in the Louisiana gubernatorial runoff election, the Senate voted 93 to 4 in favor of cloture on [the 1991 Civil Rights Act].") (footnotes omitted). For a contrasting discussion of the legislative history of the 1991 Act, see generally C. Boyden Gray, *Disparate Impact: History and Consequence*, 54 LA. L. REV. 1487 (1994); Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923 (1993).

71. *See generally* Eskridge, *supra* note 49, at app. I (listing each piece of override legislation from 1967-90).

more policy clarification.[72] Such a role is illegitimate when Congress has expressed its preference, as it has under the ADA, on the core statutory issue. With regards to the ADA, Congress has explicitly stated that the scope of coverage should protect at least 43 million Americans in order for the ADA to have effective workplace protection.[73] Congress should not have to waste its time with legislative amendments to repeat this basic mandate.[74]

B. Resurrection of the Civil Rights Canon

As compared with the Burger Court, the Rehnquist Court approached the task of statutory interpretation by placing less reliance on legislative history and increased reliance on other tools of interpretation such as textual language, textual canons, dictionaries, and substantive canons.[75] Nonetheless, the Rehnquist Court did not invoke the civil rights canon. Even if one does not accept the proposition that the civil rights canon should be invoked to interpret *all* civil rights legislation, the courts should apply this canon to the interpretation of the scope of protection provided by the Americans with Disabilities Act.[76]

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72. Spiller & Tiller, *supra* note 49, at 504.

73. 42 U.S.C. § 12101(a)(1) (2006).

74. Professor Barnes observes that many of these override efforts left some policy judgments deliberately ambiguous. *See* JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 12-15 (2004). That fact, however, is not surprising given the difficulty of acquiring a legislative consensus on civil rights matters. Congress can sometimes agree to overturn judgments at the most fundamental level of coverage with respect to civil rights statutes but may have trouble agreeing on more specific details like retroactivity or the meaning of a particular defense.

75. *See* Brudney & Ditslear, *supra* note 2, at 30 tbl.I (documenting less reliance on legislative history and increased reliance on textual meaning, language canons, dictionaries, and substantive canons between the Burger and Rehnquist Courts).

76. This Article's conclusion, however, that the Court has interpreted the definition of disability so narrowly so as not to protect 43 million Americans is not dependent on acceptance of the civil rights canon. One can also reach this conclusion, as argued *infra* in Parts II-IV, through literal interpretation of the statutory text. In a time when politicians shy away from association with the word "liberal," it is important to remember that there are strong justifications for the civil rights canon that support this Article's thesis.

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1. The Rise and the Demise of the Civil Rights Canon

The canon that "civil rights legislation should be liberally construed" is a product of two other canons. It is a subset of the canon that "remedial legislation should be liberally construed" or "remedial legislation should be broadly construed to attain its beneficial purpose."[77] It also derives from the constitutional law canon that civil rights protections should be broadly construed.[78]

"Liberal construction" of remedial legislation was a vehicle to distinguish remedial legislation from judge-made common law rules that were to be construed more narrowly.[79] Over time, however, the distinction between statutory rules and judge-made rules declined. Instead, the courts began to inquire simply into whether the rule was "remedial" and, therefore, should be liberally construed.[80]

Civil rights legislation is understood to be a subset of this remedial legislation.[81] The Supreme Court has cited a version of the civil rights canon with approval when interpreting the Voting Rights Act,[82] Title VII of the Civil Rights Act of 1964,[83] and the Equal Pay Act[84] in cases that expanded the scope of protection to women or racial minorities. Invocation of the civil rights canon went hand in hand with an anti-subordination interpretation of these

77. For an excellent discussion of the history of the remedial legislation canon, see generally Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199 (1996).

78. *See infra* notes 85-87 and accompanying text.

79. Watson, *supra* note 77, at 232.

80. *Id.* at 232.

81. *See id.* at 238.

82. Chisom v. Roemer, 501 U.S. 380, 403 (1991) ("[T]he [Voting Rights] Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination.") (extending the scope of the Voting Rights Act to judicial elections).

83. Ariz. Governing Comm. v. Norris, 463 U.S. 1073, 1090 (1983) (noting the importance of the Court acting consistently with the "broad remedial purpose" of Title VI and Title VII, and extending the scope of Title VII to cover situations in which women receive lesser retirement benefits through the use of actuarial tables).

84. Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974) ("The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.") (extending the scope of the Equal Pay Act to provide cause of action to women who were victims of pay differentials in shift wage rates that could not be justified on sex-neutral terms).

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statutes that sought to enhance protection for groups that historically faced discrimination in society.

The civil rights canon is also related to the principle that constitutional rights are to be broadly construed. This predecessor to the civil rights canon in the statutory context was first articulated in the early 1800s.[85] In 1886, in a case involving the scope of the Fourth Amendment's protection against unreasonable seizures, Justice Bradley noted that a court should "adher[e] to the rule that constitutional provisions for the security of person and property should be liberally construed."[86] He offered no precedent for this proposition, but justified the principle by arguing that it was necessary to guard these important rights from diminution.[87]

The civil rights canon—whether it be considered a subset of the remedial purpose canon or an extension of the constitutional law civil rights canon—began to emerge in the 1960s as statutory civil rights became more commonplace. While recognizing that not all courts accept the civil rights canon, Sutherland's treatise on statutory construction summarizes:

> There has now come to be widespread agreement ... that civil rights acts are remedial and should be liberally construed in order that their beneficent objectives may be realized to the fullest extent possible. To this end, courts favor broad and inclusive application of statutory language by which the coverage of legislation and initiatives to protect and implement civil rights is defined.[88]

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85. Petitioners argued for application of the canon as early as 1829. *See* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 406 (1829) (holding that constitutional provisions "were intended, together, effectually to secure the political and civil rights of the citizen, and to protect from legislative encroachment. They ought always to be liberally construed in favour of the rights of the citizen.").

86. Boyd v. United States, 116 U.S. 616, 635 (1886).

87. Justice Bradley argued:

> A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.

Id. at 635.

88. 3B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 155-58 (2003).

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Further, Sutherland's treatise states that the ADA "must be broadly construed to effectuate its remedial purpose."[89]

Nonetheless, Sutherland's treatise is not able to cite recent examples of the Supreme Court following the civil rights canon.[90] It cites the 1968 decision in *Jones v. Alfred H. Mayer Co.*[91] and the 1969 decision in *Daniel v. Paul.*[92] It cites many decisions from state courts and federal courts of appeals but no recent decisions from the Supreme Court. As for the specific application to the ADA, the treatise cites a 1967 Supreme Court decision,[93] which pre-dates enactment of the ADA by 23 years,[94] and two lower court cases, only one of which survived a motion to dismiss.[95] The statement about the ADA being liberally construed comes at the end of a six-page section on the interpretation of protections on the basis of having a "handicap."[96] That statement did not appear in the twelve-page section devoted to interpretation of the ADA,[97] and the statement is not substantiated by the cases cited in support of it because the Supreme Court has never cited the civil rights canon in an ADA case. The Supreme Court last cited a version of the civil rights canon in 1991,[98] on the eve of its first interpretation of the ADA. Hence, the civil rights canon has not been a tool that the Court has used since it began interpreting the ADA. The Court abandoned the civil rights canon as it retreated from an anti-subordination theory in interpreting civil rights legislation.

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89. *Id.* at 208.

90. *Id.* at 158 n.16.

91. 392 U.S. 409 (1968).

92. 395 U.S. 298 (1969).

93. 3B SINGER, *supra* note 88, at 208 n.21.

94. Tcherepnin v. Knight, 389 U.S. 332 (1967). The treatise presumably cited this case because it has the famous line: "Remedial legislation should be construed broadly to effectuate its purposes." *Id.* at 336. This case, however, involved the interpretation of the Securities Act, not the ADA.

95. Henderson v. Ardco, Inc., 247 F.3d 645, 654-55 (6th Cir. 2001) (reversing grant of summary judgment to the defendant in ADA "regarded as" case); Herrera v. CTS Corp., 183 F. Supp. 2d 921, 931 (S.D. Tex. 2002) (district court granting the defendant's motion to dismiss plaintiff's disability claim).

96. *See* 3B SINGER, *supra* note 88, at 203-08.

97. *See id.* at 120-31.

98. *See* Chisom v. Roemer, 501 U.S. 380, 380 (1991).

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2. Particular Applicability of the Civil Rights Canon to the ADA

The dire need to resurrect the civil rights canon is evident in the context of the Supreme Court's interpretations of the ADA and, in particular, the Court's interpretation of the word "disability."[99] When Congress enacted the ADA, it found that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."[100] Hence, the ADA is remedial legislation designed to correct an identified problem for a subordinated group in society. The problem of employment discrimination is the first area of discrimination listed by Congress in its findings, and the employment discrimination title is the first of three major titles within the statute. Undoubtedly, the ADA is remedial legislation that meets the core purpose of the civil rights canon by enhancing protection for a discrete and insular minority. A major focus of this legislation is creating effective workplace regulations to benefit individuals with disabilities.

Congress's findings concerning individuals with disabilities being a discrete and insular minority are consistent with well-established facts about the political powerlessness of individuals with disabilities. Many individuals with disabilities are disenfranchised, the group as a whole has a very low voting turnout record, and few members of Congress self-identify as members of this group.[101] Further, individuals with disabilities have diffuse interests that are difficult to unite under a common statutory purpose. Hence, political mobilization is rarely successful, and major civil rights legislation to protect this group was not enacted until 1990.[102] If the civil rights canon is to be applied to any contemporary group in society, individuals with disabilities should be first, or at least high on the list.

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99. 42 U.S.C. § 12102(2) (2006) (defining "disability").

100. 42 U.S.C. § 12101(a)(7) (2006).

101. For a discussion of the voting problems facing individuals with disabilities, see generally Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353 (2003). As recently as 2000, the General Accounting Office estimated that 84 percent of polling places had at least one impediment that could preclude individuals with disabilities from voting. *See* U.S. GEN. ACCOUNTING OFFICE, VOTERS WITH DISABILITIES—ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS 7 (2001).

102. *See* JOHNSON, *supra* note 69, at 11; SHAPIRO, *supra* note 69, at 140.

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Yet the Supreme Court has not cited it once in interpreting the ADA.

The disability community has faced a continued history of disenfranchisement. In 1793, Vermont required voters to have "quiet and peaceable behaviour" and, in 1819, Maine's constitution excluded "persons under guardianship" from voting.[103] Delaware excluded those who were "idiots" or "insane" from voting in 1831.[104] Such exclusions continue today:

> Only ten states permit citizens to vote irrespective of mental disability. Twenty-six states proscribe voting by persons labeled idiotic, insane or non compos mentis .... Twenty-four states and the District of Columbia disenfranchise persons adjudicated incompetent or placed under guardianship .... Four states disqualify from voting persons committed to mental institutions ... but other laws in three of those states provide that commitment alone does not justify disenfranchisement.[105]

Physical barriers also preclude voting by individuals with disabilities. A 2001 report by the Government Accounting Office found that 28 percent of polling places were inaccessible and did not provide curbside voting in the 2000 presidential election.[106] The National Organization on Disability reported in 2001 that fewer than 10 percent of polling places used audio output that would allow visually impaired voters to vote privately and independently.[107]

Historically, the courts did not consider these kinds of problems to be important. When Connecticut required that all voting take place in person, and that absentee voting not be permitted, Judge Newman ruled against the plaintiffs with the following language: "A physically incapacitated voter has no more basis to challenge a voting requirement of personal appearance than a blind voter can complain that the ballot is not printed in Braille."[108] It was unthink-

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103. ME. CONST. of 1819, art. II, § 1.; VT. CONST. of 1793, ch. II, § 21.

