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The Disabled ADA: How a Narrowing ADA Threatens To Exclude the Cognitively Disabled

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I. INTRODUCTION

Congress, in the Americans with Disabilities Act of 1990[1] (ADA), found that upwards of forty-three million Americans have one or more physical or mental disabilities.[2] More current United States Census Bureau estimates put that number at 49.7 million.[3] Included among those disabled are 12.4 million cognitively disabled Americans who suffer from conditions that impair their ability to learn, remember, or concentrate.[4] This Comment contends that, because courts have narrowly interpreted the ADA's coverage provisions since its enactment, these 12.4 million cognitively disabled Americans are perilously close to being altogether denied ADA protection—a result that, notwithstanding the ADA's awkward coverage provisions, Congress never intended.

Congress found that the disabled persistently "encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."[5] In the face of these and other distressing facts

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

2. *Id.* § 12101(a)(1).

3. JUDITH WALDROP & SHARON M. STERN, DISABILITY STATUS: 2000, CENSUS 2000 BRIEF 1 (Dep't of Commerce 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-17.pdf ("Census 2000 counted 49.7 million people with some type of long lasting condition or disability. They represented 19.3 percent of the 257.2 million people who were aged 5 and older in the civilian non-institutionalized population—or nearly one person in five . . . ." (footnotes omitted)).

4. *Id.* (noting that 12.4 million Americans, or nearly five percent of the U.S. population, suffer from conditions that cause "difficulty in learning, remembering, or concentrating"). The U.S. Census Bureau does not provide the term "cognitively disabled" to describe these 12.4 million Americans. The authors coined the term.

5. 42 U.S.C. § 12101(a)(5).

regarding the plight of disabled Americans,[6] Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[7] The ADA guarantees "*broad* antidiscrimination protection for disabled individuals—defined as those having physical or mental impairments that substantially limit one or more major life activities."[8] Such broad protection for a historically ignored class of persons positions the ADA, arguably, as "the most significant civil rights legislation since the mid-1960s."[9] Or at least it should be.

If the ADA is something less than the most significant civil rights legislation since the mid-1960s, it is largely due to the phenomenon of what has been called "the incredible shrinking protected class."[10] This phrase aptly describes the evolution of the ADA's coverage since its enactment. Courts, in their apparent zeal to define a manageable protected class, have restrictively interpreted the ADA's broad, but often ambiguous, terms to the extent that they "have effectively steered the analytical focus away from the ADA's original aim of aiding disadvantaged individuals' integration into the job market . . . to the point where [the ADA] is in danger of becoming ineffective."[11]

This Comment contends that the day of ADA ineffectiveness may have come for the cognitively disabled, surreptitiously ushered

6. *See id.* § 12101(a)(2)–(7).

7. *Id.* § 12101(b)(1).

8. David W. Lanneti, *Extending Coverage of the Americans with Disabilities Act to Individuals with Attention Deficit-Hyperactivity Disorder: A Demonstration of Inadequate Legislative Guidance*, 35 TORT & INS. L.J. 155, 157 (1999) (emphasis added); *see also* 29 C.F.R. pt. 1630 app. (2006) ("The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.").

9. *See* Lanneti, *supra* note 8, at 157. The appendix to 29 C.F.R. part 1630, labeled as "Interpretive Guidance on Title I of the Americans with Disabilities Act," states the following about the ADA's civil rights ramifications:

> Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex, the ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.

29 C.F.R. pt. 1630 app.

10. *See generally* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997).

11. *Id.* at 108–09.

in through decisions such as *Sutton v. United Air Lines, Inc.*[12] and *Toyota Motor Manufacturing v. Williams.*[13] These decisions, by narrowly defining who qualifies as "disabled," exemplify courts' unarticulated, but noticeable, inclination to restrictively interpret the ADA. This inclination portends serious consequences for the cognitively disabled, who are at once able to perform employment tasks but sufficiently disabled to be at a performance disadvantage in their employment.[14] As will be later discussed, this status as the "too-able disabled" makes it difficult for the cognitively disabled to fit within the ADA's nearly unworkable coverage zone, a fit made even more difficult by restrictive judicial interpretations.[15] Indeed, the result of these restrictive interpretations could be to deprive the cognitively disabled, who have courageously taken steps to mitigate the limiting effects of their disability, of both reasonable accommodation in the workplace and legal recourse under the ADA should they be terminated because of their disability.[16] This is a result Congress never intended.[17]

Part II of this Comment reviews the plain language, interpretive regulations, and legislative history of the ADA in order to establish the intended bounds of its coverage. Part II also makes clear that the ADA, even with its clumsy coverage provisions, is, on its face, sufficiently broad, if generously interpreted, to cover the cognitively disabled. It also suggests that "substantial limitation"—a key ADA coverage term that has heretofore been interpreted to disabled persons' detriment—is more appropriately conceptualized as a coverage "floor" than as a coverage "high bar."

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12. 527 U.S. 471 (1999).

13. 534 U.S. 184 (2002).

14. *See infra* Part IV.C.

15. *See infra* Part IV.

16. *See id.*; *see also, e.g.*, Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1062–67 (9th Cir. 2005); Collins v. Prudential Inv. & Ret. Servs., 119 F. App'x 371, 377–78 (3d Cir. 2005).

17. *See Sutton*, 527 U.S. at 499 (Stevens, J., dissenting) ("The Committee Reports on the bill that became the ADA make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures."); *see also infra* Part II.C–D (emphasizing that Congress intended to inclusively define the ADA protected class to include all those who had been disadvantaged by a medically recognized disability). While nor addressing cognitive disability directly, Justice Stevens's dissent in *Sutton* articulates Congress's intent for an inclusive ADA, *see Sutton*, 527 U.S. at 495–99 (Stevens, J., dissenting), under which the cognitively disabled would certainly be protected.

Part III surveys ADA jurisprudence to reveal courts' apparent proclivity for narrowing the ADA's coverage. Part III is less concerned with the cases' dispositive holdings as applied to particular facts and more concerned with the underlying inclination those holdings suggest. Specifically, Part III examines the corrective measures requirements of *Sutton*[18] and the substantial-as-severe limitation threshold of *Toyota*[19] as evidence that courts tend to favor a narrow ADA and have employed debatable legal interpretations to accomplish this objective.

Part IV illustrates the real consequences of this narrowing trend by considering the potential effects of the courts' narrowing efforts on the cognitively disabled specifically. As explained in Part IV, the cognitively disabled have a legitimate claim on ADA protection pursuant to the ADA's remedial purposes but are in jeopardy of being denied that protection as the courts persist in elevating the ADA's coverage threshold, most notably in the area of "substantial limitation."[20] Part IV also proposes, as part of a broader policy discussion, an alternative reading of "substantial limitation" that more faithfully adheres to Congress's intent. Part V offers a brief conclusion.

The ADA's popular title suggests that it provides benefits and protections to all disabled Americans, and its language is sufficiently broad that it may be interpreted to that end. This Comment urges courts and lawmakers to revisit the holdings of significant ADA decisions in order to restore the ADA's original breadth, thereby ensuring protection for the cognitively disabled in the employment sphere. Failure to extend the ADA's coverage to the cognitively disabled is to deny them the civil rights that Congress intended to grant them.[21]

18. 527 U.S. at 475 ("[T]he determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment . . . .").

19. 534 U.S. 184, 198 (2002) ("We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.").

20. *See, e.g.*, *id.* at 196–97; *see also infra* Part III.A.

21. *See* H.R. REP. NO. 101-485, pt. 2, at 22–24 (1990), *as reprinted in* 1990 U.S.C.C.A.N 303, 304–06 (summarizing Congress's intent in enacting the ADA).

II. THE ADA'S COVERAGE ACCORDING TO ITS LANGUAGE

Before the reader can appreciate the significance of the courts' narrowing of the ADA, he or she must first have an understanding of the goals and results Congress sought in enacting the ADA. To that end, the following subsections summarize the ADA's eligibility requirements and protections, the EEOC's interpretive regulations, and pertinent aspects of the ADA's legislative history. This Part concludes with an examination of the Supreme Court's decision in *Albertson's, Inc. v. Kirkingburg*,[22] an example of the Court construing the ADA in keeping with Congress's intent.

A. The ADA's Statutory Framework

1. Qualification

The ADA protects disabled persons but only those that are "disabled" as defined in the ADA.[23] Thus, a person with a medically diagnosed disability must nonetheless fit within the ADA's definition of "disability" in order to qualify for protection.[24] The ADA recognizes an individual as "disabled" if (1) the individual has "a physical or mental impairment that substantially limits one or more of [his or her] major life activities,"[25] (2) the individual has "a record of such an impairment,"[26] or (3) the individual has been "regarded as having such an impairment."[27] This Comment focuses on the first of these three.

In addition to having a disability within the ADA's meaning, a disabled person seeking protection in the employment sphere must be a "qualified individual."[28] A "qualified individual with a disability"

22. 527 U.S. 555 (1999).

23. *See* 42 U.S.C. § 12102(2) (2000) (defining "disability" as used in the ADA).

24. *See Toyota*, 534 U.S. at 198 ("It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment.").

25. 42 U.S.C. § 12102(2)(A).

26. *Id.* § 12102(2)(B).

27. *Id.* § 12102(2)(C).

28. *See id.* § 12111(8). The ADA contains several provisions explicitly excluding employees with certain characteristics from being "qualified individuals." *See, e.g.*, *id.* § 12114(a) ("[T]he term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.").

is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[29] While not conclusive proof of an employment position's essential functions, the ADA generally defers to the employer's judgment as to what job functions are essential, and any written description prepared by the employer before advertising or interviewing job applicants, qualifies as evidence of the job's essential functions.[30]

Disabled individuals capable of performing the essential functions of the job they hold or desire are eligible for ADA protection.[31] The ADA protects these individuals from discrimination "in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[32] The ADA also requires employers to provide reasonable accommodation to their disabled employees.[33]

2. Remedies

The ADA protects qualified disabled persons by calling upon the enforcement powers of the Equal Employment Opportunity Commission (EEOC)[34] and by creating a private right of action for the disabled person to bring against a discriminating employer.[35] The

29. *Id.* § 12111(8).

30. *See id.*

31. *See id.* § 12112(a).

32. *Id.* Included in this list by later reference are medical examinations and inquiries. *See id.* § 12112(d). Before employment, the employer may not "conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." *Id.* § 12112(d)(2)(A). However, the employer "may make pre-employment inquiries into the ability of an applicant to perform job-related functions." *Id.* § 12112(d)(2)(B). For further details on examinations and inquiries, see *id.* § 12112(d)(3)–(4). For specific types of discrimination by employers that the ADA prohibits, see *id.* § 12112(b)(1)–(7).

33. *See id.* § 12111(9).

34. The EEOC has power to prevent unlawful employment practices. *Id.* § 2000e-5(a) ("The Commission is empowered . . . to prevent any person from engaging in any unlawful employment practice as set forth in . . . this title."). For an explanation of the EEOC's powers generally, see *id.* § 2000e-4.

35. *See id.* § 12117(a) ("[T]he power, remedies, and procedures set forth in . . . this title shall be the powers, remedies, and procedures . . . [provided] to the [EEOC], to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment."). The Attorney General may

EEOC may file charges against ADA violators on its own or on behalf of aggrieved persons.[36] If the subsequent investigation uncovers reasonable cause for the charge, the EEOC will first attempt to eliminate the discrimination through "informal methods of conference, conciliation, and persuasion."[37] If the EEOC's informal means fail, it may bring a civil action against the offending employer in a United States district court.[38] If the EEOC chooses not to commence the action itself, it may give leave to the aggrieved party to pursue the action.[39] If the employer is found in violation of the ADA, the court "may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief."[40]

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pursue a civil action against the offending employer where the employer is "a government, governmental agency, or political subdivision." *Id.* § 2000e-5(f)(1).

