Civil Rights

Enhancing Disability Protection Without Abondoning Principle

*By Senator Orrin G. Hatch**

The ADA Restoration Act (ADARA)[1] states as its intention to reverse Supreme Court decisions that "narrowed the class of people who can invoke the protection from discrimination that the Americans with Disabilities Act of 1990 provides."[2] The bill's supporters claim that these decisions "ignored Congress's clear intent as to who should be protected,"[3] excluding "millions of people [Congress] intended to be protected under the ADA."[4] This article examines the ADA's basic principles, those Supreme Court decisions, and the ADARA's language and likely results. It concludes that, by abandoning the ADA's basic principles, the ADARA significantly expands, rather than restores, its intended coverage, and sets the ADA at odds with the rest of federal disability policy.

I. The Americans with Disabilities Act

Signed into law by President George H.W. Bush on July 26, 1990, the ADA has been called "the most extensive disability civil rights law ever enacted"[5] and "the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964."[6] Senator Tom Harkin (D-IA), who introduced the bill,[7] called it the "emancipation proclamation" for disabled Americans, predicting that it will "change the way we live and the way we associate with one another in all aspects of our livelihood."[8] I was an ADA co-sponsor and described it as "a major, landmark piece of legislation"[9] that would "bring individuals with disabilities into the mainstream of the economic structure of this country."[10] To that end, the ADA prohibits discrimination against an individual on the basis of a present,[11] past,[12] or perceived[13] disability in employment,[14] state and local government services,[15] public accommodations,[16] and telecommunications.[17] In the employment context, it also requires provision of "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless… the accommodation would impose an undue hardship."[18]

A. Basic Principles

For more than three decades, Congress has built federal disability policy on basic principles such as individuality and functionality. The Rehabilitation Act of 1973, for example, states its purpose as authorizing programs to meet the needs of "handicapped individuals,"[19] and uses the word *individual* or its plural form 239 times. As one federal court put it, under the Rehabilitation Act, "[i]t is the impaired individual that must be examined, and not just the impairment in the abstract."[20] It defines the phrase *individual with a disability* in functional terms as "an individual who has a physical or mental impairment which substantially limits one or more… major life activities."[21] The Air Carrier Access Act of 1986[22] and the Fair Housing Act Amendments of 1988[23] define these terms by the same individual and functional principles.[24]

Against this backdrop, Congress implemented the principles of individuality and functionality in both the purpose and the provisions of the ADA. It pursues each of its four purposes on behalf of "individuals with disabilities."[25] The reports of the Senate Labor and Human Resources Committee[26] as well as the House Education and Labor Committee,[27] Judiciary Committee,[28] and Energy and Commerce Committee[29] similarly describe each of the ADA's purposes in terms of individuals with disabilities. The ADA's substantive provisions also implement the principle of individuality, defining the key term *disability* "with respect to an individual,"[30] and using the word *individual* or its plural form 297 times.

The ADA implements the principle of individuality in another important way. The House Education and Labor Committee report notes that disability discrimination "often results from false presumptions, generalizations"[31] and "stereotypical assumptions."[32] Generalizations and assumptions necessarily ignore individuals and their particular circumstances and abilities. In its ADA findings, Congress denounced restrictions and unequal treatment "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[33] As the Congressional Research Service explains, prohibiting discrimination based on perceived disability "has as its purpose the protection of individuals from stereotypical assumptions that do not reflect the individual's ability."[34]

The ADA also implements the related principle of functionality. The word dis*ability* itself reflects a focus on a person's ability and function.[35] Echoing previous disability statutes, the ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[36] In other words, as each of the committee reports emphasizes,[37] while every disability is an impairment, only those impairments substantially limiting an individual's function are disabilities. Congress thus rejected a per se approach, based on assumptions and generalizations, that would automatically define any particular impairment or condition as a disability.

Instead, the definition of disability begins with the much broader category of impairments, defined in the committee reports[38] and subsequent regulations[39] to be "any… condition… affecting one or more… body systems" and "any mental or psychological disorder." Under this broad definition—unlimited by factors such as severity, symptoms, or duration—virtually every American is impaired. In the ADA, Congress emphasized that individuals with disabilities are a much smaller group,

* *Senator Orrin G. Hatch represents the State of Utah and serves on the Health, Education, Labor, and Pensions Committee, which has jurisdiction over the Americans with Disabilities Act. He chaired the committee from 1981 to 1987 and was the committee's Ranking Member at the time of the ADA's passage in 1990.*

a "discrete and insular minority" of persons who have been "subjected to a history of purposeful unequal treatment."[40]

While the ADA, therefore, is similar to previous disability statutes, it is different than other civil rights statutes. The National Council on Disability (NCD) explains the difference this way: "Unlike prohibitions of discrimination according to race or gender, where one is automatically a member of a protected class by one's physical characteristics at birth, for one to be protected by the ADA one must qualify as a person with a disability."[41] The NCD lists this combination of individuality and functionality among the "key concepts in the ADA,[42] and these principles justify describing it as a "clear, balanced, and reasonable" approach to disability discrimination.[43] They keep the statute focused on the truly disabled, accommodate and balance various interests, and helped produce an overwhelming consensus supporting the ADA.