104. DEL. CONST. of 1831, art. IV, § 1.

105. Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1645-46 (1979) (internal footnotes omitted).

106. U.S. GEN. ACCOUNTING OFFICE, *supra* note 101.

107. NAT'L ORG. ON DISABILITY, ALERT: MOST VOTING SYSTEMS ARE INACCESSIBLE FOR PEOPLE WITH DISABILITIES (Aug. 2, 2001), http://www.nod.org.

108. Whalen v. Heimann, 373 F. Supp. 353, 357 (D. Conn. 1974) (finding no equal

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able in the 1970s that voters with disabilities should seek equal access to the polls. Although Congress has since passed some weak measures designed to improve accessibility to the polls for individuals with disabilities,[109] their voting participation rates are low and accessibility is inadequate.[110]

These barriers to voting made the passage of the ADA a remarkable event. The forces that combined to make this event occur are too diverse to summarize in a brief sentence or paragraph. Presidential politics, Vietnam veterans with disabilities, personal stories of disability within the families of key point people, and other factors colluded in the drafting of a disability civil rights statute that the *New York Times* described, at the time, as one that no one could safely oppose.[111] Those forces, however, have not converged again since 1990 to persuade Congress to amend the statute in the face of repeated narrow interpretation of its most basic elements,[112] and those amendments should not be necessary in the first place.

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to vote and stating that it is not "the province of courts to weigh the relative ease or difficulty with which the state could accommodate its voting procedures to meet the needs of various handicapped voters"); *see also* Selph v. Council of L.A., 390 F. Supp. 58, 61-62 (C.D. Cal. 1975) (holding that the Equal Protection Clause does not require city to make polling places accessible to the disabled when absentee voting is available).

109. *See, e.g.*, Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. § 1973ee (2006).

110. *See* Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 827 (2005). Waterstone stated:

> Social science research demonstrates that the cumulative effect of these problems is decreased voting levels for people with disabilities. The 2000 National Organization on Disability/Harris Survey found that voter registration is lower for people with disabilities than for people without disabilities (62 [percent] versus 78 [percent], respectively). A different survey in 1999 found that people with disabilities were on average about twenty percentage points less likely than those without disabilities to vote and ten points less likely to be registered to vote, even after adjusting for differences in demographic characteristics (age, sex, race, education, and marital status).

Id.

111. *See generally* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 22-68, 218 n.60 (2005).

112. It is possible that these forces will converge in 2007 or 2008, due to Democratic control of Congress and increasing numbers of disabled veterans needing more assistance from the federal government. Even so, many believe that it would be very unfortunate for these groups to have to expend their legislative capital on restoring legislation that has previously been enacted; the public interest would be better served by these groups tackling other issues that also affect their communities but do not already have an adequate legislative response.

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One might argue that the mere existence of the ADA, and the willingness of nondisabled individuals to consider legislative initiatives on behalf of individuals with disabilities, demonstrates that the civil rights canon is unnecessary in this context. In that sense, however, individuals with disabilities are no different than women or racial minorities who benefited from the application of the civil rights canon in the early interpretations of the Civil Rights Act of 1964. By definition, a group can only seek application of the civil rights canon if it has succeeded in convincing the legislature to enact laws on its behalf. The low rates of enfranchisement by individuals with disabilities coupled with their late entry into the legislative arena, however, suggest that they are *at least* as worthy of application of this canon as any other group that has attained protection legislation. The disability community only attained its "Title VII equivalent" in 1990—twenty-six years after such legislation protected women and minorities.[113] Unlike the 1964 Civil Rights Act, the ADA has not benefited from the Court applying the civil rights canon in its early years of interpretation.[114] Hence, the most basic determination under the statute—the definition of disability—has been construed so narrowly as to undermine the basic effectiveness of the statute.[115] Although it may not be necessary to apply the civil rights canon to every interpretation of a civil rights statute, that canon is crucial to the interpretation of a statute in its early years when fundamental coverage decisions are made about the scope of a statute's protection. As Parts III and IV will demonstrate, the failure to apply this canon has led the Court not even to honor the strict statutory language of the ADA. The Court's recognition of the legitimacy of the civil rights canon might, at least, help honor Congress's clearly expressed intentions to provide meaningful protection to individuals with disabilities at the workplace, and to protect at least 43 million Americans.

The civil rights canon dictates broad interpretation of remedial civil rights legislation.[116] But even if one did not articulate a presumption of broad interpretation, the language of the ADA itself counsels broader interpretation of the term "disability" than has

113. *See* Civil Rights Act of 1964 (codified in scattered sections of 42 U.S.C. (2006)).
114. *See supra* notes 90-98 and accompanying text.
115. *See infra* Part III.
116. *See supra* Part I.B.1.

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been permitted by the Supreme Court. There is no good justification for interpreting the statute so narrowly that it covers 13.5 rather than 43 million Americans, and provides no protection to those who are mildly disabled and able to work.

II. DERIVATION OF THE 43 MILLION FIGURE

When Congress stated in its first finding that it sought to protect at least 43 million Americans from disability discrimination, it intended to cover those with mild disabilities, as well as those with severe disabilities. It sought to protect more than those already protected under the Social Security laws or labeled as "severely disabled" by the Census Bureau who were unable to obtain employment. Otherwise, it would have signaled a more narrow statutory scope by stating that it intended to cover no more than 13.5 million Americans.

A. Social Security Laws

The term "disability" is a legally created category to define who should receive assistance or protection.[117] That term first appeared in federal law in 1790 to define who should receive compensation for injuries sustained in war.[118] The initial use of that term was to define who had an incapacity that precluded manual labor.[119]

In 1935, Congress made the historic decision to create a federally-funded pension system through the Social Security program for

117. Race is also a legally constructed category. *See, e.g.*, RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996); F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (1991); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996). But, the ADA is different than Title VII in that one must meet a definition of "disability" to attain statutory protection. Everyone is considered to have a "race" for the purposes of Title VII.

118. *See* 1 Stat. 119, 121 (1790) ("That if any commissioned officer, non-commissioned officer, private or musician aforesaid, shall be wounded or disabled while in the line of his duty in public service, he shall be placed on the list of the invalids of the United States, at such rate of pay, and under such regulations as shall be directed by the President of the United States, for the time being.").

119. *See generally* Peter Blanck & Chen Song, *"Never Forget What They Did Here": Civil War Pensions for Gettysburg Union Army Veterans and Disability in Nineteenth-Century America*, 44 WM. & MARY L. REV. 1109, 1120 (2003).

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workers who reached the age of sixty-five.[120] At that time, individuals could only attain Social Security benefits if they had previously been in the workplace until age sixty-five. From the outset, some people suggested that benefits should also be extended to people who retired early on an involuntary basis due to disability.[121] In 1954, Congress introduced the concept of "disability" into the Social Security structure by making benefits available to workers who had paid into the Social Security system but retired between the ages of fifty and sixty-five due to disability.[122] It defined disability as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration."[123] The concept of work-related disability expanded from a focus in the nineteenth century on physical disabilities to a recognition of physical and mental disabilities that precluded people from working. In 1960, the minimum age requirement was eliminated.[124] Congress replaced the requirement that the disability be of "long-continued and indefinite duration" in 1965 with a requirement that it "be expected to last for a continuous period of not less than 12 months."[125] In 1972, the Social Security program was expanded to include those who were disabled and had not contributed to the Social Security system through what is termed the "SSDI" program.[126]

The disability rosters greatly expanded after Congress eliminated the minimum age requirement, as well as the requirement that the individual be previously employed, so that, by 1975, the disability program became larger than the Social Security program for individuals over the age of sixty-five. This growth continued despite a narrowing of the definition of disability in 1968 to require that a claimant:

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120. Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935).

121. The original program also created a system of state grants for assistance to visually impaired individuals or "crippled" children, so some sensitivity to the issue of disability arose at the beginning of this program although the term "disability" was not broadly used by Congress at that time. *See id.*

122. Social Security Amendments of 1954, Pub. L. No. 83-761, 68 Stat. 1052, 1079 (1954).

123. *Id.* at 1080 (adding 42 U.S.C. § 416(i)(1)).

124. Pub. L. No. 86-778, 74 Stat. 924, 967 (1960).

125. Pub. L. No. 89-97, 79 Stat. 286, 366 (1965).

126. Pub. L. No. 92-603, 86 Stat. 1329, 1465 (1972).

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> is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him or whether he would be hired if he applied for work.[127]

The 1968 amendment reflected Congress's interest in reducing the disability rosters by encouraging individuals with disabilities to obtain work. Congress attempted further tinkering with the Social Security disability laws through "Ticket to Work" and other measures, but the Social Security disability rosters did not diminish.[128] By 1990, when Congress passed the ADA, approximately 5 million Americans were receiving benefits under SSDI.[129] Today, nearly 9 million Americans receive SSDI benefits.[130]

The ADA was passed, in part, in an attempt to help remove some individuals from the Social Security rosters by having them enter the workforce.[131] Unfortunately, those hopes were unrealistic.[132] Nonetheless, Congress would have understood in 1990 that the 5 million Americans who received disability-related Social Security benefits were a small minority of the 43 million Americans who it expected to cover under the ADA. By picking the figure of 43 million to signal its scope of protection, Congress was signaling that it

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127. Pub. L. No. 90-248, 81 Stat. 821, 868 (1968) (§ 158 amending § 223(c) of the Social Security Act).

128. *See* Paul Armstrong, *Toward a Unified and Reciprocal Disability System*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 157, 172 (2005).

129. *See* SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2004, at 17 tbl.1, *available at* http://www.SA.gov/policy/docs/statcomps/di_ars/2004/di_asr04.pdf (reporting that 4.9 million Americans received disability benefits in 1990, of whom 3 million qualified for those benefits as "workers").

130. *See id.* (reporting that 8.8 million Americans received disability benefits in 2004, of whom 6.2 million qualified for those benefits as "workers").

131. *See* 135 CONG. REC. S4984 (daily ed. May 9, 1989) (statement of Sen. Harkin) ("I believe that the ADA will substantially reduce the costs of dependency of individuals with disabilities."); 134 CONG. REC. S5972 (daily ed. May 16, 1988) (statement of Sen. Riegel) ("I am currently developing legislation which would protect certain benefits for beneficiaries of the Social Security Disability Insurance Program to facilitate their ability to enter the work force.").

132. *See supra* notes 129-30 (reporting Social Security figures for 1990 and 2004).

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intended a much larger group than had been covered under the Social Security laws.

B. The 43 Million Figure

The available evidence strongly suggests that Congress relied on estimates from the Census Bureau, not the Social Security Administration, for its conclusion that the ADA's definition of disability would protect 43 million Americans.[133] Deriving the 43 million figure, however, requires one first to derive a 36 million figure because Congress began its discussion of the ADA in 1988 with a bill that defined the number of Americans with disabilities as 36 million.[134]

In 1986, the Census Bureau published a report entitled "Disability, Functional Limitation, and Health Insurance Coverage: 1984/85."[135] This report was based on a survey of houses during May-August 1984, in which residents were asked a set of questions on their disability status.[136] These questions focused on physical impairments that might impose functional limitations on individuals who were over the age of fifteen.[137]

The 36 million figure from the 1988 version of the ADA is consistent with the Census Bureau report.[138] The Bureau found that

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133. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484-86 (1999) (concluding that Congress relied on Census Bureau data for its estimate of who was covered by the ADA).