36. *See id.* § 2000e-5(b).

37. *Id.*

38. *Id.* § 2000e-5(f)(1). When the EEOC "concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of [the ADA], [it] . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge." *Id.* § 2000e-5(f)(2).

39. *See id.* § 2000e-5(f)(1) ("[I]f . . . the [EEOC] . . . has not filed a civil action . . . , [it] shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the [employer] named in the charge . . . by the person claiming to be aggrieved . . . .").

40. *Id.* § 2000e-5(g)(1). In certain instances, employers may defensibly discriminate under the ADA. *See generally id.* § 12113 (setting out defenses to charges of discrimination). If discrimination charges arise out of "qualification standards, 42 U.S.C. § 12113(b), tests, or other selection criteria that screen out or tend to screen out or otherwise deny a job or benefit," the employer may show that the standards, tests, and selection criteria relate to the job and reflect business necessity and also that the performance sought "cannot be accomplished by reasonable accommodation." *Id.* § 12113(a). Similarly, religious entities may "giv[e] preference in employment to individuals of a particular religion to perform work connected with the carrying on . . . of [the entity's] activities." *Id.* § 12113(c)(1). This provision effectively allows religious entities to discriminate against disabled persons where religious affiliation was relevant to the employment. *See id.* § 12113(c)(1). Employers may also discriminate against disabled persons in food handling jobs where the person has an "infectious or communicable disease that is transmitted to others through the handling of food, . . . and which cannot be eliminated by reasonable accommodation . . . ." *Id.* § 12113(d)(2). Finally, and most pertinent here, employers charged with failure to make reasonable accommodation, *see id.* § 12111(9), can assert that the requested accommodation would have imposed undue hardship, thereby making it an unreasonable accommodation. *See id.* § 12111(10).

B. The Administrative Regulation of the ADA

Because the ADA's broad drafting would make it difficult to apply consistently by itself, Congress has authorized the EEOC to make specific regulations to clarify and carry out the employment title of the ADA.[41] The EEOC has promulgated several regulations describing prohibited conduct,[42] listing employers' defenses,[43] and explaining the ADA's statutory definition of "disability," [44] which was borrowed nearly verbatim from the ADA's philosophical forerunner, the Rehabilitation Act of 1973.[45]

Interestingly, the Supreme Court, while not outright dismissing the EEOC's "disability" interpretation, has questioned the EEOC's authority to interpret the term. In *Sutton v. United Airlines, Inc.*, the Court noted that the EEOC, like other agencies authorized to interpret the ADA, only had explicit authority to interpret terms under one of the Titles of the ADA and that no agency was given specific authority to interpret "disability," because, instead of being within one of the ADA's Titles, it was under the ADA's generally applicable provisions.[46] Later, in *Toyota Motor Manufacturing v. Williams*, the Court declared that the EEOC's "disability" interpretation was not controlling and supplied its own interpretation of "substantially limits."[47] Nevertheless, because the Court has not neatly and definitively replaced the EEOC's interpretation, lower courts continue to apply the EEOC's guidance—as shaped by the Supreme Court's pronouncements—in

41. *Id.* § 12116 ("Not later than 1 year after July 26, 1990, the [EEOC] shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.").

42. 29 C.F.R. §§ 1630.4–.13 (2005) (setting out the EEOC's regulations as to what constitutes a violation of the ADA); *cf.* 42 U.S.C. § 12112(b)(1)–(7) (original language of the ADA as to what constitutes discrimination based on a disability).

43. *See* 29 C.F.R. § 1630.15.

44. *See id.* § 1630.2(g)–(l).

45. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701–18 (2000), was enacted to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." *Id.* § 701(b)(1). The Rehabilitation Act defines "disability" in two ways, the latter of which is as "a physical or mental impairment that substantially limits one or more major life activities." *Id.* § 705(9)(B). The ADA uses the same language for the first prong of its disability definition, the same part of the definition at issue in this Comment. *See* 42 U.S.C. § 12102(2)(A).

46. *See* 527 U.S. 471, 478–79 (1999).

47. 534 U.S. 184, 196–98 (2002).

determining disability.[48] Thus, the EEOC's definition remains relevant, and it is the courts' treatment of that definition with which this Comment is most concerned.

The first of the ADA's "disability" definitions can itself be divided into three parts: a (1) physical or mental impairment which (2) substantially limits (3) one or more major life activities. The EEOC defines "physical or mental impairment" as "(1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more . . . body systems;"[49] or "(2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[50] Further, it defines "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[51]

48. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 800 (7th Cir. 2005) (explaining that, even after *Toyota*, courts may still look to the EEOC's interpretation for guidance).

49. 29 C.F.R. § 1630.2(h)(1) (2005). Damage to the following body systems qualifies as physical impairment: "neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine . . . ." *Id.*

50. *Id.* § 1630.2(h)(2). In the Appendix, the EEOC explains the following about "physical or mental impairment":

> It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part.

Id. at pt. 1630 app.

51. *Id.* § 1630.2(i). In further explaining the meaning of "major life activities" in the Appendix to the regulation, the EEOC states that the enumerated list of activities "is not exhaustive." *Id.* at pt. 1630 app. For example, "other major life activities include, but are not limited to, sitting, standing, lifting, reaching." *Id.*

Somewhat more complicated is the EEOC's definition of "substantially limits." According to the EEOC, a disability that is substantially limiting is one that makes a person "unable to perform a major life activity that the average person in the general population can perform,"[52] or "significantly restrict[s] . . . the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[53] In considering whether an individual is substantially limited in a major life activity, the EEOC sets forth the following factors as relevant: "(i) [t]he nature and severity of the impairment;"[54] "(ii) [t]he duration or expected duration of the impairment;"[55] and "(iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[56]

If the major life activity in question is "working," a person is substantially limited only if he or she is "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."[57] This inquiry also includes consideration of the geographical job search area,[58] the number of jobs in the area similar to the person's former job for which he or she no longer qualifies because of disability (the "job class" aspect of the inquiry),[59] and the number of jobs in the area dissimilar to the person's former job for which he or she no longer qualifies because of disability (the "broad range of jobs" aspect of the inquiry).[60] "Working," however, is only available to establish disability under the ADA where "an individual is not substantially limited with respect to any other major life activity."[61]

52. *Id.* § 1630.2(j)(1)(i).
53. *Id.* § 1630.2(j)(1)(ii).
54. *Id.* § 1630.2(j)(2)(i).
55. *Id.* § 1630.2(j)(2)(ii).
56. *Id.* § 1630.2(j)(2)(iii).
57. *Id.* § 1630.2(j)(3)(i).
58. *Id.* § 1630.2(j)(3)(ii)(A).
59. *Id.* § 1630.2(j)(3)(ii)(B).
60. *Id.* § 1630.2(j)(3)(ii)(C).
61. *Id.* at pt. 1630 app. §1630.2(j).

The EEOC explains that "whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."[62] Because the "disability" determination turns on the extent to which a person's impairment affects a major life activity, courts apply these standards on a case-by-case basis.[63]

The EEOC regulations are interpretive in nature and do not bind courts to a narrow or restrictive interpretation of the ADA. Regarding "disability" specifically, the regulations simply provide lists and considerations for courts called upon to make the case-by-case determination.[64] Thus, the ADA itself and the EEOC's regulations allow courts to apply a generous, inclusive understanding of disability.[65] The fact that courts are not so generous suggests a misunderstanding of the remedial aims of the statute,[66] as the next subpart makes clear.

C. The Legislative History Behind the ADA

Before proceeding to criticize courts for their restrictive interpretation of the ADA, it is important to establish that such interpretation is, in fact, contrary to Congress's intent. Besides its facially broad—and therefore arguably inclusive—language regarding

62. *Id.*

63. *See, e.g.*, Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998) (holding that the determination of whether plaintiff's impairment substantially limits major life activities is "individualized and fact-specific").

64. *See* 29 C.F.R. § 1630.2(g)–(i) (setting out relevant considerations in determining whether a person is disabled within the meaning of the ADA); *see also supra* Part II.B.

65. The ADA has heretofore been described as "vague." *See, e.g.*, Locke, *supra* note 10, at 108 n.8 (citations omitted). "Vagueness" "refers to the degree to which . . . language is uncertain in its respective application to a number of particulars." Dombrowski v. Swiftships, Inc., 864 F. Supp. 1242, 1247 (S.D. Fla. 1994) (citing REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 39 (1986)). For example, the boundaries of "substantially limits" are unclear. This "vagueness" provides courts with flexibility in determining, on a case-by-case basis, who may be considered "substantially limited." *See id.* Courts may certainly use that flexibility in disabled persons' favor.

Furthermore,"[a]s in all cases of statutory construction, [the] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979). Thus, even courts wishing to exercise their interpretive flexibility consistent with Congress's intent can look to the ADA's stated purposes and legislative history to conclude that generous, inclusive interpretations best effectuate that intent.

66. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 495 (1999) (Stevens, J., dissenting).

"disability," the ADA's legislative history reveals Congress's remedial intent. Research into the ADA's legislative history reveals that Congress heard extensive testimony on the pitiable plight of the disabled.[67] In response to testimony on disabled persons in the workplace and their potential to contribute if given protections and accommodations, the House Report states, consistent with the ADA as enacted, that "the ADA is to . . . bring persons with disabilities into the economic and social mainstream of American life."[68] The report repeatedly revisits this theme.[69]

Nothing in the report indicates a desire to exclude large groups of people with medically recognized disabilities from ADA protection.[70] When selecting which physical and mental impairments to recognize under the "disability" definition, Congress expressly left that list open so that the statute could remain comprehensive as new disabilities emerge.[71] Congress was similarly inclusive in its list of "major life activities."[72]

Most significantly, Congress set an inclusive "limitation" threshold for coverage.[73] For example, Congress went so far as to say that a person may be "substantially limited" in a major life activity "even if the effects of the impairment are controlled by medication."[74] Additionally, Congress declared that impairment does not constitute a disability "unless its severity is such that it results in a 'substantial limitation . . . .'"[75] Rather than using the term "severity" to describe the requisite level of "limitation" to qualify for ADA coverage, Congress can be understood to have used "severity"

67. *See generally* H.R. REP. NO. 101-485, pt. 2 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 304.

68. *Id.* at 22.

69. *See generally id.* These reports constitute particularly strong evidence of Congress' intent. As the Court in *Garcia v. United States* stated, "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

70. *See generally* H.R. REP. NO. 101-485, pt. 2.

71. *See id.* at 51.

72. *See id.* at 52 ("'[M]ajor life activity' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities.").

73. *See id.*

74. *Id.*

75. *Id.*

to represent a continuum on which the courts are to place a given impairment. In other words, courts are to ask, "Does this person's impairment reach the level of 'substantial' on the severity continuum?"[76]

This distinction matters because the coverage question turns on the reading of those terms. And it matters especially for the cognitively disabled because, unlike in the case of a wheelchair user, whose walking limitation relative to the average person is readily apparent and therefore easier to label as "substantial," the point where a dyslexic person's limitations become substantial is difficult for a fact finder to ascertain. If "substantial" is read as "severe," the fact finder accepts the reality that the person's dyslexia "limits" him but could very well be unconvinced that the dyslexia "severely limits" him when compared with the average person. After all, the dyslexic person appears to be able to do everything that an average person can do. Someone that appears so able does not appear to be "severely limited," or so the thinking goes, leading to a denial of coverage. On the other hand, if to be "substantially limited" is read to be "perceptibly disadvantaged but still functional" on the severity continuum, then that dyslexic person may well be covered.

Since "substantial" is not a true synonym for "severe,"—and this is the law, where subtle distinctions can matter—to set "substantially limits" as the coverage threshold is to set a more inclusive standard than would be created with the words "severely limits." Indeed, when read in the context of the legislative history, "substantially limits" appears to represent the reasonable compromise between a Congress that wanted to help the disabled and employers that did not want the unjust burden of accommodating every person with a doctor's note.[77] By setting "substantially limits" as the coverage threshold, Congress can be seen as merely asserting that the difference in ability between a "disabled" person and the average person must be consequential in order to qualify for ADA protection. In other words, rather than being nominally disabled, the individual must actually experience the disadvantages of the disability to an appreciable degree. This is how courts could and should apply the ADA.

76. *See id.*

77. *See generally id.*

To be clear, Congress never directly explained its use of "substantially" in relation to any other adverb it could have chosen to modify "limits." Therefore, while the foregoing analysis comports with the plain meaning of the ADA's provisions and stated purposes, courts narrowly interpreting the ADA cannot be seen as brazenly disregarding legislative guidance. Nevertheless, Congress clearly intended the ADA to open up employment and social opportunities to a broad class of persons with disability-induced limitations, and courts should not be entirely excused from interpreting the ADA's coverage terms in contravention of its purposes.

D. The Prudent Floor of "Substantial Limitation"

Even beyond the ADA's plain language and legislative history, which read together suggest an inclusive interpretation of the statute, the Supreme Court too has interpreted "substantial limitation" in an inclusive manner, effectively characterizing "substantial limitation" as a prudent coverage floor rather than an exacting coverage high bar. In *Albertson's, Inc. v. Kirkingburg*, a truck driver with monocular vision who had been mistakenly certified as fit to drive was fired after a company physical revealed his condition.[78] The driver, Kirkingburg, ultimately received a U.S. Department of Transportation waiver, but Albertson's refused to rehire him, leading him to sue Albertson's for violation of the ADA.[79]

The district court granted summary judgment for Albertson's, ruling that Kirkingburg did not qualify for ADA protection because he was not qualified to drive a truck without an accommodation.[80] On appeal, the Ninth Circuit, addressing Albertson's new argument that Kirkingburg was not "disabled" under the ADA, reversed, concluding that Kirkingburg "had presented 'uncontroverted evidence' that his vision"[81]—"seeing" being a major life activity[82]—"was effectively monocular," meaning that "he had demonstrated that 'the *manner* in which he sees differs significantly from the

78. 527 U.S. 555 (1999).

79. *Id.* at 560.

80. *Id.* at 561 (referring to 42 U.S.C. § 12112(a) (2000), which provides that the ADA applies only to "qualified individuals with a disability").

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

82. *See* 29 C.F.R. § 1630.2(i) (2005).

manner in which most people see.'"[83] Put another way, the Ninth Circuit held that a difference in manner of sight was sufficient to establish Kirkingburg as disabled under the ADA.[84]

Addressing this issue, the Supreme Court noted that the Ninth Circuit had rightly looked to whether Kirkingburg's monocular vision "[s]ignificantly restrict[ed him] as to the condition, manner, or duration under which the average person in the general population can perform that same major life activity"[85] but was nevertheless incorrect in applying the legal standard because it had relied on the fact that "the manner in which [Kirkingburg] sees differs significantly from the manner in which most people see."[86] Criticizing the Ninth Circuit's holding as equating a "mere difference" in seeing with a "significant restriction" in seeing,[87] the Court explained, "By transforming 'significant restriction' into 'difference,' the [Ninth Circuit] undercut the fundamental [ADA] requirement that only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities."[88] The Court reasoned that Kirkingburg's body could have learned to mitigate the difficulty of monocular vision to the point that he was no longer significantly restricted in his seeing relative to others.[89] To find Kirkingburg "disabled" under these circumstances, the Court concluded, would be to elevate the condition of monocular vision to the level of per se disability, regardless of how his condition actually affected him, which would contravene the ADA's express mandate to determine disability "with respect to an individual."[90]

83. *Kirkingburg*, 527 U.S. at 561 (quoting *Kirkingburg*, 43 F.3d at 1232).

84. *Id.*

85. *Id.* at 563–64 (quoting 29 C.F.R. § 1630.2(j)(ii)).

86. *Id.* at 564–65 (internal quotation marks omitted) (quoting *Kirkingburg*, 143 F.3d at 1232).

87. *Id.*

88. *Id.* at 565.

89. *Id.* at 565–66. The Court first raises the principle of mitigating measures functioning to overcome disability in *Sutton*. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).

90. *Kirkingburg*, 527 U.S. at 565–66 (quoting 42 U.S.C. § 12102(2) (2000)). The Court had previously declined to address whether HIV infection is a per se disability. *See* Bradgon v. Abbott, 524 U.S. 624, 624 (1998).

Significantly, the Court stated further that while the ADA is concerned "only with limitations that are in fact substantial,"[91] the ADA's disability definition allows persons to have some ability.[92] Indeed, the Court acknowledged that to show a "substantial limitation" in ability is not "an onerous burden."[93] Implicit in this characterization of "substantial limitation" is the idea that "substantial limitation" is a coverage threshold within the reach of many, if not most, of the persons Congress sought to assist by enacting the ADA.[94] *Kirkingburg*, then, can be read as establishing "substantial limitation" as a prudent "floor" beneath which the "substantial limitation" threshold may not descend.[95] At the very least, *Kirkingburg* establishes, by its "not an onerous burden" language, that "substantial limitation" should not be interpreted restrictively.

It is curious, then, to see the Supreme Court and other courts consistently treat "substantial limitation" as a high bar for the disabled to hurdle. Nothing in the ADA, the regulations, the legislative history, or *Kirkingburg* suggests such treatment.[96] Nevertheless, Part III makes clear that the "substantial limitation" high bar is in effect.

III. THE JUDICIARY'S NARROWING OF "DISABILITY"

As Part II describes how the ADA was intended to work, Part III explains how it has come to work or, rather, how it has come to not work. The ADA's narrowing invokes the familiar adage of the frog and the pot of water: If a frog placed in a pot of water is subjected to only gradual heat increases, it will acclimate and remain in the pot, not realizing that it is nearing its eventual demise.[97] Similarly, the

91. *Kirkingburg*, 527 U.S. at 565–66.

92. *Id.* (citing *Bragdon*, 524 U.S. at 641).

93. *Id.* at 567.

94. *See generally id.*

95. *See id.* at 564–70. This recognition of a low coverage threshold comports with Congress's aims on both fronts: (1) it promotes justice for disabled employees by keeping the limitation standard within reach, and (2) it promotes justice for employers by ensuring that "within reach" is still sufficiently high that the nominally disabled may not exploit it as a windfall. *See* discussion *supra* Part II.C.

96. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 495–508 (1999) (Stevens, J., dissenting).

97. Now, this adage is not seamlessly applicable here. First, the disabled community did not sit idle while the heat was being turned up. For example, in *Sutton* alone, six amicus curiae

ADA did not devolve to its current narrow state in a single case, but rather piecemeal over time in two prominent Supreme Court decisions and a smattering of lower court holdings. This Part examines those two Supreme Court cases to identify how they narrowed the ADA and also subsequent lower court holdings as evidence of the troublesome outcomes the narrow ADA portends for the cognitively disabled.

A. Paragons of Narrowness: Sutton *and* Toyota

It should be noted at the outset that courts consistently pledge allegiance to the ADA-as-enacted, even where, as in the cases analyzed here, they issue holdings that are inconsistent with the ADA's purposes.[98] Indeed, in each of the cases analyzed in this subsection, the Court professes to be preserving the intended scope of the ADA. Nevertheless, two prominent cases reveal themselves as indicative of the courts' inclination toward ADA narrowing. In *Sutton v. United Air Lines, Inc.*, the Court held that corrective measures must be factored into a disability determination.[99] In *Toyota Motor Manufacturing v. Williams*, the Court held that (1) the ADA is to be "interpreted strictly to create a demanding standard for qualifying as disabled,"[100] (2) "substantial limitation" is effectively "severe limitation,"[101] and (3) persons are "disabled" only if they are significantly impaired in a major life activity across all spheres in which that activity might be conducted.[102] Neither of these decisions seems consistent with the ADA's remedial purpose.

1. Sutton v. United Air Lines, Inc.

In *Sutton v. United Air Lines, Inc.*, decided the same day as *Kirkingburg*, twin sisters, both of whom suffered from severe myopia, applied to United for employment as commercial airline

briefs were filed. *See id.* at 474. Second, it is not clear that the courts, in turning the heat up, intended to boil the frog, though that nevertheless is the threatened outcome.

98. *See, e.g.*, Toyota Motor Mfg. v. Williams, 534 U.S. 184, 188 (2002); *Sutton*, 527 U.S. at 477–80. Interestingly, the Court in both cases explicitly asserts that its holdings *are* consistent with the ADA's purposes.

99. 527 U.S. at 482.

100. *Toyota*, 534 U.S. at 197.

101. *Id.* at 198.

102. *Id.* at 201–02.

pilots.[103] Each sister's uncorrected visual acuity at the time of application was 20/200 or worse in the right eye and 20/400 or worse in the left eye.[104] At that level of visual acuity, the sisters "effectively [could not] see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores."[105] With corrective lenses, the sisters had 20/20 vision.[106]

Although well below United's uncorrected visual acuity standard for its commercial airline pilots of 20/100 or better,[107] United mistakenly invited the sisters to interview further and complete flight simulator tests.[108] But upon discovering in the interviews that it had overlooked the sisters' visual deficiencies, United rescinded its invitations and did not offer either sister a pilot position.[109]

The sisters sued United under the ADA for rejecting their applications on the basis of their visual disability. The trial court dismissed the sisters' complaint for failure to state a claim since fully correctable visual impairment could not "actually substantially limit[] . . . any major life activity."[110] The Tenth Circuit affirmed on the same grounds, effectively holding that it was proper to consider the sisters' seeing abilities in their corrected state when determining whether they were disabled under the ADA.[111] This decision was "in

103. *Sutton*, 527 U.S. at 475. Despite being decided on the same day, *Sutton*'s tone is arguably inconsistent with that of *Kirkingburg*. In *Kirkingburg*, the Court merely preserved the ADA's "case-by-case" inquiry and declared that to show oneself "disabled" under the ADA is "not an onerous burden." *See supra* Part II.D. *Kirkingburg* did not represent a departure from the plain meaning of the ADA, the EEOC's interpretations, or most courts' decisions to that point.

In *Sutton*, however, the Court held, contrary to eight circuit courts of appeal, agency interpretive guidance, and the common sense notion that statutes do not plainly mean that which they do not plainly state, that mitigating measures must be considered as part of a disability determination under the ADA. *See infra* Part III.A.1. *Sutton* also states, with grave precedential effect, that Congress intended the ADA to be interpreted restrictively.

Attempting to reconcile the two decisions, it is possible that the Court saw "disability" to be a relatively light evidentiary burden applicable to only a relatively small number of people. To apply a generous evidentiary burden to an ungenerously small group is to be only half faithful to Congress's stated purposes for the ADA. *See supra* Part II.C.

104. *Sutton*, 527 U.S. at 475.

105. *Id.* (citations omitted).