134. *See* 134 CONG. REC. S5106 (daily ed. Apr. 28, 1988). The 1988 bill was the product of a report by the National Council on Disability. *See Sutton*, 527 U.S. at 484-85. This report, which was repeatedly cited by Congress, made it clear that the definition of disability was intended to be broad. *See, e.g.*, NAT'L COUNCIL ON DISABILITY, TOWARDS INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS 12 (1986), *available at* http://www.ncd.gov/newsroom/publications/1986/pdf/toward.pdf. The 1988 bill was consistent with that intention: it prohibited discrimination on the basis of handicap and then defined the term "handicap" broadly to include any effect on a bodily system. *See* 134 CONG. REC. S5106 (daily ed. Apr. 28, 1988). It defined the phrase "on the basis of handicap" to mean "because of a physical or mental impairment, perceived impairment, or record of impairment." *Id.* The bill then defined "physical or mental impairment" to mean "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body." *Id.*

135. *See* CENSUS BUREAU, DISABILITY, *supra* note 33.

136. *See id.* at 1.

137. *Id.*

138. *See supra* note 134. The drafters of the ADA were clearly aware of the Census Bureau Report, and the 1988 version of the ADA was recommended to Congress by the National Council on Disability, and the National Council on Disability authored a report in support of

37.3 million persons 13.5 years of age or older had a functional limitation in one or more of the nine areas that they measured: seeing, hearing, speech, lifting or carrying, walking, using stairs, getting around outside, getting around inside, and getting into and out of bed.[139] Of those 37 million Americans, only 8 million between the ages of sixteen and sixty-four years said they had a disability that prevented them from working.[140] Thirteen million of the 37 million Americans with disabilities were over the age of sixty-five and not likely to be working irrespective of their disability status.[141] These figures suggest that Congress, in 1988, would have been aware that about 24 million of the individuals covered by the ADA could have been expected to be covered by Title I—the ADA's employment title—if they faced discrimination in the workplace because they appeared to be both mildly disabled and qualified to work.

The estimate that at least 24 million Americans covered by the ADA would be qualified to work is also consistent with the modest nature of the functional limitation definition used by the Census Bureau in its survey. The Census Bureau had both a "functional limitation" category and a "severe limitation" category.[142] Although 37.3 million Americans were found to have a "functional limitation," 13.5 million were found to have a "severe limitation."[143] That 13.5 million figure was consistent with those who reported that they had a disability that "prevented [them] from working."[144] By contrast, nearly 24 million Americans reported they had a disability that did *not* preclude them from working.[145] In fact, of the 18.2 million between sixteen and sixty-four who reported that they had

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the 1988 bill that referred extensively to the Census Bureau data.

139. *See* CENSUS BUREAU, DISABILITY, *supra* note 33, at 2 and accompanying tbl.A.

140. *See id.* at 5.

141. *See id.*

142. *Id.* at 2.

143. *Id.*

144. *Id.* at 5. Eight million Americans between the ages of sixteen and sixty-four "were prevented from working by their disability," as were 4 million between the ages of sixty-five and seventy-two. *Id.*

145. *See id.* Of people age sixteen to sixty-four, 18.2 million "had a work disability." *Id.* The sixty-five to seventy-two age group contained 5.3 million with "a work disability." *Id.* A "work disability" was defined as "a condition that limited the kind or amount of work [a person] could do." *Id.*

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a disability that did not preclude them from working, 11.8 million reported that they were in the labor force.[146]

What do those statistics reveal? They suggest that Congress would have had to use a "mild disability" definition in 1990 rather than a "severe disability" definition if it sought to protect more than 36 million Americans from disability discrimination. When Congress revised the ADA during the legislative process to cover 43 million rather than 36 million Americans, it could not have intended to protect only those covered by the Social Security Administration (about 5 million) or only those covered by the Census Bureau's definition of "severe disability" (13.5 million).[147]

Moreover, one should remember that Congress intended the 43 million to be a *floor* rather than a *ceiling*. Congress stated, in its first finding, that the number of Americans with disabilities is growing as the population ages.[148] The 1997 Census Bureau report, which relied on similar categories of functional limitations, concluded that 52.6 million individuals had a disability.[149] Unlike the 1984/85 data, this report included 4.6 million Americans who were under the age of fifteen.[150] Nonetheless, it reflects an increase in the disabled population from 37 million to 48 million in a little more than a decade.[151] Like the 1984/85 Report, the 1997 report also reflects that more than 13 million Americans have mild disabilities that frequently do not preclude them from working.[152] Yet, as we will see, the Supreme Court's definition of disability rarely

146. *See id.* at 6 tbl.E.

147. The legislative record does not reveal why the number was raised from 36 to 43 million during the drafting process. The fact that the figure was raised, however, at least suggests that there was some concern that a 36 million figure would be misconstrued to cover an insufficient number of individuals with disabilities. The Census Report actually mentioned a 37.3 million figure rather than a 36 million figure, so there was good reason for the disability community to be concerned that a 36 million figure was too conservative an estimate. CENSUS BUREAU, DISABILITY, *supra* note 33, at 2. From a legislative intent perspective, the decision to raise the figure from 36 million to 43 million must, at a minimum, demonstrate an attempt to cover *at least* as many people who are included in the Census Bureau definition of mild disability.

148. *See* 42 U.S.C. § 12101(a)(1) (2006).

149. CENSUS BUREAU, 2002 STUDIES, *supra* note 35, at 1.

150. *See id.* at 9 tbl.1.

151. *See id.*; *see also supra* note 134 and accompanying text (in order to compare the disability population).

152. *See* CENSUS BUREAU, 2002 STUDIES, *supra* note 35, at 15. About 8.5 million of these individuals are classified as having a mild disability.

appears to cover someone who is both disabled and qualified for employment.[153]

In any event, these statistics only reflect estimates of who might be covered by the "actually disabled" definition of disability. The ADA also includes those who have a "record of" disability and those who are "regarded as" disabled.[154] Those definitions should extend coverage to *more* than 43 million, or even more than the 51.2 million people found to be actually disabled in the latest Census Bureau report.[155] As will be discussed in Part IV, the "regarded as" prong potentially covers *anyone* who is falsely regarded as having a disability that she does not have, or anyone whose actual impairment is exaggerated so that it falsely seems disabling.[156] Nonetheless, the Supreme Court has interpreted the "regarded as" prong so narrowly that it does not meaningfully add more people to the scope of statutory coverage.[157] Thus, even after one considers the implications of the "record of"[158] and "regarded as" prongs, the statute still does not come close to covering 43 million Americans, and will not provide meaningful protection to those who are mildly disabled and able to work.

III. SUPREME COURT CASES DEFINING "DISABILITY" UNDER SUBSECTION (A)

As discussed above, Congress's choice of the 43 million figure reflected an intention to cover those with both mild and severe disabilities. Yet, the Court has interpreted the ADA inconsistently with that intent, resulting in the ADA covering no more than 13.5 million Americans, and only covering those too disabled to work. The Supreme Court's decisions in three cases decided on June 22, 1989, helped achieve that narrow scope of coverage under the "actually disabled" prong.

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153. *See infra* Part III.

154. 42 U.S.C. § 12102(2)(B), (C) (2006).

155. CENSUS BUREAU, 2002 STUDIES, *supra* note 35, at 70-107.

156. *See infra* Part IV.

157. *See infra* Part IV.

158. This Article does not focus on subsection (B) because it has not been the subject of many reported decisions. It appears, however, that the courts have also construed subsection (B) narrowly. *See infra* note 273.

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A. Sutton v. United Air Lines, Inc.

Karen Sutton and Kimberly Hinton argued that United Airlines violated the ADA by denying them an opportunity to be hired as pilots when their uncorrected vision could not meet United's visual acuity standard of 20/100.[159] Their uncorrected vision was 20/200 in one eye and 20/400 in the other eye.[160] They argued that their corrected vision—20/20—rendered them qualified for employment but that United failed to hire them because of their vision in its uncorrected state.[161]

The district court's opinion reflects a common judicial perspective under the ADA: that the ADA only covers those who are severely disabled and those who need reasonable accommodations. Judge Daniel Sparr granted United's motion to dismiss, concluding that the ADA cannot be interpreted to include individuals with "slight shortcomings that are both minor and widely shared."[162] He found that "[m]illions of Americans suffer visual impairments no less serious than those of the Plaintiffs. Under such an expansive reading, the term 'disabled' would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect."[163] He overlooked the fact that the plaintiffs' uncorrected vision placed them in the bottom 2 percent of the United States population and was neither minor nor widely shared.[164]

Judge Sparr also assumed that the statute would only cover those who are visually impaired and who need reasonable accommodations. To justify the conclusion that the plaintiffs were not covered by the statute because their visual impairment was insufficiently disabling, he quoted a sentence from the ADA's legislative history, which listed the kinds of accommodations that might be needed by

159. *See* Sutton v. United Airlines, Inc., No. 96-S-121, 1996 WL 588917, at *1 (D. Colo. Aug. 28, 1996), *aff'd*, 130 F.3d 893 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1991).

160. *See id.*

161. *See id.*

162. *Id.* at *5.

163. *Id.*

164. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 507 (1999) (Stevens, J., dissenting) (citing J. ROBERTS, BINOCULAR VISUAL ACUITY OF ADULTS, UNITED STATES, 1960-62, at 3 (Nat'l Ctr. for Health Stat., Series 11, No. 30, Dep't of Health and Welfare (1968))).

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some individuals with visual impairments.[165] He did not seem to understand that the statute also covered individuals with mild impairments who did not need accommodations but faced discrimination due to the stereotypical attitudes of others.

The next court to consider Sutton and Hinton's case was the Tenth Circuit Court of Appeals. Like the district court, this court also assumed that the statute covered only those with severe disabilities. It affirmed the district court's motion to dismiss.[166]

In justifying its decision, the Tenth Circuit cited a Fifth Circuit case and an unpublished decision from the Southern District of New York in which plaintiffs with visual impairments were found not to be handicapped under section 504 or the ADA.[167] The Fifth Circuit case was *Chandler v. City of Dallas*.[168] One of the two plaintiffs in this case was Adolphus Maddox.[169] He had impaired vision in his left eye that could not be corrected to better than 20/60, and he had a horizontal field of vision in that eye that was less than 70 degrees.[170] The vision in his right eye, however, was normal.[171] Maddox prevailed at trial, but the Fifth Circuit overturned that decision on appeal, finding that he was not an individual with a disability under section 504 of the Rehabilitation Act.[172]

The Fifth Circuit's reasoning in *Chandler* was based on an unpublished Fifth Circuit opinion, *Collier v. City of Dallas*, in which the Fifth Circuit had concluded in 1986 that an individual whose vision in one of his eyes could only be corrected to 20/200 was not disabled under section 504.[173] Since 20/60 vision is better than

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165. *Sutton*, 1996 WL 588917, at *5 ("For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics [sic] visual aids, Braille devices, talking calculators, magnifiers, audio recordings and brailled material." (alteration in original)).