106. *Id.*

107. *Id.* at 476.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 477.

tension" with other courts of appeal and agency interpretations instructing that ADA disability be determined without regard to corrective measures.[112]

After noting the split in authority, and after dutifully laying out the ADA's statutory and regulatory framework,[113] the Supreme Court addressed the corrective measures question. Since the language of the ADA does not directly address the issue, the sisters argued that the EEOC's guidance should control, namely that "determination of whether an individual is substantially limited in a major life activity [should] be made without regard to mitigating measures."[114] United countered that EEOC's guidance should be disregarded because it conflicted with the plain meaning of the ADA, which requires that substantial limitations "actually and presently exist."[115] The Court agreed with United, concluding that "the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA."[116]

The Court stated three justifications for its conclusion.[117] First, the Court noted that the ADA uses "substantially limits" in the present indicative form, suggesting that "a person [must] be presently—not potentially or hypothetically—substantially limited"

112. At the time *Sutton* was decided, the *Sutton* Court noted that the decisions in *Bartlett v. N.Y. State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629–30 (7th Cir. 1998); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 859–66 (1st Cir. 1998); and *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937–38 (3d Cir. 1997), had all held that disabilities should be determined without reference to mitigating measures. *See Sutton*, 527 U.S. at 477. The Court also noted that the EEOC and the DOJ had issued similar guidelines. *See id.* at 480 ("[T]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." (quoting 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998))); *see also* 28 C.F.R. pt. 35 app. A § 35.104 (2006) ("The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services.").

113. *Sutton*, 527 U.S. at 477–80.

114. *Id.* at 481 (citing 28 C.F.R. pt. 35 app. A § 35.104 (1998); 28 C.F.R. pt. 36 app. B § 36.104; 29 C.F.R. pt. 1630 app. § 1630.2(j)).

115. *Id.*

116. *Id.* at 482. *See generally* Thad LeVar, *Why an Employer Does Not Have To Answer for Preventing an Employee with a Disability from Utilizing Corrective Measures: The Relationship Between Mitigation and Reasonable Accommodation*, 16 BYU J. PUB. L. 69 (2001).

117. *Sutton*, 527 U.S. at 482.

to be "disabled."[118] The Court reasoned that a person's use of effective corrective measures could preclude the possibility of simultaneously suffering substantial limitation.[119] Second, along those same lines, the Court opined that to judge a person in his or her uncorrected state contravenes the ADA's "individualized inquiry" because it would require courts to speculate as to how the uncorrected impairment usually affects individuals.[120] To project general group characteristics onto individuals, the Court concluded, "is contrary to both the letter and the spirit of the ADA."[121]

Finally, "and critically,"[122] the Court pointed to the ADA's conservative estimate of 43 million disabled Americans as giving "content" to the ADA's terms.[123] After recounting several disability estimates Congress could have included in the ADA,[124] the Court concluded: "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number . . . . That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[125] It is here, by interjecting the phrase "and critically," that the majority indicated the relative importance, in its view, of this

118. *Id.*

119. *Id.* at 482–83.

120. *Id.* at 483.

121. *Id.* at 484. The Court also pointed out that disregarding mitigating measures could force courts to disregard the mitigating measures' negative side effects, *id.*, though it did not clearly demonstrate how a disabled person whose mitigating measures produce negative side effects is worse off by being considered disabled without regard to mitigating measures. Indeed, it is doubtful that a disabled person whose mitigating measures result in further limitation would persist with such measures unless the underlying disability was itself sufficiently limiting as to qualify the person for ADA protection. In other words, if your disability is so bad that you tolerate corrective measures that, on the whole, make you worse off, your disability probably qualifies you for protection without regard to mitigating measures. Thus, for all practical purposes, considering mitigating measures will never swing in favor of coverage for the disabled person. *Cf.* Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 386 (3d Cir. 2004) (noting that while dialysis might effectively cure an employee's renal failure, she may still be disabled if the time-consuming and cumbersome treatment process substantially limits her mobility and other aspects of daily living).

122. *Sutton*, 527 U.S. at 484.

123. *Id.* at 487.

124. *Id.* at 484–87.

125. *Id.* at 487. Justice Ginsburg's concurrence echoes the majority's final point, concluding that, because the Act speaks of discrete and insular minorities, Congress intended to extend ADA protection to a "confined, and historically disadvantaged, class." *Id.* at 494–95 (Ginsburg, J., concurring).

justification,[126] thereby belying its unexplained tendency to narrow the ADA's applicability.

The Court's first two justifications rely on the conclusion that the ADA can be read "by its terms" and thus understood without referring to the legislative history.[127] "Looking at the Act as a whole," the Court saw the present indicative verb form of "substantially limits" coupled with the individual inquiries requirement as evidence that corrective measures should be considered in determining ADA coverage.[128] This conclusion is a plausible, if formalistic, interpretation of Congress's intent. It nevertheless seems to be wrong.

The legislative history reveals that the Senate, the body that originated the ADA, intended that "whether a person has a disability should be assessed without regard to the availability of mitigating measures."[129] A subsequent House report clarifies that persons with "correctable" or "controllable" disabilities were still to be covered as disabled, "without considering whether mitigating measures . . . would result in a less-than-substantial limitation."[130] Had the Court acknowledged the ambiguity in the ADA—and the argument for ambiguity is strong since the statute does not at all mention corrective measures—the Court may well have decided the issue differently.

Nevertheless, though it is debatable whether the ADA's terms can be read together unambiguously to arrive at the conclusion that corrective measures are part of the disability inquiry,[131] the Court's first two cited justifications are formal and grammatical in nature. And, because they are formal and grammatical, they do not necessarily, by themselves, cast the ADA as a restrictive statute, even though a holding based thereon results in fewer persons covered. After all, as the Court notes, the inquiry is still individualized, and a person using corrective measures may yet qualify as "disabled" under the ADA.[132] Had the Court stopped here, its holding could be seen

126. *Id.* at 484 (majority opinion).

127. *See id.* at 482.

128. *Id.* at 482–84.

129. H.R. REP. NO. 101-485, pt. 3, at 28 (1990).

130. S. REP. NO. 101-116, at 23 (1989).

131. *See Sutton*, 527 U.S. at 495–502 (Stevens, J., dissenting).

132. *Id.* at 487–88 (majority opinion).

as expressing no opinion as to the breadth of coverage Congress intended.

The Court's third justification, however, introduces the idea that Congress purposely imbued the ADA with a latent exclusivity that was to shape every consideration in applying the statute. In support of this third justification, the Court ignores the ambiguity inherent in the ADA's reference to 43 million disabled Americans. The reference, on its face or even in the context of other provisions, does not indicate whether it is to be read as inclusive or exclusive. To provide that figure with meaning, the Court turns to a long exposition of how the figure came to be, admitting at the outset, however, that "the exact source of the 43 million figure is not clear."[133]

Undaunted, the Court cites as authority not the congressional record, but a law review "article authored by the drafter of the original ADA bill introduced in Congress in 1988,"[134] who recounts several disability estimates, utilizing various conceptions of disability, that preceded—and are not mentioned in—the House or Senate Reports that accompanied the bill.[135] Justice Stevens, in his dissent, notes: "Given the inability to make the 43 million figure fit any consistent method of interpreting the word 'disabled,' it would be far wiser for the Court to follow—or at least to mention—the documents reflecting Congress' contemporaneous understanding of the term: the Committee Reports on the actual legislation."[136] The Supreme Court has repeatedly stated that the most authoritative source for legislative history is committee reports.[137]

No matter how logically interpreted, the sources the Court cites to substantiate its "43 million is exclusive" claim are not, by its own standards, the most authoritative. Since Congress itself did not document the process it followed to arrive at the 43 million estimate,[138] and because it is not actually a coverage provision to

133. *Id.* at 484.

134. *Id.* at 511 (Stevens, J., dissenting) (quoting *id.* at 484).

135. *Id.* at 484–88 (majority opinion).

136. *Id.* at 512 (Stevens, J., dissenting).

137. *See* Garcia v. United States, 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

138. *See Sutton*, 527 U.S. at 484 (admitting that "the exact source of the 43 million figure is not clear").

apply, it would seem unnecessary to imbue "43 million" with any meaning either way.

Left with a neutral "43 million," facial ambiguity regarding corrective measures, and legislative history strongly suggesting that corrective measures are irrelevant, the Court could have been "faithful to the remedial purpose of the Act" and "give[n] it a generous, rather than a miserly, construction."[139] As Justice Stevens notes, "It has long been a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.'"[140] In light of those purposes, Justice Stevens concludes that the ADA's three-prong disability test can be "most plausibly read together not to inquire into whether a person [has an impairment]—past or present—that substantially limits, or did so limit, the individual before amelioration."[141] He continues, "This reading avoids the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations."[142] Addressing the fear of over-inclusiveness, Justice Stevens concludes that letting more disabled persons "in the door" is not worrisome because "[i]nside that door lies nothing more than basic protection from irrational and unjustified discrimination because of a characteristic that is beyond a person's control."[143] In that light, "[n]one of the Court's reasoning . . . justifies a construction of the Act that will obviously deprive many of Congress' intended beneficiaries of the legal protection [the ADA] affords."[144]

Since the Court's formalistic justifications, however debatable, had already substantiated its holding, to interpret "43 million" as exclusive in support of an exclusive holding is to reveal, if not explain, a propensity to narrow the ADA's coverage. Worse yet, it sets a tone of narrowness that can be seen in subsequent decisions.

139. *Id.* at 495 (Stevens, J., dissenting).

140. *Id.* at 504 (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)).

141. *Id.* at 499.

142. *Id.*

143. *See id.* at 504.

144. *Id.* at 508.

2. Toyota Motor Manufacturing v. Williams

The Supreme Court, based in part on *Sutton*'s message of latent exclusivity, again manifested its tendency to narrow the ADA in *Toyota Motor Manufacturing v. Williams*.[145] Williams worked for Toyota's automobile manufacturing plant in Georgetown, Kentucky, where her use of pneumatic tools on the engine fabrication assembly line eventually caused pain in her hands, wrists, and arms.[146] Toyota's in-house physician diagnosed this pain as bilateral carpal tunnel syndrome and bilateral tendonitis, and her personal physician identified work restrictions.[147] Toyota attempted to reassign Williams based on these restrictions, and, after a succession of dissatisfactory job reassignments and legal disputes, Williams accepted an assignment to an inspection unit that required her to visually inspect vehicles for paint defects.[148] After a couple of years, Toyota expanded her duties to include applying a highlight oil to the cars using a sponge attached to a block of wood.[149] This assignment eventually caused Williams's shoulders to hurt,[150] and Williams requested that she be allowed to perform only her original inspection duties.[151] Williams never did work again in her original assignment or otherwise and was eventually terminated.[152]

Williams sued Toyota in federal district court, alleging, among other things, that Toyota had violated the ADA by "failing to reasonably accommodate her disability and by terminating her employment."[153] Williams claimed that she was "disabled" under the ADA because "her physical impairments substantially limited her in (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working, all of which, she argued,

145. 534 U.S. 184, 188 (2001).

146. *Id.* at 187.

147. *Id.*

148. *Id.* at 188.

149. *Id.* at 188–89.

150. *Id.*

151. *Id.* at 189.