166. Sutton v. United Air Lines, Inc., 130 F.3d 893, 895 (10th Cir. 1997).

167. *See id.* at 901 n.8 (citing Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993); Sweet v. Elec. Data Sys., Inc., No. 95 Civ. 3987, 1996 WL 204471 (S.D.N.Y. Apr. 26, 1996)).

168. 2 F.3d 1385 (5th Cir. 1993).

169. *See id.* at 1388.

170. *See id.* at 1389.

171. *See id.* at 1388-89.

172. *See id.* at 1395-96.

173. *See id.* at 1390 (citing Collier v. City of Dallas, No. 86-1010 (5th Cir. Aug. 19, 1986) (unpublished)). The Moritz Law Library acquired a copy of the *Collier* opinion from the Fifth Circuit archives. It is an unpublished opinion with the following notation:

> Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles

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20/200 vision, the Fifth Circuit reasoned that Maddox was also not disabled for the purposes of section 504.[174] Reliance on *Chandler* which, in turn, relied on *Collier* was peculiar. There is no arguable basis for concluding that someone whose vision is only correctable to 20/200 is not disabled. Such vision constitutes legal blindness for the purpose of the Social Security laws and meets the Census Bureau's definition of severe disability.[175] The Tenth Circuit's reference to *Chandler* reflects that it had no manageable standard for determining which visually impaired individuals should be covered by the ADA, because the 20/200 holding from *Collier* cannot be correct.

In further support of its reasoning, the Tenth Circuit in *Sutton* cited *Sweet v. Electronic Data Systems, Inc.*,[176] an unpublished decision of the Southern District of New York.[177] This case involved Bryant Sweet, who, as the result of an accident, had vision that was correctable to 20/80 in one eye and 20/20 in the other eye.[178] Without glasses, his vision in the weak eye was 20/200.[179] District Court Judge Michael B. Mukasey granted defendant's motion for summary judgment on the ground that Sweet was not an individual with a disability under the ADA.[180] Judge Mukasey reached his determination, in part, on the basis of standards for visual impairment used by various professional organizations.[181] He noted that the Social Security Administration defines blindness as vision worse than 20/200 and defines visual impairment as between 20/40 and 20/200, and that the World Health Organization defines blindness as vision worse than 20/400 and defines visual impairment as between 20/60 and 20/400.[182] Because the "[p]laintiff's corrected visual acuity of 20/80 in his left eye [was] at the strong end of either scale," and

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of law imposes needless expense of the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

174. *See Chandler*, 2 F.3d at 1390.

175. *See* SOC. SEC. ADMIN., IF YOU ARE BLIND OR HAVE LOW VISION—HOW WE CAN HELP 2 (2007); *see also* CENSUS BUREAU, 2002 STUDIES, *supra* note 35, at 2.

176. No. 95 Civ. 3987, 1996 WL 204471 (S.D.N.Y. Apr. 26, 1996).

177. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 901-02 n.8 (10th Cir. 1997).

178. *See Sweet*, 1996 WL 204471 at *1.

179. *See id.*

180. *See id.* at *1, *9.

181. *See id.* at *5.

182. *See id.*

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because the plaintiff was able to participate in a broad range of activities without difficulty, the court found that he was not "substantially impaired" in the major life activity of seeing.[183] Judge Mukasey then concluded that "[p]laintiff's restricted reading capacity does not require a different result."[184]

Judge Mukasey's reasoning, however, was inconsistent with the definition of disability chosen by Congress. Congress did not limit the visual impairment category to those who are legally blind.[185] The evidence that Sweet's uncorrected vision was only 20/80, coupled with the evidence of his difficulties with reading, would have easily put him within the category of visual impairment used by the Census Bureau in its 1984/85 household survey on disability.[186] An impairment in *reading* was a part of the Census Bureau definition of an individual with a visual impairment.[187] The problem with the reasoning in *Sweet*, like the problem with the reasoning in *Chandler*, is that it precludes coverage for those with less than "severe" visual impairments. Nothing short of legal blindness in both eyes would appear to suffice.

The Supreme Court followed the path of the lower courts in construing the "actually disabled" prong of the ADA to apply to only a very narrow category of individuals with visual impairments. Unlike the lower courts, however, the Supreme Court closely examined the 43 million figure to arrive at its conclusion.[188] It traced the derivation of the 43 million figure to the reports by the National Council on Disability and the Census Bureau data.[189] Based on this data, it concluded that Congress could not have intended to cover people when the limitations imposed by their disabilities could be reduced through the use of mitigating measures.[190] It noted, for example, that 100 million Americans use

183. *Id.* at *5.

184. *Id.* at *6.

185. *See* 42 U.S.C. § 12102(2) (2006). The ADA never refers to the concept of "legal blindness" or "blindness" at all. It merely requires an individual to be substantially limited in one or more major life activities. Legal blindness, as discussed in the text accompanying note 175, is a term used by the Social Security Administration.

186. *See* CENSUS BUREAU, DISABILITY, *supra* note 33, at 1. The standard used by the Census Bureau was "difficulty in seeing words and letters in ordinary newsprint." *Id.*

187. *See id.*

188. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484-86 (1999).

189. *See id.* at 484-85.

190. *See id.* at 486-87.

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corrective lenses—a figure that, in itself, exceeds the 43 million estimate.[191]

Although the Court was correct to conclude that Congress did not intend to cover everyone who uses corrective lenses, the Court was wrong to conclude that Congress did not intend to cover *anyone* who benefited from corrective lenses. The Census Bureau report found that 12.8 million Americans had visual impairments.[192] Only 1.7 million of the 12.8 million individuals with a visual impairment who were surveyed by the Census Bureau indicated that they were not able to see letters or words at all, and were therefore placed in the "severe limitation" category.[193] But Congress used the 12.8 million figure, rather than the 1.7 million figure, to arrive at its 43 million estimate. The Census Bureau estimate of 12.8 million Americans with visual impairments constituted about 5 percent of the population at the time of the Census Bureau survey, far short of the 100 million who wear corrective lenses.[194]

Rather than broadly ruling that *no one* who uses mitigating measures to attain 20/20 vision can be covered by the statute, the Court had other options available that could have resulted in covering closer to 43 million Americans. For example, the Court could have presumptively covered anyone whose vision was "significantly" worse than the general population in a statistical sense. The generally accepted standard for statistical significance is two standard deviations from the mean, or the bottom 2.5 percent.[195] That approach is currently used to determine which children are presumptively entitled to services under the Individuals with Disabilities Education Act.[196] The statistical significance approach, in fact, is arguably too narrow because the Census Bureau's 12.8 million figure for visual impairment included about *5 percent* of the

191. *Id.* at 487.

192. CENSUS BUREAU, DISABILITY, *supra* note 33, at 1.

193. *Id.*

194. *See id.*

195. *See generally* Joseph L. Gastwirth, *Employment Discrimination: A Statistician's Look at Analysis of Disparate Impact Claims*, 11 LAW & INEQ. 151, 165 n.77 (1992) (stating that "[t]he Supreme Court generally assumes that the line of statistical significance lies at two standard deviations"); *see, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.14, 311 n.17 (1977) (citing Castenada v. Partida, 430 U.S. 482, 496 n.17 (1977)).

196. For example, New York uses this approach under the IDEA. *See* RUTH COLKER & ADAM A. MILANI, EVERYDAY LAW FOR INDIVIDUALS WITH DISABILITIES 42-43 (2006).

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1986 population.[197] Nonetheless, application of a statistical significance test would clearly cover the plaintiffs in the *Sutton* case because their uncorrected vision placed them in the bottom 2 percent of the population.[198]

Alternatively, the Court could have limited the mitigating measure rule to cases involving visual impairments due to the easy availability of corrective lenses. Instead, the Court offered an overly rigid standard under which few Americans who would be seeking employment could qualify as individuals with disabilities.[199] The rigid mitigating measure rule carved out by the Supreme Court in *Sutton* was closer to the definition used under the Social Security Act for those too disabled to work rather than the one used under the Census data to form the basis for the 43 million figure.[200]

One might say that it is not fair to blame the Court for this overly restrictive approach because the parties only gave it two stark options: accept the EEOC's broad rule to disregard *all* mitigating measures, or impose mitigating measures in all cases.[201] Arguably, it is hard to expect the Court to craft a rule, such as the two standard deviation rule, if that rule is not suggested by a party. But Justice Stevens's dissenting opinion did observe that the plaintiffs in *Sutton* had vision that placed them in the bottom 2 percent of the population.[202] Thus, the majority was aware that middle grounds were possible that might cover the plaintiffs while not covering *everyone* who wore corrective lenses. Under the guise of limiting the statutory coverage to 43 million, the Court went out of its way to pick an approach that it must have realized would cover far fewer

197. *See supra* note 194 and accompanying text.

198. *See supra* note 164 and accompanying text.

199. Another problem with how the Court used the 43 million figure is that it did not seem to appreciate that individuals could have more than one disability. It observed, for example, that 100 million Americans wear corrective lenses, 28 million have hearing impairments and 50 million have high blood pressure. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999). By implication, the Court suggested that a broad definition of disability could cover nearly every American if we add those various figures together to arrive at 178 million Americans. *See id.* But the Census Bureau arrived at a 37.3 million figure in 1984/85 for the number of people with limitations even though three of the subcategories (lifting or carrying, walking, and using stairs) included 18 to 19 million Americans. *See* CENSUS BUREAU, DISABILITY, *supra* note 33, at 2, tbl.A. Many individuals were in all three categories. *See id.*

200. *See supra* notes 131-32 and accompanying text.

201. *See Sutton*, 527 U.S. at 481.

202. *Id.* at 507 (Stevens, J., dissenting).

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than 43 million. Even the most modest application of the civil rights canon would have precluded that result.[203]

B. Albertson's, Inc. v. Kirkingburg

Hallie Kirkingburg had been a commercial truck driver since 1979.[204] He had amblyopia.[205] His corrected vision was 20/20 in one eye but only 20/200 in his other eye.[206]

Albertson's hired Kirkingburg as a truck driver in 1990.[207] In order to be hired, he passed both a physical exam and a 16-mile road test.[208] His visual acuity was tested twice—before he was hired and several months thereafter.[209] Even though his visual acuity in his left eye was 20/200, he was found qualified for the job.[210] After Kirkingburg had been on the job for a year, he suffered a non-driving, work-related injury when he fell from a truck.[211] When he sought to return to work after a long-term absence, Albertson's required him to be recertified under DOT regulations.[212] This time, the physician determined that Kirkingburg did not meet the DOT's regular visual acuity standard of at least 20/40 in each eye and binocular acuity.[213]

When Kirkingburg learned that he had not met DOT's visual acuity standards, he sought to satisfy their standards through a waiver program created by the Federal Highway Administration.[214] This program was created to bring DOT's standards into compliance with the ADA without sacrificing highway safety.[215] Under this program, an individual can obtain a vision waiver if: "he has three years of recent experience driving a commercial vehicle without (1)

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203. *See supra* Part II.

204. *See* Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1230 (9th Cir. 1998), *rev'd*, 527 U.S. 555 (1999).

205. *See id.* at 1230, 1232.

206. *See id.* at 1230.

207. *See id.*

208. *See id.*

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.* at 1230 n.1.

214. *See id.* at 1231.