152. *Id.* at 188–90. The parties disagreed about the events that transpired. *See id.* at 189. Williams claimed that Toyota refused her request and forced her to continue working as it had most recently prescribed. *Id.* Toyota claimed that Williams merely stopped showing up for work regularly. *Id.* On her last day of work at Toyota, Williams's physicians placed her under a "no-work-of-any-kind" restriction. *Id.* at 190. Nearly two months later, she received a letter from Toyota terminating her employment because of her poor attendance record. *Id.*

153. *Id.*

constituted major life activities under the Act."[154] Toyota prevailed on a motion for summary judgment, with the district court holding, inter alia, that Williams had suffered from a physical impairment but not to the degree that it substantially limited any major life activity.[155] On appeal, the Sixth Circuit reversed the district court, concluding that Williams was in fact substantially limited in a "class of manual activities affecting the ability to perform tasks at work."[156]

In considering Williams's claims, the Supreme Court started with the ADA definition of disability, since in its view, the issue on appeal was "whether [Williams's] impairments substantially limited [her] in the major life activity of performing manual tasks."[157] To answer this question, the Court noted that "[t]here are two potential sources of guidance for interpreting the terms of this [disability] definition—the regulations interpreting the Rehabilitation Act of 1973,[158] and the EEOC regulations[159] interpreting the ADA."[160]

The Rehabilitation Act of 1973[161] was enacted to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society"[162] and has previously been identified in this Comment as the philosophical forerunner of the ADA.[163] With regard to the legitimacy of the Rehabilitation Act interpretations as persuasive authority on the meaning of "disability," the Court said,

> As we explained in *Bragdon v. Abbott*, Congress did more in the ADA than suggest this construction; it adopted a specific statutory provision directing as follows: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the

154. *Id.*

155. *Id.* at 190–91.

156. *Id.* at 192 (quoting Williams v. Toyota Motor Mfg., 224 F.3d 840, 843 (6th Cir. 2000), *rev'd*, 534 U.S. at 184).

157. *Id.* at 196.

158. 29 U.S.C. § 706(8)(B) (1988).

159. *See* 29 C.F.R. § 1630.2 (2005).

160. *Id.* at 193 (citing 29 U.S.C. § 706(8)(B) (1988)); *see also* 29 C.F.R. § 1630.2 (2005) (EEOC regulations).

161. 29 U.S.C. §§ 701–96 (2000).

162. *Id.* § 701(b)(1).

163. *See supra* Part II.B.

> Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title."[164]

The Court was more skeptical about the legitimacy of the EEOC regulations in interpreting "disability," noting, as it had in *Sutton*, that "no agency has been given authority to issue regulations interpreting the term 'disability' in the ADA. Nonetheless, the EEOC has done so."[165] But instead of conclusively dismissing the EEOC's disability definition or otherwise deciding the amount of deference due, the Court merely assumed, without deciding, that the regulations were reasonable, since both parties had.[166]

Considering the Rehabilitation Act regulations as the most legitimate persuasive authority for ADA disability interpretation, the Court looked there first, citing the Department of Health, Education, and Welfare (HEW) regulations for the meaning of both "physical impairment"[167] and "major life activity."[168] HEW, however, never defined "substantially limits."[169]

Thus compelled to consult the EEOC regulations for an understanding of "substantially limits,"[170] the Court noted that an impairment can be "substantially limit[ing]" if the impaired person is (1) "[u]nable to perform a major life activity that the average person in the general population can perform"[171] or (2) "[s]ignificantly restricted as to the condition, manner, or duration under which [he

164. *Toyota*, 534 U.S. at 193–94 (citations omitted).

165. *Id.* at 194.

166. *Id.* ("Because both parties accept the EEOC regulations as reasonable, we assume without deciding that they are, and we have no occasion to decide what level of deference, if any, they are due.").

167. *Id.* at 194–95. HEW regulations define "physical impairment" to mean "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine." 45 C.F.R. § 84.3(j)(2)(i)(A) (2003).

168. *Toyota*, 534 U.S. at 195. HEW regulations provide a list of examples of "major life activities" that includes "walking, seeing, hearing" and "performing manual tasks." *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(ii)).

169. *Id.* (stating the Department of Health, Education, and Welfare's position that a definition of "substantially limits" was impractical at that time (citing Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 42 Fed. Reg. 22,676, 22,685 (May 4, 1977) (to be codified at 45 C.F.R. pt. 84))).

170. *Id.*

171. *Id.* (citing 29 C.F.R. § 1630.2(j)(i) (2001)).

or she] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[172] The Court further noted that, in considering the substantial limitation question, the EEOC regulations instruct courts to consider "the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment."[173] Apparently unimpressed with the EEOC provisions just considered, however, the Court declared that the EEOC's regulations were "silent" as to what constitutes "substantial limitation" in regard to performing manual tasks and proceeded to craft its own definition.[174]

The Court's definition of "substantial" relies "first and foremost" on two dictionaries' definitions of "substantial" as meaning "considerable" or "to a large degree."[175] From these dictionary definitions, the Court concluded that "[t]he word 'substantial' . . . clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities."[176] The Court intimated that these dictionary definitions comport with its decision in *Kirkingburg*,[177] noting parenthetically that *Kirkingburg*'s holding—"mere difference" does not equate to "significant restric[tion]"—is equivalent to disallowing minor limitations.[178]

172. *Id.* at 195–96 (citing 29 C.F.R. § 1630.2(j)(ii)).

173. *Id.* at 196 (citing 29 C.F.R. § 1630.2(j)(2)(i)–(iii)).

174. *Id.* Given the EEOC's instruction to consider the nature, duration, and impact of the impairment in determining "substantial limitation," *see* 29 C.F.R. § 1630.2(j)(2)(i)–(iii), the Court's characterization of EEOC regulations as being "silent" on the issue appears to be a calculated precursor to an inexplicably restrictive interpretation akin to that seen in *Sutton*.

175. *Toyota*, 534 U.S. at 196–97 (citing 17 OXFORD ENGLISH DICTIONARY 66–67 (2d ed. 1989) (defining "substantial" as "[r]elating to or proceeding from the essence of a thing; essential; [o]f ample or considerable amount, quantity, or dimensions"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976) (defining "substantial" as "considerable in amount, value, or worth" and "being that specified to a large degree or in the main")).

176. *Id.* at 197.

177. *See* 527 U.S. 555, 565 (1999).

178. *Toyota*, 534 U.S. at 197. The Court here accurately, if incompletely, characterizes its *Kirkingburg* holding. The Court correctly notes that *Kirkingburg* stands for the idea that minor limitations are not "substantial" limitations. *See Kirkingburg*, 527 U.S. at 565. However, as this Comment has previously noted, *Kirkingburg* also stands for the idea that "substantial limitation" is "not an onerous [proof] burden" for the disabled to carry. *See supra* Part II.D; *see also Kirkingburg*, 527 U.S. at 567.

The Court then defined "major" as meaning "important,"[179] concluding that "'[m]ajor life activities' . . . refers to those activities that are of central importance to daily life."[180] Under that definition, the Court explained, Williams's manual tasks only constitute "major life activities" if they are central to daily life, if not individually, at least together.[181] Ultimately, the Court presented the following synthesized definition: "We . . . hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or *severely* restricts the individual from doing activities that are of central importance to most people's daily lives."[182]

Applying this definition, the Court found that Williams was not substantially limited in performing the manual tasks central to most people's daily lives.[183] In light of Williams's ability to "brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house,"[184] the Court concluded that her intermittent difficulties with sweeping, dancing, dressing, playing with her children, gardening, and driving long distances "did not amount to . . . severe restrictions in the activities that are of central importance to most people's daily lives."[185]

This appraisal of Williams's limitations is perhaps the strongest indication in the case that the Court favors a narrow ADA, though the Court's narrowing inclination is apparent in several other aspects of its decision as well. First, the Court hinted early on at its intentions to narrowly interpret the Act when it characterized the EEOC's regulations as "silent" on the meaning of "substantially limits,"[186] notwithstanding the EEOC's definition of "substantially limits" as "[u]nable to perform a major life activity that the average person in the general population can perform[] or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to

179. *Kirkingburg*, 529 U.S. at 567.
180. *Id.*
181. *Id.*
182. *Toyota*, 534 U.S. at 198 (emphasis added).
183. *See id.* at 201–02.
184. *Id.* at 202.
185. *Id.*
186. *See supra* note 169.

the . . . the average person,"[187] thereby providing it with an opportunity to define "substantial limitation" as it wished.

Second, the Court attempted to validate its own definition of "substantial limitation"—read "severely restricts"—by hearkening back to *Sutton*:

> That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act. When it enacted the ADA in 1990, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities." If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher.[188]

As this Comment has already noted, *Sutton*'s interpretation of Congress's 43 million estimate as indicating an exclusive ADA is flawed. The interpretation relies on a mishmash of varying disability estimates utilizing a variety of disability conceptions instead of giving weight to the House and Senate committee reports, neither of which mentions the other studies to which the Court cites.[189] The interpretation also ignores the contextual clues from the legislative history and interpretive regulations generally, with the Court reading in exclusivity even where the House and Senate reports and agency interpretations instruct against the consideration of corrective measures when determining disability. As was noted, *Sutton*'s reading of 43 million unwarrantedly imbued the ADA with a latent exclusivity, which, not surprisingly, the *Toyota* court adopts. The Court's reliance on *Sutton* here clearly illustrates the damage from that decision's overreaching.[190]

Third, the Court took liberties with the English language in converting "substantially limits" into "severely restricts." As an initial matter, a survey of thesaurus and dictionary references—including

187. 29 C.F.R. § 1630.2(j)(1) (2005).

188. *Toyota*, 534 U.S. at 197 (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999)) (citations omitted).

189. *See supra* Part III.A.1.

190. *See Sutton*, 527 U.S. at 484–87; *see also supra* Part III.A.1.

those to which the Court cited in its opinion—shows no true synonymy between "substantial" and "severe."[191] Substantial means "true or real; not imaginary," or "considerable in importance, value, degree, amount, or extent."[192] Synonyms include "consequential," "actual," "existent," "concrete," "meaningful," and "sizeable."[193] Relevant here, severe means "causing sharp discomfort or distress; extremely violent or intense," or "very serious; grave or grievous."[194] Its synonyms include "arduous," "critical," "dangerous," and "serious."[195]

Though none is seen here, any synonymy that does exist between "substantial" and "severe" is limited by *Kirkingburg*'s holding that proving "substantial limitation" is not "an onerous burden."[196] If the burden is not onerous, it seems inapt to describe it using the term "severe."[197] Moreover, the idea from which "severe" apparently comes, namely that the ADA's terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled,"[198] relies

191. *See Toyota*, 534 U.S. at 196–97 (referencing dictionary definitions of "substantial").

192. AMERICAN HERITAGE COLLEGE DICTIONARY 1354 (3d ed. 1997).

193. ROGET'S NEW MILLENNIUM THESAURUS (Barbara Ann Kipfer ed., 1st ed. 2006), http://thesaurus.reference.com/browse/substantial.

194. AMERICAN HERITAGE COLLEGE DICTIONARY 1354 (3d ed. 1997).

195. ROGET'S NEW MILLENNIUM THESAURUS (Barbara Ann Kipfer ed., 1st ed. 2006), http://thesaurus.reference.com/browse/severe. "Serious" is the only common synonym between substantial and severe, but this minor commonality fails to outweigh the clear difference between the two words that all the other synonyms of each word demonstrate.

196. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999).

197. This Comment favors the term "consequential" as a synonym for "substantial." "Consequential" means "having significant consequences," which echoes the EEOC's regulatory language of "significant[] restrict[ion]." MERRIAM-WEBSTER ONLINE DICTIONARY (2005), http://m-w.com/dictionary/consequential. "Consequential" also means "having great meaning or lasting effect, or important," a meaning it shares with "substantial," revealing that it is indeed an apt synonym. MERRIAM-WEBSTER ONLINE THESAURUS (2005), http://m-w.com/cgi-bin/thesaurus?book=Thesaurus&va=consequential; MERRIAM-WEBSTER ONLINE THESAURUS (2005), http://m-w.com/cgi-bin/thesaurus?book=Thesaurus&va=substanrial&x=0&y=0. It is also synonymous with "material" and "meaningful," as well as the other synonyms of "substantial." MERRIAM-WEBSTER ONLINE THESAURUS (2005), http://m-w.com/cgi-bin/thesaurus?book=Thesaurus&va=consequential; MERRIAM-WEBSTER ONLINE THESAURUS (2005), http://m-w.com/cgi-bin/thesaurus?book=Thesaurus&va=subsrantial&x=0&y=0. Reading "substantial" as "consequential" satisfies the *Kirkingburg* Court's desire to mainrain a meaningful minimum threshold while also representing a reachable degree of limitation on the severity continuum Congress created. The Court's choice of "severe" to describe the ADA's limitation threshold disregards not only Congress's apparent intent, but also prior precedent.