215. *See id.*

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license suspension or revocation, (2) involvement in a reportable accident in which the applicant received a citation for a moving violation, and (3) more than two convictions for any other moving violation in a commercial vehicle."[216] The individual must also present a report from an optometrist that his vision is correctable to 20/40 and that he is "able to perform the driving tasks required to operate a commercial motor vehicle."[217] Kirkingburg met that standard and received the waiver.[218] Albertson's, nonetheless, terminated Kirkingburg's employment.[219] Albertson's explained that it had a policy of employing only drivers who "meet or exceed the minimum DOT standards."[220]

Kirkingburg brought suit against Albertson's, alleging that it discriminated against him in violation of the ADA.[221] Albertson's moved for summary judgment, arguing that Kirkingburg had not established a prima facie case under the ADA.[222] It argued that he was not qualified to perform the job of truck driver because he could not meet the basic DOT vision standards.[223] The district court granted Albertson's motion.[224] On appeal, Albertson's made the additional argument that it was entitled to summary judgment because Kirkingburg did not have a disability within the meaning of the ADA.[225]

The Ninth Circuit reversed the district court's determination that Kirkingburg was not disabled as a matter of law.[226] Its reasoning, however, was sloppy in focusing on the fact that "the *manner* in which he performed the major life activity of seeing was different" than for other people.[227] Although that observation was correct, Kirkingburg met the statutory definition of being disabled because

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216. *Id.* (quoting 57 Fed. Reg. 31,450 (1992)).

217. *Id.* (quoting 57 Fed. Reg. 31,460 (1992)).

218. *See id.* Because Kirkingburg has monocular vision, he would meet the 20/40 standard with the vision in his right eye.

219. *See id.*

220. *Id.*

221. *See id.* at 1230.

222. *See id.*

223. *See id.* at 1234.

224. *See id.* at 1230.

225. *Id.* at 1232.

226. *See id.* at 1237.

227. *Id.* at 1232 (emphasis in original) (citing Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997)).

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his vision in his left eye, with correction, was only 20/200.[228] That vision placed him in the bottom 2 percent of the population.[229]

The Supreme Court reviewed that aspect of the Ninth Circuit's decision but offered little clarity on what standards would need to be met in order for an individual to have a visual disability under the ADA.[230] The Court chided the Ninth Circuit for discussing whether Kirkingburg had "differen[t]" vision rather than "impair[ed]" vision in concluding that he was disabled.[231]

After reviewing some of the general evidence about the visual limitations of individuals with monocular vision, the Court suggested that "our brief examination of some of the medical literature leaves us sharing the Government's judgment that people with monocular vision 'ordinarily' will meet the Act's definition of disability."[232] In fact, the vague standards established by the Court have not led to others with amblyopia (monocular vision) satisfying the definition of disability under the ADA.[233] By contrast, if the Court had adopted a manageable standard, like a "statistical significance solution" for those with visual impairments, lower courts (and employers) would have better guidance.[234] The focus of the case would be whether an individual was qualified for employment, not whether he was an individual with a disability.

228. *See supra* note 175 and accompanying text.

229. *See supra* note 164 and accompanying text.

230. *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

231. *Id.* at 564-65.

232. *Id.* at 567.

233. *See infra* Part III.D.

234. In fact, the dissenting opinion in *Sutton* cited a well regarded medical source to observe that only 2 percent of the population suffers from myopia that is worse than 20/200. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 507 n.4 (1999) (Stevens, J., dissenting). The majority, by contrast, cited a different source for the proposition that more than 100 million Americans need corrective lenses to see properly. *See id.* at 487. The question in the case was not how many Americans wear corrective lenses; instead, the question was how many Americans have vision worse than 20/200. The majority and dissenting opinions, nonetheless, reflect that it is possible to use scientific sources for common impairments to evaluate who is in the bottom 2 percent of the population.

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C. Murphy v. United Parcel Service

Vaughn Murphy was diagnosed with high blood pressure when he was ten years old.[235] For over twenty years, he performed mechanic jobs despite the fact that he used a lever to lift heavy objects, did not run to answer the telephone, did not work above his head, and did not perform heavy work.[236] Murphy applied for a mechanic job at UPS in August 1994.[237] One aspect of this mechanic job was to drive tractor trailers and package cars to perform "road tests" and "road calls."[238] He was hired by UPS on August 18, 1994, and performed road tests on UPS vehicles between twelve and eighteen times.[239] In order to perform those road tests, a mechanic was supposed to have a DOT commercial driver's license.[240] To obtain such a license, one must have blood pressure less than or equal to 160/90.[241]

Although Murphy took medication to reduce his blood pressure, his treating physician stated that Murphy would never be able to get his blood pressure below 160/100 without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep, and irritability.[242] His blood pressure, even when treated, placed him in the bottom 2 percent of the adult population.[243]

UPS mistakenly certified Murphy as qualified to obtain a DOT commercial license despite his high blood pressure.[244] When this error was detected a month later, however, his employment was terminated.[245] Although Murphy's blood pressure was not low enough to qualify him for a one-year certification, it was sufficient

235. *See* Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 875 (D. Kan. 1996), *aff'd without opinion*, 141 F.3d 1185 (10th Cir. 1998), *aff'd* 527 U.S. 516 (1999).

236. *See id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.* at 876.

242. *See id.*

243. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., BLOOD PRESSURE LEVELS IN PERSONS 18-74 YEARS OF AGE IN 1976-80, AND TRENDS IN BLOOD PRESSURE FROM 1960 TO 1980 IN THE UNITED STATES, at 31 (1986), *available at* http://www.cdc.gov/nchs/data/series/sr_11/sr11_234.pdf.

244. *See Murphy*, 946 F. Supp. at 876.

245. *See id.*

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to qualify him for optional temporary DOT health certification.[246] Nonetheless, UPS did not allow Murphy to attempt to obtain the optional temporary certification so that he could retain his employment.[247] The trial court held that Murphy was not disabled because his high blood pressure did not limit him substantially.[248] The court of appeals and the Supreme Court affirmed.[249]

The Supreme Court dodged the question of whether Murphy was "actually disabled" even after taking medication because certiorari was only granted on the more narrow question of whether his disability should be assessed in its unmedicated state.[250] Having ruled in *Sutton* that one's disability should be assessed *after* the use of mitigating measures—an assessment that was not made by the lower courts in Murphy's case—the Supreme Court did not interject its own conclusion in this matter. Nonetheless, the framework offered by the Court to resolve this question is not likely to cover many individuals who are both disabled and qualified to work. The Court suggested that the focus of the inquiry, under the *Sutton* mitigating measure rule, is "whether petitioner is 'disabled' due to limitations that persist despite his medication or the negative side effects of his medication."[251]

A "statistical significance" standard, rather than such a nebulous standard, would have been more likely to reach the correct result. That approach would be especially appropriate for individuals like Murphy—those who were counted in the Census Bureau's disability determination due to their self-imposed limitations in the performance of daily tasks.[252] Murphy had learned over the years to self-accommodate by avoiding heavy lifting and activities that would raise his blood pressure so that he could procure employment as a mechanic.[253] Murphy would have indicated on the Census Bureau form that he had difficulty walking one quarter of a mile, difficulty walking stairs without resting, and difficulty carrying objects as

246. *See* Murphy v. United Parcel Serv., 527 U.S. 516, 522 (1999).
247. *See id.*
248. *See Murphy*, 946 F. Supp. at 882.
249. *See Murphy*, 527 U.S. at 518-19.
250. *See id.* at 521.
251. *Id.*
252. *See Murphy*, 946 F. Supp. at 872.
253. *See id.*

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heavy as a full bag of groceries.[254] To be moderately (rather than severely) disabled, the Census Bureau did not require an individual to be *unable* to perform those tasks. It merely required that an individual could only perform them with *difficulty*.[255] Murphy provided ample evidence of such difficulties, yet not one court that heard his case ruled in his favor. Those rulings are inconsistent with the Census Bureau data that formed the basis for Congress's 43 million estimate of individuals with disabilities.

As in *Sutton*, the focus on whether the plaintiff was disabled allowed the Court in *Murphy* to avoid entirely the question of whether he was qualified for employment.[256] Vaughn Murphy is exactly the kind of person who Congress thought it might assist through passage of the ADA. He was already employed as a mechanic before the ADA went into effect,[257] but he wanted to improve his employment situation with a higher paying mechanic job with UPS. UPS certified him as qualified and had no problems with his job performance before it began to focus on his blood pressure.[258] The Court's twisted interpretation of the definition of disability precluded someone who was clearly terminated because of the employer's perception that he was too disabled to do the job from having his day in court to demonstrate that he was qualified for employment. The ADA is not likely to make an impact on the employability of individuals with disabilities if such individuals are outside the scope of statutory coverage.

D. The Statistical Significance Solution

If one accepts the premise that the Court carved out too narrow a definition of disability in *Sutton*, then one is left with the difficult task of constructing an interpretation of the term "disability" that covers a reasonable, but not unlimited, number of Americans. One solution is to suggest that the Court merely repeal the "mitigating

254. These tasks specifically were inquired about in the Census survey. *See* CENSUS BUREAU, DISABILITY, *supra* note 33, at 1.

255. *See id.*

256. *See Murphy*, 527 U.S. at 522-23.

257. Murphy began working as a mechanic in approximately 1974. *See Murphy*, 946 F. Supp. at 875.

258. *See supra* note 244 and accompanying text.

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measures" rule. But, as the Court notes, the absence of a mitigating measures rule could leave the 100 million Americans who wear corrective lenses covered by the statute if they face discrimination on that basis.[259] If the ADA also covered everyone who takes medication for high blood pressure and other common conditions, then it possibly could cover 150 or even 200 million Americans if the mitigating measure rule is eliminated.

In theory, that result is not problematic. Title VII covers the entire population because we each have a race or a gender.[260] Congress, however, did not take the same approach with the ADA that it took with Title VII. It chose a "limited class" model, under which only individuals who were "disabled"—rather than individuals who faced discrimination on the basis of a physical characteristic—were covered by the statute.[261] Most likely, it made that choice because it wanted to make "reasonable accommodations" available to the covered class.[262] The concept of "reasonable accommodations" does not apply to race or gender claims brought under Title VII.[263] Although studies suggest that reasonable accommodations do not typically cost more than $500,[264] Congress may have been concerned that reasonable accommodations would prove to be expensive and thereby may have chosen a "limited class" model to keep down the costs of accommodation.

In any event, Congress did choose a "limited class" model for the ADA irrespective of the virtues of that approach. It created a definition consistent with a limited class model and drafted a first finding that suggested that that definition would not cover much more than one-sixth of the population. The question, then, is whether there is a manageable way to get rid of the mitigating

259. *See supra* note 191 and accompanying text.

260. *See* 42 U.S.C. §§ 2000e to 2000e-17 (2006).

261. *See* Kelly Cahill Thomas, *Limiting "Limitations": The Scope of the Duty of Reasonable Accommodation Under the Americans with Disabilities Act*, 57 S.C. L. REV. 313, 316 (2005).

262. 42 U.S.C. § 12112(b)(5)(A) (2006); *see also supra* Part I.

263. It does apply to religion claims but under a very narrow statutory model. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (requiring employers to incur no more than "de minimis" costs in order to provide accommodation on the basis of religion).

264. *See* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 377-78 (1997) (reporting that the average cost of a reasonable accommodation was less than $500, with many accommodations costing nothing).

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measures rule while also keeping statutory coverage around 43 or 50 million (today's equivalent of one-sixth of the population).

One possible methodology for common, *measurable* impairments[265] such as poor vision or high blood pressure would be to cover those whose condition places them in the bottom 2.5 percent of the population irrespective of the effectiveness of mitigating measures. Instead of the ADA covering all 100 million Americans who wear corrective lenses, it would only cover the 2 to 3 million Americans whose vision is two standard deviations below the mean, even if their vision is correctable with lenses. That figure does not threaten to cause the ADA to cover nearly the entire population but allows individuals like the plaintiffs in *Sutton* or *Kirkingburg* to receive statutory protection. One advantage of a statistical significance approach for common, measurable disabilities is that we would have a group of individuals who both plaintiffs and defendants would know with certainty were covered by the statute. Statutory coverage would also have to be available to others whose impairments are not readily measurable but who have "substantial limitations" as required by the statute. A definition of statistical significance, however, is consistent with the meaning of the word "substantial" as used in the statute. In fact, the ADA regulations use the term "significant" to define the term "substantial."[266] Hence, it makes sense to use a common statistical test to help define the term "substantial" in the statute.

It should be emphasized, however, that a statistical significance test is likely to *understate* the number of individuals with disabilities in our society, because Congress estimated that one-sixth of the population was covered by the ADA, not merely 2.5 percent. That test should be a floor rather than a ceiling and should only be applied to common impairments whose existence can be considered statistically normal.

Because of the possibility that a statistical significance test would cause the statute *not* to cover 43 million, it is important to limit its application to common, measurable impairments. Further, one must remember that the "record of" and "regarded as" definitions of

265. This test would not work for psychological impairments that are not readily measurable. Instead, such impairments should be covered without regard to the mitigating measure rule.

266. *See* 29 C.F.R. § 1630.2(j)(ii) (2006).

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disability would still be available to those with common, measurable impairments who did not meet the two standard deviation requirement. If these individuals are treated as if their impairment is severe when it is mild, they still might be "regarded as" disabled.[267]

One major challenge in fashioning a legal definition of disability is, as stated at the outset, that the term "disability" is an arbitrary term that seeks to fit a wide range of people.[268] People with mental impairments have little in common with people with visual impairments, hearing impairments, or mobility impairments. Hence, it was a mistake for the Court to try to develop an overarching definition that would readily apply to all types of disabilities. A more cautious approach would allow the Court to see what types of definitions work in a variety of different contexts. But, unfortunately, the definition chosen by the Court in *Sutton* does not even work well in the context of visual impairments, even though the case involved plaintiffs with visual impairments.[269]

If the Court had not crafted such a broad holding in *Sutton*, which applied to a range of disabilities not yet before the Court, its decision could have promoted dialogue on an appropriate legal standard that would approximate the Census Bureau data. Instead, the *Sutton* opinion has inappropriately closed the door until the Court confesses its error and reexamines the issue.[270] The Court's current analysis of disability under the "actually disabled"[271] prong leaves far fewer than 13.5 million Americans protected by the ADA, and individuals like the Sutton twins, Vaughn Murphy, and Hallie Kirkingburg outside the scope of statutory protection. For the ADA to provide effective protection in the workplace, it needs to protect such individuals whose disability is relatively mild, yet who fall within the bottom 2.5 percent of the population. The Court needs to devise a framework that is more consistent with Congress's stated intentions to protect at least 43 million Americans, so that such individuals are swept under the disability umbrella.

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267. *See supra* notes 40-45 and accompanying text.
268. *See supra* Part I.
269. *See supra* Part III.A.
270. *See supra* Part III.A.
271. 42 U.S.C. § 12102(2)(A) (2006).

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IV. REGARDED AS DISABLED

If the Supreme Court's interpretation of the "actually disabled" prong is correct, then other tools must be available to broaden the scope of statutory coverage beyond the 13.5 million severely disabled individuals covered under that prong. One option would be for the "regarded as" prong (subsection (C))[272] to be such a vehicle.[273] Under subsection (C), the ADA could cover individuals with no impairments or mild impairments who do not meet the "actually disabled" definition of disability but who face discrimination due to the stereotypes of others. Because those individuals rarely, if ever, are eligible for reasonable accommodations, a liberal interpretation of subsection (C) could help protect many Americans who cannot meet the standards imposed under the "actually disabled" prong without imposing costs on defendants through accommodations. Nonetheless, the *Sutton* decision also made subsection (C) unavailable for such plaintiffs.

In considering this option, it is important to remember that the 43 million figure does not even apply to cases brought under the "record of" or "regarded as" prongs. The 43 million figure was an estimate of people who were *actually* disabled.[274] The other two prongs should broaden statutory coverage beyond that figure.

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272. 42 U.S.C. § 12102(2)(C) (2006).

273. Subsection (B)'s "record of" rule could be another vehicle, because the courts have interpreted the "record of" definition narrowly. 42 U.S.C. § 12102(2)(B) (2006). One unduly restrictive requirement that many courts have imposed on subsection (B) "record of" cases is the requirement that the employer actually have viewed medical documentation that misclassified the plaintiff as disabled; word of mouth knowledge of such misclassification is insufficient to establish a "record of" disability. *See, e.g.*, Taylor v. Nimock's Oil Co., 214 F.3d 957, 961 (8th Cir. 2000) ("In order to have a record of a disability, an employee's 'documentation must show' that she has a history of or has been subject to misclassification as disabled."); Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084, 1087 (10th Cir. 1999); Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1229 (11th Cir. 1999) (explaining that plaintiff furnished no evidence that employer had any record of a substantially limiting impairment). For example, the *Taylor* court concluded that the employer's "mere knowledge of [plaintiff's] heart attack, coupled with the sending of a get-well card and a note about her job duties, [does not] constitute[] sufficient documentation that [plaintiff] had a history of disability or that [the employer] misclassified her as disabled within the meaning of the ADA." *Taylor*, 214 F.3d at 961. Privacy rules make it extremely unlikely that employers would have viewed the medical records themselves; such a narrow interpretation of the "record of" rule makes it an ineffective way for plaintiffs to establish that they are disabled. The Supreme Court has not yet considered this line of cases but, as cited above, it has been adopted in several circuits.

274. *See supra* Part I.

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Subsection (C) is, by its own terms, particularly encompassing. It does not require an individual to have an impairment at all, and certainly does not require an individual to be *disabled* by the impairment. Subsection (C), as will be discussed below, covers anyone who is treated in a mistaken or stereotypical way even though she is not actually disabled as defined by the "actually disabled" prong. Subsection (C) potentially covers *any* individual, because any of us could be treated stereotypically based on an impairment we do not possess. The Court, however, has gone to great lengths to limit subsection (C) so that it covers virtually no one. That restriction cannot be justified by the 43 million figure which, by its own terms, only applies to those who are actually disabled. Again, even the most modest application of the civil rights canon would reach a contrary result.

A. Sutton & Murphy

The "regarded as" definition of disability seeks to protect individuals in three different categories:

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;
> (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
> (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.[275]

The *Sutton* plaintiffs argued that they were entitled to bring a claim under subsection (C) under the first of these three theories because the employer exaggerated the scope of the limitations imposed by their visual impairments.[276] They contended that United Airlines "mistakenly believes their physical impairments substan-

275. 29 C.F.R.§ 1630.2(*l*) (2006).
276. Sutton v. United Air Lines, Inc., 527 U.S. 471, 490 (1999).

tially limit them in the major life activity of working."[277] They alleged that United Airlines "has a vision requirement that is allegedly based on myth and stereotype."[278]

At first glance, the *Sutton* case should have easily fallen within the "regarded as" definition of disability under the first theory. There was no dispute in the case that the plaintiffs were rejected for employment because of a physical attribute. Although the Court, in its earlier discussion of subsection (A)—the "actually disabled" prong—concluded that their vision was not a "disabling condition" as defined by the ADA, the employer appeared to regard it as a disabling condition in denying them employment.[279] One only proceeds to subsection (C), under the first theory, if one has a condition that has been determined not to meet the definition of disability under subsection (A). Hence, the argument under subsection (C) will be that an employer treated a condition as disabling when, in fact, it was not.

The complication in *Sutton* arose from the "class of jobs" rule that the EEOC crafted for cases brought under subsection (A). The Supreme Court erroneously applied this rule, which is not required by the statutory language, to the subsection (C) context.[280]

In the regulations defining "substantially limits," the EEOC states that with respect to the major life activity of working that:

> The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.[281]

Hence, a plaintiff who contends that he or she has a physical or mental impairment that substantially limits the major life activity of "working" has to establish that he or she is limited in the

277. *Id.*
278. *Id.*
279. *Id.* at 489-90.
280. *Id.* at 489-93.
281. 29 C.F.R. § 1630.2(j)(3)(i) (2006) (emphasis added).

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performance of a class of jobs, not merely the specific job in question.

According to Professor Chai Feldblum,[282] the EEOC drafted this regulation in response to concerns raised by Christopher Bell, an attorney working for the EEOC, which were embraced by the House Judiciary Committee during its consideration of the ADA.[283] The House Judiciary Committee noted in its report that a person should not be able to use subsection (A) if he or she is limited "in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used."[284] But the House Judiciary Committee made clear in its report that the confined nature of the "substantially limits" rule in the context of the major life activity of working only applied to subsection (A). It did *not* apply to subsection (C):

> [A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.[285]

Whether the EEOC regulation, as applied to subsection (A), is ultra vires goes beyond the scope of this Article.[286] But it makes no sense to apply this regulation to a subsection (C) case. Presumably, the "class of jobs" regulation was drafted to help limit an employer's

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282. Feldblum, *supra* note 9, at 133.

283. *Id.*

284. H.R. REP. NO. 101-485, pt. 3, at 29 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 451.

285. *Id.* at 30, 1990 U.S.C.C.A.N. at 453. The EEOC interpretive guidance makes a similar statement. The interpretive guidance states: "[T]herefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on 'myth, fear or stereotype,' the individual will satisfy the 'regarded as' part of the definition of disability." 29 C.F.R. § 1630.2(*l*) (2006).

286. One might argue that the EEOC should promulgate regulations consistent with the statutory language, not one sentence found in a committee report. Ironically, the Supreme Court in *Sutton* accepts this regulation for the purpose of narrowing the scope of the ADA, while it rejects the EEOC's mitigating measure rule (which was also contained in each of the three major Senate and House committee reports). Sutton v. United Air Lines, Inc., 527 U.S. 471, 489-90 (1999). Selective deference to the EEOC and the legislative history is difficult to justify, especially when this deference is only employed to narrow rather than broaden interpretation of the statute in conflict with the civil rights canon.

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reasonable accommodation expenses.[287] In a subsection (A) case, an individual who alleges that she is disabled because she is substantially limited in the major life activity of working would necessarily request accommodations that would allow her to be a *qualified* worker. By requiring that the plaintiff demonstrate that her physical or mental impairment substantially limits her in a broad class of jobs, the EEOC limits the number of individuals who can qualify as disabled under that definition of disability. In turn, the rule would then limit the number of cases in which defendants would be asked to spend money on reasonable accommodations.

Those concerns, however, are not applicable to a subsection (C) case. In the subsection (C) case which proceeds under theory one, the plaintiff takes the position that she *is* qualified for employment but has been stereotypically denied employment because the employer has exaggerated the consequences of her physical or mental impairment. She is typically not requesting accommodations; she is merely requesting an opportunity to demonstrate that her impairment does not preclude her from being qualified.