198. *See* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 197 (2002) (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999)) (citations omitted).

on *Sutton*'s questionable reading of exclusivity. Again, this reliance has had, and may yet have, unfortunate precedential consequences.[199]

Lastly, the Court makes clear that a person's substantial limitation must manifest itself across all spheres of a major life activity to trigger ADA protection.[200] In fact, the Court intimates that Williams could have shown substantial limitation in performing manual tasks if she could have shown severe difficulty ***both at home and at work.***[201] Unfortunately, this understanding of substantial limitation ignores the reality that a person's limitation in a given activity can be greatly affected by the context in which the activity is performed. For example, a dyslexic person may not experience substantial limitation when leisurely reading the newspaper at home but may experience significant limitation when deciphering complex documents at work. Since it is precisely those struggles in the work sphere that validate and necessitate the ADA's protections, *Toyota*'s conception of "substantial limitation" unquestionably narrows the ADA contrary to Congress' intent. The Court's unanimity in *Toyota* suggests that this narrowing will be difficult to reverse.

Sutton and *Toyota* both reveal the Court's tendency to limit application of the ADA. In each case, the Court stretched to achieve a "demanding standard," almost as if it felt a duty to ensure that the protected class of disabled persons never exceeded 43 million. Perhaps this would not be a problem if the ADA's provisions were better crafted. However, given the dichotomous "qualified individual" standard, a miserly interpretation of "substantial limitation" inarguably shuts out many from the protections of the ADA, particularly the cognitively disabled.

199. *See* EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 800–02 (7th Cir. 2005) (rejecting a district court's interpretation of *Toyota* as having changed the definition of "substantially limits" to "severely restricted," but acknowledging that the ADA, per *Toyota*, contains a demanding standard for qualifying as disabled).

200. *See Toyota*, 534 U.S. at 199–201.

201. *Id.* at 200–02 (stating that showing Williams to be substantially limited in performing manual tasks at work ignores her ability to perform tasks that are "of central importance to people's daily lives" such as household chores, bathing, etc., and that the lower court should have addressed her performance in both contexts to determine whether she was severely restricted when compared to the average person).

B. "Qualified Individual" + "Disability" = ADA's "No Man's Land": A Case Study

The fascinating but unfortunate outcome of *Sutton*, *Toyota*, and their progeny is the near-extinction of the "qualified [but disabled] individual" whom the ADA ostensibly protects.[202] Recall that the ADA protects only those "disabled" individuals that can perform the job's essential functions with or without reasonable accommodation.[203] Assuming that most jobs demand proficiency in a variety of tasks, a person must normally possess considerable ability in order to perform a job's essential functions. In fact, rationally, the more ability, the better. Yet herein lies the paradox: if a person has sufficient ability to perform the essential functions of his or her job, he or she will have difficulty simultaneously showing sufficient limitation in a major life activity so as to clear the courts' "severe limitation" high bar.

The case of *Rohan v. Networks Presentations LLC*,[204] in which the courts determined that an actress suffering from post-traumatic stress disorder was both too competent to be disabled and too disabled to be competent, epitomizes this problem. In *Rohan*, Networks Presentations, a producer of Broadway musicals, employed plaintiff as an actress and singer.[205] When it hired her, Networks Presentations knew that Rohan suffered from post-traumatic stress disorder (PTSD) and severe depression stemming from childhood incest and sexual abuse.[206] It also knew that Rohan's persistent reliving of the abuse through flashbacks often caused "hyperventilation, inability to speak, inability to open her eyes, gagging, bodily pain, and/or staring off into space."[207] Since Rohan's flashbacks were often brought on by exposure to things of a sexual nature, Rohan "found the sexually charged antics of her colleagues difficult to bear,"[208] and she experienced several episodes during the course of her employment and became suicidal.[209] Unable

202. *See* 42 U.S.C. § 12111(8) (2000).
203. *Id.*
204. 375 F.3d 266 (4th Cir. 2004).
205. *Id.* at 269.
206. *See id.* at 268–69.
207. *Id.* at 269.
208. *Id.* at 270.
209. *See id.* at 270–71.

to further cope with Rohan's problems, Networks Presentations terminated her.[210]

Rohan sued for wrongful termination under the ADA.[211] The district court ruled that Rohan was not a "qualified individual" under the ADA because her disabilities prevented her from interacting with others—an essential job function.[212] In an ironic twist, the Fourth Circuit disagreed: not only could Rohan perform the essential function of interacting so as to make her a qualified individual, but her disabilities were not sufficiently severe to even trigger ADA protection.[213] In one appeal, Rohan went from being so disabled as to not qualify for the job to being so capable as to not be disabled under the ADA.

These two dichotomous interpretations of the same set of facts illustrate the difficulty under the narrow ADA of proving that one is both qualified and substantially limited. For these two courts, Rohan was either one or the other. She could not, as the ADA requires, be both.

The fact that the ADA awkwardly requires disabled persons to be both qualified and substantially limited explains why courts must construe the ADA's provisions liberally to effectuate its remedial purposes. The qualified individual requirement does not readily lend itself to generous interpretation because a person either is or is not qualified to perform the essential functions of the job, and it would likely be unduly burdensome on employers to have courts water down essential functions in an effort to lower the qualified individual threshold. The disability requirement, however, is ripe for liberal interpretation because, as has been addressed, courts are often called on to interpret "substantially limits." To be "substantially limited" in a major life activity, a person must show that he or she is "significantly restricted" in the performance of that activity when compared with the average person. Then courts must acknowledge

210. *See id.* at 271.

211. *Id.* at 272.

212. *Id.* Here, the court arguably employs a generous disability standard to find Rohan disabled. However, it swings the disability pendulum so far that direction that she no longer qualifies for ADA protection. Although opposite from the overly restrictive interpretations at issue in this Comment, this standard still ends up denying Rohan protection. This Comment advocates a measured generosity in interpreting disability that will result in more disabled persons being covered by the ADA, not less.

213. *See id.* at 279–80.

that a disabled person's functionality can be perceptibly, consequentially lower than the average person's functionality without rendering that disabled person unqualified to perform a job's essential functions.

Toyota's restrictive interpretation of "substantially limits," born out of *Sutton*'s latent exclusivity notion, created an unnecessarily high coverage threshold. The Court in *Kirkingburg* had already addressed the concern about coverage provisions being interpreted too generously, resolving that courts ought not label "minor" performance deficiencies "substantial," but rather only those that are "actual." A person can have an actual, perceptible performance deficiency relative to the average person without that deficiency rendering him or her incapable of performance. The ADA allows for some ability.

Kirkingburg suggests that courts interpret "substantially limits" after this manner, since any other interpretation, owing to the ADA's awkward "qualified [but disabled] individual" standard, will create an onerous burden for disabled plaintiffs. *Rohan* illustrates the inherent problems in the ADA's dichotomous coverage provisions, problems courts exacerbate by restrictively interpreting "substantial limitation." *Rohan* also foreshadows the potential plight of the cognitively disabled under the narrow ADA.

IV. INTERPRETING THE ADA TO PROTECT THE COGNITIVELY DISABLED

On an ability spectrum ranging from total ability to utter inability, the ADA was designed to protect persons in the midrange.[214] Those at the top were not disabled and did not need protection in order to participate in the economic mainstream.[215] Those at the bottom were so disabled that there was no hope—and no expectation—that they would participate.[216] Those in the midrange, however, demonstrated enough ability that they could be expected to participate in the economic mainstream if employers

214. *See generally* H.R. REP. NO. 101-485, pt. 2 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 304–06; *see also supra* Part II.C–D.

215. *See* H.R. REP. NO. 101-485, pt. 2, *as reprinted in* 1990 U.S.C.C.A.N. 303, 304–06.

216. *See id.*

would make a reasonable allowance for disability.[217] As discussed hereafter in subsection A, most cognitively disabled persons fit naturally in that midrange.

Nonetheless, the courts' narrow interpretation of the ADA, like a vise-grip, has compressed the ability spectrum with the effect of dramatically reducing the midrange. One side of the vise-grip is the "qualified individual" standard; the other side is the ever-heightening disability threshold. As the courts squeeze these sides together, they make it increasingly difficult to be severely cognitively limited in a major life activity and yet to be qualified to perform a job's essential functions without accommodation, as the ADA requires for protection.[218]

Rather than interpreting "substantially limits" to mean "severely restricts," as the *Toyota* court does, this Comment argues that a more appropriate interpretation, one which fits more closely with the intent of the ADA and the Court's holding in *Kirkingburg*, lies in the term "consequential." Such a reading of the law would prevent inconsequential disabilities from burdening employers while protecting those disabled persons whom the narrow ADA has unjustifiably squeezed out. This Comment addresses the cognitively disabled specifically, because, as will be discussed, they are particularly susceptible to being shut out by the narrowing ADA. In discussing cognitive disabilities, the focus is on Attention Deficit Hyperactivity Disorder (ADHD) as a representative disability and on demonstrating its material consequences. The Comment then uses ADHD as part of a larger analysis arguing the value of our interpretation of "substantially limits."

A. An Overview of ADHD

While the medical community has recognized numerous discrete cognitive disabilities,[219] this Comment, when speaking of the cognitively disabled, is referring to persons afflicted with ADHD. Over four percent of adults in the United States suffer from ADHD,

217. *See id.*

218. *See generally* Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002).

219. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 46 (4th ed. 1994) [hereinafter DSM-IV]. Common learning disabilities include dyslexia (difficulty with reading), dysgraphia (difficulty with writing), dyspraxia (difficulty with organizing and initiating action), and dyscalculia (difficulty with numbers). *See id.*

giving it one of the highest incidences among mental disorders.[220] Although hidden from view, ADHD may affect several major life activities, not the least of which is learning.[221]

ADHD is manifest primarily as inattentiveness, hyperactivity-impulsivity, or some combination of the two.[222] To validate an ADHD diagnosis, symptoms must be observed in two or more settings, such as home and work.[223] Diagnosticians must also see "clear evidence of interference with developmentally appropriate social, academic, or occupational functioning."[224] These diagnostic standards represent a more stringent threshold recently implemented because of concerns regarding over-diagnosis.

The inattentiveness element of ADHD often results in careless mistakes, incomplete work, poor organization, and a strong aversion to sustained mental effort.[225] The hyperactivity-impulsivity element manifests itself in adults through constant "feelings of restlessness and difficulty engaging in quiet sedentary activities."[226] It also leads to impatience and intrusive behavior that disrupts "social, academic, and occupational settings."[227] All of these symproms worsen in situations that require sustained attention or mental effort.[228] And contrary to common belief, ADHD is a lifelong disability.[229]

Although some may question the validity of the disorder, neurobiological factors demonstrate actual physiological differences between ADHD adults and the general population.[230] Despite the

220. *See* Ronald C. Kessler, et al., *The Prevalence and Effects of Adult Attention Deficit/Hyperactivity Disorder on Work Performance in a Nationally Representative Sample of Workers*, 47 J. OCCUPATIONAL & ENVTL. MED. 565, 566 (2005).