Applying the class of jobs rule to a subsection (C) case would impose an unrealistic burden of proof on the plaintiff. The only evidence she has available is that the defendant considered her unable to perform the particular job for which she applied because of an exaggerated understanding of her physical or mental impairment. She would have no basis to demonstrate that the defendant considered her unqualified for a broad class of jobs, because the defendant need not have an opinion with respect to a broad class of jobs. In the *Sutton* case, for example, the plaintiffs would have no way to know or establish that the defendant considered them unable to fly any airplanes, drive any vehicles, or participate in various other occupations. They only knew that the defendant viewed them as unqualified to perform the discrete job of global airline pilot for which they applied.

The *Sutton* Court, however, did not pause to consider whether the "class of jobs" rules should apply to cases brought under both subsections (C) and (A). It held that the plaintiffs could not establish that they were being substantially limited in the major life activity of working because they could merely allege that the defendant

287. 29 C.F.R. § 1630.2(j)(3)(i) (2006).

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regarded them as unqualified to work in the position of global airline pilot.[288] But, of course, United had no reason to have or express an opinion about their qualifications for a position other than the one for which they applied.

Similarly, Vaughn Murphy lost in the Supreme Court under his subsection (C) theory because he could only demonstrate that the employer perceived him to be unable to perform the particular job as a mechanic at UPS due to his high blood pressure.[289] It is, of course, possible that the employer *also* thought his high blood pressure made him unable to walk, drive safely, engage in recreational activities, do simple housework, garden, or play with children. But Vaughn Murphy would have no way of knowing those facts. All he knew was that the employer believed his high blood pressure rendered him unqualified to work as a mechanic for UPS even though he could obtain the proper medical clearance from DOT to test drive UPS's trucks.[290]

In light of the limited evidence available about the employer's perceptions, the Court found that "[a]t most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle—a specific type of vehicle used on a highway in interstate commerce."[291] Thus, "in light of petitioner's skills and the array of jobs available to petitioner utilizing those skills, petitioner has failed to show that he is regarded as unable to perform a class of jobs."[292] The Court used the "class of jobs" regulation to avoid asking the question whether UPS exaggerated the scope of Murphy's impairment to deny him employment opportunities.[293]

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288. *Sutton*, 527 U.S. at 493-94.

289. Murphy v. United Parcel Serv., 527 U.S. 516, 520 (1999).

290. *Id.* at 522. Kirkingburg also argued that he should prevail under subsection (C). Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1233 (9th Cir. 1998). Like the plaintiffs in *Sutton*, he lost under the "class of jobs" rule. The court noted that one of Kirkingburg's managers described him as "blind in one eye or legally blind." *Id.* (internal quotation omitted). The "regarded as" theory was not part of the certiorari petition, so the Supreme Court did not rule on that issue in *Kirkingburg*. *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 n.9 (1999).

291. *Murphy*, 527 U.S. at 524.

292. *Id.* at 525.

293. UPS, for example, insisted that DOT certification was necessary for Murphy to perform the essential functions of his job. *Id.* at 524. But DOT certification was only required if the vehicle was to be used on a highway in interstate commerce. 49 C.F.R. § 390.5 (1998).

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The "class of jobs" rule, as this Article will demonstrate below, has been devastating to plaintiffs in subsection (C) cases because employment discrimination plaintiffs who bring cases under subsection (C) will nearly always allege that they meet the definition of disability due to the major life activity of working. By definition, subsection (C) plaintiffs take the position that they are *not* disabled but are being treated by others as if they are disabled. In the employment context, that evidence of adverse treatment is most likely going to involve an employer's misperception of their ability to perform a particular job. It is possible that the employer also has misperceptions about their inability to perform other major life activities (or other jobs), but plaintiffs have no way of producing such evidence.

B. Post-Sutton *Case Law*

The case law reflects that subsection (C) has been useless in ADA employment cases and that it has little application outside the employment context. The EEOC's "major life activity of working" guidance, coupled with the *Sutton* Court's narrow interpretation of that guidance, has been fatal to plaintiffs' subsection (C) claims in the employment context.

Before the Supreme Court decided *Sutton*, courts were mixed with respect to how strictly they applied the "working" rule in "regarded as" cases.[294] After *Sutton*, virtually no set of facts seems sufficient to establish a "regarded as" claim of meeting the defini-

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Driving a truck around a parking lot or local road does not implicate this requirement. Because the case was decided on summary judgment, there are no facts in the record about the necessity of Murphy having the DOT certification.

294. The EEOC successfully brought a pre-*Sutton* "'regarded as' substantially limited in the major life activity of working" case on behalf of Arazella Manual who was denied employment as a bus driver on the basis of the medical examiner's conclusion that she was too obese to move swiftly enough to deal with an emergency while performing the duties of bus driver. *See* EEOC v. Tex. Bus Lines, 923 F. Supp. 965, 980 (S.D. Tex. 1996). The lower court never mentioned the "class of jobs" rule in this case, even though there was only evidence in the record about plaintiff's perceived inability to perform one bus driving job. *Id.* By contrast, Don Fredregill lost his "regarded as" case because his argument that he was denied promotion to a senior management position due to a perception that he was too obese to be qualified for such employment did not meet the "class of jobs" rule. *See* Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1090-92 (S.D. Iowa 1997).

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tion of disability in the employment context.[295] Of the fifty or so appellate cases that have proceeded under the "regarded as" theory since the Court decided *Sutton*, only a few have been successful.[296]

Ronald Foore's case typifies this pattern. He had uncorrectable vision of 20/400, was discharged from his position as a police officer, and was unable to meet the definition of disability under the "actually disabled" or "regarded as" definitions.[297] While acknowledging the *Albertson's* Court's holding that individuals with monocular vision will "ordinarily" meet the "actually disabled" test, the Fourth Circuit found that Foore's self-compensation for his monocular vision made him not the "ordinary case."[298] He also could

295. *See, e.g.*, Lusk v. Ryder Integrated Logistics, 238 F.3d 1237 (10th Cir. 2001) (holding that plaintiff who requested lifting restriction did not establish that he was regarded as disabled when discharged by employer); Amadio v. Ford Motor Co., 238 F.3d 919 (7th Cir. 2001) (refusing to speculate that employer regarded plaintiff as disabled when it terminated him after learning of his hepatitis); Doyal v. Okla. Heart, Inc., 213 F.3d 492 (10th Cir. 2000) (finding plaintiff who suffered stress-related illnesses and was terminated from her administrative position not to be regarded as disabled); Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000) (holding that police officer did not meet "regarded as" definition of disability when he argued that police department overreacted after learning that he was taking medication as treatment for depression). *But see* McInnis v. Alamo Cmty Coll. Dist., 207 F.3d 276 (5th Cir. 2000) (reversing defendant's summary judgment against plaintiff where evidence indicated that defendant's compliance coordinator had stated that she could tell that plaintiff was perceived as disabled; evidence also indicated that defendant acted on the perception of his disability by transferring plaintiff. This case, however, involved the major life activity of speech rather than working.).

296. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001). In light of *Sutton*, it is surprising that any lawyers would even try to bring an appellate case on a "regarded as" theory where the major life activity is "working," given the stringent test developed by the Court for those cases. Nonetheless, I have found that lawyers continue to bring those cases. And, as discussed in the following paragraphs of this Article, many of those cases are unsuccessful. The fact that lawyers have been willing to bring those cases, however, has caused the Sixth Circuit, as I will discuss, to try to relax the legal rules to make it possible for some of those cases to be successful. The courts, of course, can only adjust the legal rules as a result of continued litigation.

297. Foore v. City of Richmond, 6 F. App'x 148, 150 (4th Cir. 2001).

298. *Id.* at 153. A Ninth Circuit decision also confirms that individuals with monocular vision have difficulty demonstrating that they are disabled or regarded as disabled. *See* EEOC v. United Parcel Serv., 306 F.3d 794, 797 (9th Cir. 2002) (reversing district court ruling in favor of plaintiff with monocular vision in a case involving parcel delivery service). In another relevant case, the plaintiff succeeded in meeting the definition of disability in a "regarded as" case as a result of his monocular vision, but he was found not to be qualified for employment based on his vision. *See* Dyke v. O'Neal Steel, Inc., 327 F.3d 628, 633-34 (7th Cir. 2003). Hence, Dyke's case is consistent with the observation that it is virtually impossible both to

not meet the "regarded as" definition because "police officer" was not considered to be a broad enough class of jobs.[299] Foore was fired from his position merely because he could not meet a vision requirement—even though the court found he had no significant vision problems, and even though his job performance as a police officer had been entirely satisfactory.[300] The evidence could only demonstrate that the police department found him unqualified to perform the job he had held; that evidence was insufficient to meet the "class of jobs" rule.[301] Without the "class of jobs" rule, he had the perfect case of being treated unfairly due to a false assumption about his physical abilities. A jury had awarded him $50,000; the judge reduced the award to $5000 but awarded him attorney's fees.[302] The Fourth Circuit overturned that decision,[303] holding that the "class of jobs" technicality precluded a jury from awarding him damages for what it considered to be unlawful disability discrimination.[304]

The "class of jobs" problems have precluded many other plaintiffs from obtaining relief.[305] In the First Circuit, Steven Lessard's work as a "mounting employee" could not meet the "class of jobs" rule, and there were not sufficient job openings for him to demonstrate a perception of not being qualified for all jobs requiring repetitive work.[306] In the Second Circuit, Cristina Peters lost her claim at trial because the position she sought as a school guidance counselor was

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be "disabled" and "qualified" for employment.

299. *Foore*, 6 F. App'x at 154.

300. *Id.* at 150.

301. *Id.* at 153.

302. *Id.* at 151.

303. *Id.*

304. *Id.* at 154.

305. *See, e.g.*, Carruthers v. BSA Adver., Inc., 357 F.3d 1213 (11th Cir. 2004) (affirming district court granting employer's motion for judgment as a matter of law in a case in which plaintiff alleged that employer regarded her bilateral hand strain/sprain as precluding her from working); Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789 (9th Cir. 2001) (affirming decision that the employer did not regard plaintiff as disabled in a case involving a reporter with keyboard and handwriting limitations; court found insufficient evidence to meet the "class of jobs" test in the "actually regarded" phase of the lawsuit); Haulbrook v. Michelin N. Am., 252 F.3d 696 (4th Cir. 2001) (holding that discharged employee could not meet definition of disability under "regarded as" theory where employer simply believed he could not work at one of its facilities due to chemical sensitivities).

306. Lessard v. Osram Sylvania, Inc., 175 F.3d 193, 197-98 (1st Cir. 1999) (holding that plaintiff who had suffered shrapnel wounds in his left hand was not able to demonstrate that he was regarded as unable to do all jobs involving repetitive work because a broad category of jobs were not available to the plaintiff when he unsuccessfully applied for work).

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found not to meet the "class of jobs" rule.[307] The court of appeals overturned that decision on another ground.[308] The Fourth Circuit affirmed a trial court decision that an employee, Tess Rohan, who allegedly suffered from post-traumatic stress disorder and severe depression, was not "regarded as" disabled by her employer merely because it perceived that she could not work as an actress in a touring theater company.[309] In the Fifth Circuit, an emergency room doctor who allegedly received adverse treatment after being exposed to hepatitis C could not meet the "class of jobs" rule.[310] Similarly, the Sixth Circuit held that John Swanson did not sufficiently allege that he was "regarded as" disabled in a class of jobs due to his depression because the employer "perceived Swanson as a capable physician, just not a capable surgeon under [the hospital's] program."[311] The Seventh Circuit affirmed the dismissal of Robert Tockes's suit against Air-Land Transportation Services for not meeting the "regarded as" definition of disability, even though the evidence indicated that he was told he was being fired because "he was crippled, and the company was at fault for having hired a handicapped person."[312] The Eighth Circuit rejected a case brought by Albert James Conant, who sought a general laborer position with the city of Hibbing, because he had no evidence to demonstrate how the employer would have treated him with regard to other laborer positions within the city.[313] A plaintiff did succeed on the "regarded as" theory in the Tenth Circuit, but only because she was able to demonstrate that the employer refused to consider her for a wide

307. Peters v. Baldwin Union Free Sch. Dist., 320 F.3d 164, 168 (2d Cir. 2003) (summarizing the trial court decision).

308. *Id.* ("A mental illness that impels one to suicide can be viewed as a paradigmatic instance of inability to care for onself.").

309. Rohan v. Networks Presentations LLC, 375 F.3d 266, 277-78 (4th Cir. 2004) (holding that touring theater company actress was not a broad class of jobs). The court relied on a prior Fourth Circuit case in which a subsection (A) plaintiff could not meet the "class of jobs" rule in a case involving a utility repair worker. *Id.* at 278 (citing Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986)).

310. Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 506 (5th Cir. 2003). The hospital administrator allegedly said "that he didn't think that [plaintiff] could work in the Emergency Room with hepatitis C, that he wouldn't go to a dentist with hepatitis C and he would not let [plaintiff] suture his child." *Id.* at 506 (internal quotation omitted). That remark was insufficient to sustain the "regarded as" theory.

311. Swanson v. Univ. of Cincinnati, 268 F.3d 307, 318 (6th Cir. 2001).

312. *See* Tockes v. Air-Land Transp. Servs., Inc., 343 F.3d 895, 896 (7th Cir. 2003).

313. Conant v. City of Hibbing, 271 F.3d 782, 785-86 (8th Cir. 2001).

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range of jobs in the sheriff's department, despite her ten years of service, when she attempted to return to work after having sought treatment for post-traumatic stress disorder.[314] It is not clear that McKenzie would have prevailed if the defendant had merely found her unqualified to work as a patrol officer given the adverse decisions on that fact pattern from other circuits.

Hence, the courts have found that plaintiffs have not met the "class of jobs" test in "regarded as" cases when they were perceived as unable to be emergency room doctors, surgeons, laborers, senior management, bus drivers, police officers, school counselors, and actresses in a touring company. Even evidence that plaintiffs were subjected to derogatory terms like "cripple" did not lead courts to speculate that defendants generally regarded them as disabled.[315] Plaintiffs can only prevail in the exceptional case in which the defendant foolishly offers a view on a wide range of jobs that happen to be available for employment. The Sixth Circuit has recognized recently that the existing rules make a "regarded as" case in the context of working "extraordinarily difficult."[316] The court observed that:

> It is safe to assume [that when] employers do not regularly consider the panoply of other jobs their employees could perform, and certainly do not often create direct evidence of such considerations, the plaintiff's task becomes even more difficult. Yet the drafters of the ADA and its subsequent interpretive regulations clearly intended that plaintiffs who are mistakenly regarded as being unable to work have a cause of action under the statute.[317]

Recognizing the difficulty posed by such cases in a case involving a salesperson who developed a bad back, the Sixth Circuit found that evidence of pretext could help establish the required level of proof.[318] In a subsequent decision, the same court found in favor of

314. McKenzie v. Dovala, 242 F.3d 967, 968 (10th Cir. 2001).

315. *Tockes*, 343 F.3d at 896.

316. Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2001).

317. *Id.*

318. *Id.* ("In cases such as this one, where there is substantial evidence that an individual's medical status played a significant role in an employer's decision to fire that individual, combined with evidence that the employer concocted a pretextual justification for that firing .... The resolution of that issue is properly left to the jury.").

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an administrator who was discharged because of an alleged misperception that he was an alcoholic.[319] There was no direct evidence that the employer viewed the plaintiff as being unable to perform any particular job except the one he held. The Sixth Circuit, however, was willing to speculate to meet the "class of jobs" rule that there was a "reasonable inference" that the plaintiff's purported alcoholism "rendered him incapable of performing a substantial number of managerial jobs."[320] Despite noting the "extraordinary" difficulty of the class of jobs rule, the Sixth Circuit has not questioned whether the statute should even be interpreted to require that rule in the "regarded as" context.

C. Further Retrenchment: Toyota *Decision*

It is time for the courts to reject the "class of jobs" rule, especially in the "regarded as" context, and return the ADA to the protection of at least 43 million Americans. Unfortunately, the Supreme Court does not appear to be going in that direction. If anything, its recent decisions suggest that it is further constricting the scope of the ADA so that it can only protect the 13.5 or so million people that the Census Bureau defines as being "severely disabled." This fact became most evident in the Court's 2002 decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[321] In this case involving a woman who the Sixth Circuit had found was "actually disabled" under subsection (A),[322] the Supreme Court reversed and remanded with instructions that the lower court should determine whether the plaintiff's physical impairment "prevents or *severely restricts* the individual from doing activities that are of central importance to most people's daily lives."[323] Neither the statute nor regulations, however, contain a "severely restricts" requirement. The statute refers to a "substantial limitation," which the regulations define as including a "significant" restriction.[324] The Court offered no

319. Moorer v. Baptist Mem'l Health Care Sys., 398 F.3d 469, 483-85 (6th Cir. 2005).

320. *Id.* at 484.

321. 534 U.S. 184 (2002).

322. Williams v. Toyota Motor Mfg., Ky., Inc., 224 F.3d 840, 842-43 (6th Cir. 2000), *rev'd*, 534 U.S. 184 (2002).

323. *Toyota*, 534 U.S. at 198 (emphasis added).

324. The regulations state that "substantially limits" means "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major

explanation for why it raised the requirement from "significant" to "severe."

The Court's statement in *Toyota* that a plaintiff seeking to prove that she is disabled under subsection (A) must demonstrate that she is "severely" limited is consistent with this Article's thesis that the Court has used the Census Bureau's "severe limitation" definition—which, according to the Census Bureau, covers no more than 13.5 million Americans, most of whom are too disabled to work. The ADA, however, does not impose a "severe limitation" requirement under the definition of disability, and the law purportedly protects far more than the 13.5 million Americans whom the Census Bureau considers to be severely disabled. There are numerous devices that the Court has used to limit coverage of the ADA to a group far fewer than 43 million Americans. The "regarded as" theory, coupled with the "major life activity of working" rule, is a crucial part of that problem and precludes the statute from being an effective remedy to the problem of employment discrimination.

CONCLUSION

The ADA was historic legislation that sought to embody an anti-subordination perspective to provide protection for a class of individuals in society. Congress stated in its findings and purpose sections that it sought to protect a discrete and insular minority, and that it considered the size of that group to be at least 43 million Americans. Further, Congress stated that it wanted this statute to provide meaningful protection in the area of employment discrimination. The Supreme Court has undermined this basic intention by construing the protected class so narrowly that it has virtually become a nullity in the employment context.

The problems that individuals with disabilities face in the employment sector are twofold. Some individuals with disabilities could engage in employment if they received accommodations. Often, they just need to use the ADA as a vehicle to gain such accommodations. Other individuals have milder physical or mental impairments and could engage in employment if they were given a

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life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(ii) (2006).

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chance to demonstrate their capabilities rather than their disabilities. They do not seek accommodations; they seek an opportunity to overcome myths and stereotypes about their disabilities. The first group needs to come within the statute's "actually disabled" prong to obtain effective assistance in maintaining employment. The second group could come within the "actually disabled" or "regarded as" prongs to attain assistance, as they have only become disabled through the attitudes of others. It is essential that the ADA provide protection to this second group of individuals, like the Sutton twins, Hallie Kirkingburg, and Vaughn Murphy, if it is to have a meaningful impact on the employment opportunities of individuals with disabilities. It is critical that the courts keep that larger objective in mind when interpreting the scope of the definition of disability under the ADA.

One response to this story of overly narrow protection is to suggest that Congress enact corrective legislation to restore its original intentions. Given the Court's hostility to the ADA's anti-subordination perspective, however, no good option is available to Congress. Congress could seek to overturn the *Sutton* mitigating measure rule, but a sweeping reversal of *Sutton*, without something like the statistical significance rule proposed by this Article, would leave nearly every American covered by the ADA and able to request reasonable accommodations. Even if the business community tolerated such an amendment, we can anticipate that the courts would seek to find other narrowing devices to limit such a broad statutory scope, such as narrowly interpreting the reasonable accommodation requirement.

Another alternative is for Congress to abandon the anti-subordination approach and make statutory protection available to anyone who faces discrimination on the basis of a physical or mental condition. Like the first alternative, this alternative would provide a potential cause of action to nearly every individual in society. By abandoning the protected class approach, however, Congress might create the potential for "reverse discrimination" lawsuits.

The drawbacks of both approaches reflect what a masterful job Congress did in 1990 by defining a protected class that was also entitled to reasonable accommodation. That approach posed challenges when plaintiffs had a common impairment, like poor vision, because it was not clear whether Congress intended such individuals to come within the scope of statutory coverage. But the Court did

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not have to undermine the effectiveness of the statute's ability to address employment discrimination problems in order to respond to this challenging fact pattern. It should have adopted something like the 2 percent rule proposed by this Article for such cases, and otherwise left intact Congress's skillful work. There should be no need to amend the 1990 statute. Instead, the Court should honor Congress's basic purpose to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[325]

Congress should not have to amend the ADA to restore its original intentions. One enactment should be enough. The courts should use the civil rights canon to construe the ADA as intended by Congress. Members of Congress have come to realize that the courts' failure to apply the civil rights canon is part of the nature of this interpretation problem. The recently introduced "Americans with Disabilities Act Restoration Act of 2006" ends with a provision entitled "Rule of Construction" in which the bill instructs the courts to construe the ADA broadly to achieve its remedial purpose.[326]

But Congress should not find itself in a position in which it needs to lecture the courts on how to do their jobs. The application of the civil rights canon should be an inherent part of the judicial process, especially for a Supreme Court that has grown increasingly fond of substantive canons. Broad construction of civil rights is as old as the Fourteenth Amendment's Equal Protection Clause; it is time for that rule of construction, once again, to become a mainstay of the interpretation of civil rights laws. At a minimum, interpretation of the scope of the coverage of the ADA deserves to benefit from application of that canon, as have other civil rights statutes in their early years of interpretation, to further an anti-subordination perspective. Congress can then spend its time crafting new legislation rather than continually resuscitating prior legislation. Only then can there be a respectful relationship between Congress and the judiciary so that future articles do not have to recount how the Supreme Court has, once again, "dissed" Congress.[327]

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325. 42 U.S.C. § 12101(b)(1) (2006).

326. H.R. 6258, 109th Cong. § 6 (2d Sess. 2006).

327. In another context, I have argued that the Court's disregard of Congress's handiwork can only be described as the Court "dissing" Congress. *See* Colker & Brudney, *supra* note 3.

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