221. *Cf.* 29 C.F.R. § 1630.2(i) (2005) (listing some major life activities while noting the list is not exhaustive).

222. *See* DSM-IV, *supra* note 219, at 78.

223. *See id.* at 79.

224. *Id.* at 78.

225. *See id.*

226. *Id.* at 79.

227. *Id.*

228. *See id.*

229. *Attention-Deficit/Hyperactivity Disorder*, *in* TEXTBOOK OF CLINICAL PSYCHIATRY (Robert E. Hales & Stuart C. Yudofsky eds.), *available at* http://www.psychiatryonline.com/content.aspx?aID=83134.

230. *See* Margaret Weiss & Candice Murray, *Assessment and Management of Attention-Deficit Hyperactivity Disorder in Adults*, 168 CANADIAN MED. ASS'N J. 715 (2003) (demonstrating actual physical differences in brain activity between normally functioning adults and ADHD adults).

popular belief that people "grow out" of ADHD,[231] as noted above, millions of adults struggle with it. Research demonstrates that adults with ADHD are at a higher risk for drug abuse, marital problems, serious motor vehicle crashes, difficulty managing home and children, and frequent changes in employment.[232] Problematically, ADHD is still referred to as an "invisible" disease because others cannot automatically associate ADHD-motivated behavior with the disease.[233] This is why so many ADHD adults are simply considered to demonstrate "bad character, low motivation, or willful misconduct."[234]

Finally, medication does not fully mitigate ADHD. In one of the largest randomized studies ever conducted on ADHD treatment, the National Institute of Mental Health found that treating ADHD with medication alone produced suboptimal outcomes.[235] This finding echoes other researchers' conclusions that medications by themselves are not adequate and should be only one part of a multi-disciplinary, multimodal treatment approach.[236]

With their myriad symptoms in mind, it should come as little surprise that the ADHD sufferers often struggle in the workplace. Research on ADHD adults in the workplace reveals that they have difficulties developing and using job skills considered essential by the U.S. Department of Labor.[237] ADHD adults are particularly

> Functional MRI studies have shown activity in the frontal striatal networks in adults with ADHD and activity in the anterior cingulate gyrus in subjects without the disorder. Positron emission tomography studies have shown decreased frontal cortical activity in affected adults and have indicated that methylphenidate increases extracellular dopamine levels by blocking the dopamine transporter (DAT), particularly in the striatum. Adults with ADHD have been found to have up to a two-fold increase in DAT-binding potential.

Id.

231. Jeanette Wasserstein, *Diagnostic Issues for Adolescents and Adults with ADHD*, 61 J. OF CLINICAL PSYCHOL. 535, 536 (2005).

232. *See* Weiss & Murray, *supra* note 230, at 716.

233. *See* Kevin Murphy, *Psychosocial Treatments for ADHD in Teens and Adults: A Practice-Friendly Review*, 61 J. CLINICAL PSYCHIATRY 607, 608 (2005).

234. *Id.*

235. *See id.*

236. William W. Dodson, *Pharmacotherapy of Adult ADHD*, 61 J. CLINICAL PSYCHIATRY 589, 604 (2005).

237. *See* Joseph Biederman et al., *A Simulated Workplace Experience for Nonmedicated Adults With and Without ADHD*, 56 PSYCHIATRIC SERVICES 1617, 1619 (2005) ("These skills include the ability to read, think critically, regulate performance, deal with unfamiliar or irregular occurrences, multitask, and work as a member of a team.").

disadvantaged in behavioral measures.[238] Furthermore, ADHD affects not only afflicted individuals' performance, but also the performance of coworkers.[239] Consequently, ADHD adults "are at a high risk of being unemployed or under-employed, are less frequently considered for promotion, and attain much lower wages and salaries."[240]

This all leads one to wonder whether or not the ADHD-disabled persons can be "qualified individuals" under the ADA. The majority of ADHD adults do not report their disabilities to their employers, suggesting that most of them are qualified. For instance, only twenty percent of learning disabled adults report their disorder during job acquisition.[241] Only thirty percent ever report their disability, primarily out of fear of "negative relationship with a supervisor," "negative relationships with coworkers," or "a concern for job security."[242] Because ADHD is not physically apparent, employees that fear negative employment consequences simply stay quiet.[243]

238. *Id.* at 1618.

239. *See id.* at 1619–20 (noting that the lack of inhibition common with ADHD results in behaviors that could distract coworkers, especially during work in teams).

240. *Id.* at 1619–29. Based on the foregoing, the Centers for Disease Control and Prevention (CDCP) considers ADHD a cost burden on society. *See id.* at 1617. Additional research supports the CDCP's conclusion. One report states: "[A]dult ADHD is a commonly occurring disorder in the U.S. civilian labor force that is associated with substantial lost work performance, especially among blue collar workers." Kessler, *supra* note 220, at 570. This poor performance is exacerbated by the fact that only 16.4% of ADHD adults in the workplace report receiving any treatment in the last twelve months. *See id.* at 568. The same report estimates that within the total U.S. labor force, ADHD leads to 120.8 million lost workdays, which equates to $19.6 billion lost annually. *Id.* Other research indicates that ADHD also increases workplace accidents. *See* Andrine Swensen et al., *Incidence and Costs of Accidents Among Attention-Deficit/Hyperactivity Disorder Patients*, J. ADOLESCENT HEALTH 346, 346 (2004).

241. Jospeh W. Madaus et al., *Employment Self-Disclosure of Postsecondary Graduates with Learning Disabilities*, 35 J. OF LEARNING DISABILITIES 364, 365 (2002).

242. *Id.* at 367.

243. *See id.* Low reporting rates are not at all surprising in light of commonly inhospitable organizational dynamics. *See also* Adrienne Colella & Angelo S. DeNisi, *The Impact of Ratee's Disability on Performance Judgments and Choice as Partner: The Role of Disability-Job Fit Stereotypes and Interdependence of Rewards*, 83 J. APPLIED PSYCHOL. 102, 109 (2001). To wit, where an evaluator bears some personal employment risk related to the performance of a disabled coworker, negative bias against the disabled employee is higher. *See id.* Also, even when organizations try to help disabled employees, these efforts are often lost from institutional memory and organizations quickly backslide to their previous neglectful state. Considering the typical organization's environment, the cognitively disabled have little incentive to disclose. *See* Lynn P. Wooten & Erika H. James, *Challenges of Organizational*

But by not disclosing their disabilities, the ADHD-disabled persons run the risk of being mistaken for able-but-substandard employees. For instance, as recounted previously, individuals diagnosed with ADHD exhibit such symptoms as difficulty "following through on instructions, paying close attention, being patient, recording important details, organizing themselves, engaging in tasks that require sustained mental effort, and appearing to be easily distracted or forgetful."[244] Except for the frequency and intensity with which these behaviors occur, these symptoms describe the run-of-the-mill bad employee.

Furthermore, the typical hiring process does not reveal ADHD, so to the employer, the ADHD-disabled person appears perfectly able during the hiring process and for a short time after beginning work. Thus, when the ADHD employee begins to produce below expectations or exhibit the unfavorable behaviors previously discussed, the employer has no reason to think disability is in play. At that point, ADHD-disabled persons who stay quiet about their disability face the prospect of termination for being perceived as bad employees.

Unfortunately, those who disclose their disability in order to explain their poor performance and seek remedial accommodation could, owing to irrational stereotypes and the like, face the same prospect.[245] Justice Stevens, in his *Sutton* dissent, identified the ADA as "encouraging employers 'to replace . . . reflexive reactions to actual or perceived handicaps with actions based on medically sound judgments.'"[246] But the ADA cannot "encourage" employers to act justly towards the disabled unless Congress or the courts make the ADA more broadly applicable.

Interestingly, and perhaps counterintuitively, accommodating the ADHD-disabled may be economical.[247] Research demonstrates that employers would likely realize economic benefits from

Learning: Perpetuation of Discrimination Against Employees with Disabilities, 23 BEHAV. SCI. & L. 123, 137 (2005).

244. Michael Sweeney, *Working Towards a Better Understanding of Attention Deficit Hyperactivity Disorder as a Legal Disability in Employment Law*, 21 J. CONTEMP. HEALTH L. & POL'Y 67, 73 (2004).

245. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 507 (1999) (Stevens, J., dissenting).

246. *Id.* at 504–05 (quoting Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 285 (1987)).

247. *See* Kessler et al., *supra* note 220, at 571.

accommodating ADHD-disabled employees.[248] Thus, employers would likely find that accommodating ADHD-disabled employees is cost effective, thereby giving them no rational incentive to discriminate.[249] However, the prevailing wisdom is that ADA-required accommodations are expensive.[250] And even if employers know otherwise, danger of irrational discrimination still exists.[251] In either case, employers operating within the ADA's narrow framework have little disincentive to discriminate against ADHD applicants or employees because there is little fear of legal repercussions.[252] The following subsection explains how the narrow ADA squeezes the cognitively disabled generally, using ADHD sufferers as an example.

248. *Id.*

249. *Id.*

250. *See id.* On that point, Kessler notes the following:

> Regarding the second part of the question, whether effective outreach and treatment would improve the performance of workers with ADHD sufficiently to have a positive return on investment for employers, the evidence from experimental treatment trials cited at the end of the last paragraph leads to the expectation that presenteeism, and perhaps also absenteeism, would decrease as a result of the successful treatment of workers with ADHD. However, there is no way to know definitively if these decreases in indirect workplace costs would exceed the direct costs of treatment in the absence of an experimental effectiveness study. It seems plausible that this would be the case, however, based on the fact that indirect costs are as high as they are estimated to be here (i.e., more than $6000 per year for technical and blue collar workers and more than $8000 per year for professionals). The fact that these costs are high means that treatment would be cost-effective from the employer perspective even if it only resulted in a 15% reduction in the work performance decrement. Indeed, given that separate research has documented effects of adult ADHD on workplace accidents, an outcome not considered in the current report, an improvement in work performance even less than 15% might have a positive region of interest (ROI) if it helped reduce accidents associated with workers' compensation claims.

Id.

251. *See Sutton*, 527 U.S. at 505–07 (Stevens, J., dissenting).

252. *See* Scott A. Moss & Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 217 (1998). Strictly speaking, the need for an accommodation cannot enter into the employer's decision regarding hiring, discharge, promotion, or other similar employment decisions, unless the accommodation would impose an undue hardship on the employer. *See* 42 U.S.C. § 12112(b)(5)(B) (2000); H.R. REP. NO. 101-485, at 70 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 304; 29 C.F.R. pt. 1630 app. § 1630.9(b) (2005). However, this prohibition is virtually impossible to enforce.

B. Applying the ADA to the Cognitively Disabled

To appreciate the narrow ADA's potential effects on the cognitively disabled, it is helpful to first consider the ADA's originally intended effects on this group. Under the EEOC's interpretive regulations discussed above, disabled individuals must show themselves to have a mental impairment that substantially limits one or more major life activities.[253] Consider ADHD as an example. Under any reasonable reading, "mental impairment" encompasses ADHD,[254] and ADHD undeniably limits the enumerated major life activity of learning.[255] Thus, in determining whether dyslexic persons are "disabled" under the language of the ADA as interpreted by the EEOC, the only real question left to answer is whether the ADHD-induced learning limitation is substantial when compared with the learning abilities of the average person.[256] A court would determine whether ADHD amounts to a substantial limitation in learning on a case-by-case basis, examining the nature, duration, and impact of ADHD on the learning of the individual.[257]

ADHD is an incurable, lifelong condition that affects one's ability to sustain concentration.[258] Since concentrating is fundamental in American education, difficulty with concentration-intensive activities can put an ADHD person at a marked learning disadvantage when compared to the average person in the general population, who can concentrate for a much longer duration. The learning disadvantage that often makes school difficult as a child can later make work difficult. ADHD can thus be professionally damaging.[259]

253. *See generally* 29 C.F.R. § 1630.

254. *See id.* § 1630.2(h)(2); *see also supra* Part II.B.

255. 29 C.F.R. § 1630.2(i).

256. *See id.* § 1630.2(j)(1)(ii). That "substantial limitation" is the dispositive factor in the disability determination for dyslexic persons holds true for the cognitively disabled generally. Thus, it is the factor this Comment has examined most closely.

257. *See id.* § 1630.2(j)(2)(i)–(iii).

258. *See supra* Part IV.A.

259. *See supra* Part IV.A. This is not to say that dyslexic persons cannot cope with their impairment. On the contrary, many develop techniques to achieve an adequate-to-the-task level of functionality in reading and writing, and many progress through school without serious incident. Nevertheless, absence of serious incident should not be mistaken for absence of limitation: to achieve adequacy in learning, dyslexic persons must expend substantial effort. This strongly evidences the substantial nature of their learning limitation. *See supra* Part IV.A.

Under the foregoing analysis of ADHD-disabled persons' "disability" claims according to the ADA/EEOC plain meaning, courts should be hard pressed to conclude that ADHD's nature, duration, and impact do not substantially limit learning consequent to being considered "disabled" under the ADA.[260] Thus, if ADHD-disabled persons find themselves outside the ADA's coverage, it is not because the ADA's or EEOC's plain language puts them there. Nor would it be because Congress did not intend for ADHD-disabled persons and other cognitively disabled persons to be covered, though the courts appear to suggest as much.[261]

Indeed, in contrast to the original ADA's simple—and generous—disability test is the judicially created narrow ADA test. In the introductory analysis of most courts' ADA decisions, the ADA's narrowing is unapparent because courts consistently cite directly to the statute and regulations for their disability test. However, as the analysis progresses, courts begin to apply narrow language from other cases to create an ADA with stricter interpretations of coverage terms. Consider *Sutton*.[262] Straight from the regulations, the Court quotes "substantially limits" as being "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[263] Yet the court interposes the idea, contrary to then-established EEOC guidelines,[264] that mitigating measures must be considered in determining "substantial limitation."[265] Thus, the substantial limitation test morphs from "being significantly restricted in a major

260. ADHD is not a per se disability. Thus, persons with ADHD must still show on a case-by-case basis that ADHD substantially limits their performance in a major life activity. The ADA contemplates that ADHD may substantially limit one person while only marginally limiting another. Of these two persons, the ADA would cover only the first.

261. *See supra* Part III.

262. *See supra* Part III.A.1.

263. Sutton v. United Air Lines, Inc., 527 U.S. 471, 480 (1999) (internal quotation marks omitted) (quoting 29 C.F.R. § 1630.2(j) (1998)).

264. *See, e.g.*, 28 C.F.R. pt. 35 app. A § 35.104 (2006); 28 C.F.R. pt. 36 app. B § 36.104; 29 C.F.R. pt. 1630 app. § 1630.2(j) (2006).

265. *See Sutton*, 527 U.S. at 482–89. It should be noted here that medication as a mitigating treatment for ADHD is not as effective as are corrective lenses for vision deficiencies. *See supra* note 250. Nevertheless, it may be effective enough to reduce a substantial limitation gap to a minor one in the courts' eyes.

life activity when compared to the average person" into "being significantly restricted in a major life activity when compared to the average person *after taking into account mitigating measures.*"

Likewise, consider *Toyota.*[266] The Court quotes the same regulatory "substantially limits" definition as quoted in *Sutton.*[267] Nevertheless, the Court declares the EEOC to be silent on the meaning of "substantially limits"[268] and proceeds to craft its own definition, equating the term to "severely restricts."[269] Even worse, the Court reinterprets "substantial limitation in a major life activity" as requiring manifest limitation across all spheres in which the major life activity is performed. Narrowing from where *Sutton* left off, *Toyota* then changes "being significantly restricted in a major life activity when compared to the average person *after taking into account mitigating measures*" to "being *severely* restricted *across all spheres in which the major life activity is performed* when compared to the average person *after taking into account mitigating measures.*"

An inclusive ADA may be seen as a hardship on employers and court clerks because it potentially extends protection to too many people. Since an inclusive ADA, however, extends protection only to those who can demonstrate a meaningful, material, and actual limitation, is it ever right to deny protection to deserving individuals simply because they are numerous? After all, women are protected under Title VII despite constituting roughly half of the U.S. population.[270] Congress did not make ADA legitimacy conditional on the number of disabled persons remaining at or below 43 million. On the contrary, Congress stated its unqualified purpose as protecting "individuals with disabilities."[271] There is no cap, and the courts need not feel obligated to impose a ceiling on the number in any protected class.[272]

266. *See supra* Part.III.A.2.

267. *See* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 195–96 (2002).

268. *See id.* at 196.

269. *Id.* at 198; *see supra* text accompanying note 182.

270. *See* 42 U.S.C. § 2000e-2(a) (2000).

271. *See, e.g., id.* at §12101(a)(5).

272. *Cf.* Sutton v. United Air Lines, Inc., 527 U.S. 471, 504 (Stevens, J., dissenting) ("I think it quite wrong for the Court to confine coverage of the [ADA] simply because an interpretation of 'disability' that adheres to Congress' method of defining the class it intended to benefit may also provide protection for 'significantly larger numbers' of individuals than estimated in the [ADA]'s findings." (citations omitted)).

Returning to the ADHD hypothetical, applying this narrower disability standard to ADHD-disabled persons strongly suggests that the narrow ADA will wrongly shut out many individuals from the ADA's protection. ADHD-disabled persons can be substantially limited in learning because of concentration difficulties affecting their ability to read, write, and follow instructions. But are they *severely* restricted in learning? And, if so, are they severely restricted in learning *not just at school or work, but also at home or at church*? Finally, are they substantially behind others *even when using coping techniques*? Under the narrow ADA's test for "disability," an ADHD-disabled person that could answer yes to all these questions would be "disabled" under the courts' narrow ADA. Yet it is difficult to imagine an ADHD-disabled person so disabled as to be able to affirmatively answer these questions, while simultaneously possessing the ability to perform the essential functions of most jobs. Thus, the ADHD-disabled person in this hypothetical would be protected from discrimination under the ADA only if he could qualify for a job.

While the physically disabled undoubtedly feel the effects of the narrow ADA, the nature of physical disability can soften the impact. Take as another example an attorney with polio. He or she may be severely limited across all spheres in the major life activity of walking when compared to the average person, even after factoring in the use of a cane, and yet still be able to perform the essential functions of his or her job, including reading, writing, speaking, and thinking. The job of attorney is primarily a mentally intensive job, and physical disability does not interfere with the essential functions of a mentally intensive job. Consequently, the physically disabled attorney might be a "qualified [but disabled] individual" within the narrow ADA.

For the cognitively disabled attorney, however, his or her disabilities directly interfere with the essential functions of a mentally intensive job. If the cognitive disability is minor, then the attorney is "qualified" but not "disabled." If the cognitive disability is substantial, the converse is true. Either way, as this hypothetical illustrates, it would seem virtually impossible for a cognitively disabled person in a mental job to be a "qualified [but disabled] individual" under the narrow ADA. In an increasingly information-based service economy, where the majority of jobs are primarily mentally intensive, rather than physically intensive, the cognitively

disabled will confront this problem again and again unless the onerous interpretation of "substantial limitation" is moderated.

C. A Modest Proposal: Return to a Plainer Reading of "Substantial"

In an ironic play on words, *Toyota*'s restrictive reading of "substantially limits" coupled with *Sutton*'s seeds of latent exclusivity disables the ADA in its role as protector of the disabled. The magnitude of the problem caused, however, belies the simplicity with which the problem could be fixed. The solution is simple because it merely entails revisiting "substantial" to restore its proper meaning.

One such definition for "substantial" is "true or real; not imaginary."[273] Others include "considerable in importance, value, degree, amount, or extent."[274] Synonyms of "substantial" include "consequential," "actual," "existent," "concrete," "meaningful," and "sizeable."[275] This Comment favors the term "consequential" as a synonym for "substantial."

"Consequential" means "having important consequences; significant,"[276] which echoes the EEOC's regulatory language of "significant[] restrict[ion]."[277] "Consequential" also means "following as an effect, result, or conclusion,"[278] and "important; influential,"[279] meanings it shares with "substantial," revealing that it is indeed an apt synonym. It is also synonymous with "material"[280] and "meaningful,"[281] as well as the other synonyms of "substantial."[282] Reading "substantial" as "consequential" satisfies the *Kirkingburg* court's desire to maintain a meaningful minimum threshold while also representing a reachable degree of limitation on the severity continuum Congress created.

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273. AMERICAN HERITAGE COLLEGE DICTIONARY 1354 (3d ed. 1997).

274. *Id.*

275. ROGET'S NEW MILLENNIUM THESAURUS (Barbara Ann Kipfer ed., 1st ed. 2006), http://thesaurus.reference.com/browse/substantial.

276. AMERICAN HERITAGE COLLEGE DICTIONARY 296 (3d ed. 1997).

277. *See* 29 C.F.R. § 1630.2(j)(1)(ii) (2005).

278. AMERICAN HERITAGE COLLEGE DICTIONARY 296 (3d ed. 1997).

279. *Id.*

280. ROGET'S NEW MILLENNIUM THESAURUS (Barbara Ann Kipfer ed., 1st ed. 2006), http://thesaurus.reference.com/browse/consequential.

281. *Id.*

282. *See id.*

"Consequential" fits with the ADA's other provisions. It fits with the EEOC's interpretive regulations. It fits with congressional intent. Most importantly, it fits with the ADA's purpose of bringing disabled persons into the nation's economic and social mainstream. With "consequential" as the favored synonym of "substantial," the ADA regains its effectiveness for the cognitively disabled.

Whether the Supreme Court will retreat from its narrow interpretations is unknown. What is known is that applying the narrow ADA will in many instances deprive Congress's intended beneficiaries, especially the cognitively disabled, of the Act's protection.

V. CONCLUSION

There are roughly 12.4 million cognitively disabled Americans who suffer from conditions that impair their ability to learn, remember, or concentrate.[283] This Comment contends that, because courts have narrowly interpreted the ADA's coverage provisions since its enactment, these 12.4 million cognitively disabled are perilously close to being altogether denied ADA protection, a result that, despite the ADA's awkward coverage provisions, Congress never intended.

Decisions such as *Sutton*[284] and *Toyota*[285] narrowly define who qualifies as "disabled," and thereby exemplify courts' inexplicable inclination to restrictively interpret the ADA. This inclination, if not checked and reversed, portends serious consequences for the cognitively disabled, who are at once sufficiently able to be hired and to perform a job's essential functions but sufficiently disabled to be at a performance disadvantage in their employment.[286] In fact, the cognitively disabled are the "too able disabled," expected to participate in the economic mainstream, but, under the current ADA jurisprudence, largely unprotected from discrimination or aided by accommodations.

Enacted in 1990, the ADA is a relatively new statute. It would thus be premature to say that the current ADA interpretations constitute unalterable precedent. Nevertheless, the march toward an

283. *See* WALDROP & STERN, *supra* note 3, at 1.

284. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

285. Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002).

286. *See infra* Part IV.C.

increasingly narrow ADA, marshaled by *Sutton* and *Toyota*, may lead to a future in which new legislation is the only recourse for "qualified [but disabled] individuals." It is now safe to say that the original, remedial intent of the ADA has itself been disabled. No group has more cause to lament this blow than the cognitively disabled.

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