The basic principles of individuality and functionality mean that the "threshold issue in any ADA case is whether the individual alleging discrimination is an individual with a disability."[44] Because the statute itself does not define terms such as *impairment*, *substantially limits*, or *major life activity*, executive branch agencies and courts have developed criteria and standards. Disability advocates have highlighted several Supreme Court decisions which, they say, have narrowed the ADA's coverage and offer the ADARA as a legislative response.

B. Supreme Court Construction of the ADA

Sutton v. United Air Lines[45] was the first Supreme Court decision construing the ADA's employment provisions. United Airlines required uncorrected visual acuity and denied employment to twin sisters with severe myopia whose eyeglasses gave them 20/20 vision. Writing for a 7-2 majority, Justice Sandra Day O'Connor said that three ADA provisions support the conclusion that impairments should be examined in their mitigated state when determining the threshold issue of disability. First, the ADA requires that a person "be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[46] Second, "whether a person has a disability under the ADA is an individualized inquiry."[47] Third, considering all unmitigated impairments to be disabilities would expand the ADA's coverage far beyond its own estimate of 43 million disabled Americans.[48]

Murphy v. United Parcel Service[49] involved a plaintiff with hypertension. Federal regulations required that commercial vehicle drivers be medically certified to drive. In August 1994, Murphy was erroneously issued a medical certification when United Parcel Service (UPS) hired him as a mechanic, requiring that he drive commercial vehicles. When the error was discovered, UPS fired him "on the belief that his blood pressure exceeded the… requirements for drivers of commercial motor vehicles."[50] Murphy sued, claiming that he was fired because of either a present or a perceived disability. Writing for the same 7-2 majority, Justice O'Connor repeated *Sutton*'s holding that determining whether Murphy's impairment is a disability required "reference to the mitigating measures he employs."[51] The Court concluded that Murphy was not disabled because, as the appeals court found and Murphy did not challenge, "when medicated, [his] high blood pressure does not substantially limit him in any major life activity."[52] The Court also held that the major life activity of working involved "perform[ing] a class of jobs utilizing his skills,"[53] rather than the particular job he held.

Albertson's, Inc. v. Kirkingburg[54] involved a plaintiff with amblyopia, an uncorrectable vision impairment. Albertson's hired him as a truckdriver after a doctor "erroneously certified that he met the [Department of Transportation's] basic vision standard."[55] After his vision was later correctly assessed during a physical, Albertson's fired Kirkingburg despite his application for a waiver of the vision requirement, and refused to rehire him after he received that waiver. Writing for a unanimous Court, Justice David Souter explained that the ADA requires that an impairment must "substantially limit" or impose a "significant restriction" on a major life activity to constitute a disability.[56] In this case, the appeals court had weakened that standard by being "willing to settle for a mere difference" in a major life activity.[57] The Court also emphasized that determining disability requires consideration of "the individual's ability to compensate for the impairment"[58] and "the statutory obligation to determine the existence of disabilities on a case-by-case basis."[59]

Toyota v. Williams[60] involved a plaintiff with carpal tunnel syndrome caused by use of pneumatic tools on an engine fabrication assembly line. Williams requested an accommodation when a change in her duties led to nerve pain. Fired after missing a substantial amount of work, Williams sued. Her own request that she be allowed to perform her previous duties contradicted her claim that her condition substantially limited performing manual tasks, and the district court found that her impairment was not a disability. The appeals court reversed, holding that Williams' condition need only limit her from a class of manual activities "'affecting the ability to perform tasks at work.'"[61] As it had done in *Sutton*, the Court examined the ADA's text and considered important Congress's finding that "some 43,000,000 Americans have one or more physical or mental disabilities."[62] The Court said: "If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual tasks to qualify as disabled, the number of disabled Americans would surely have been much higher."[63]

II. The ADA Restoration Act

The ADARA states that these decisions were "contrary to explicit congressional intent expressed in the [ADA] committee reports."[64] Disability advocates similarly argue that these decisions "narrowed the definition of who qualifies as an 'individual with a disability'" under the ADA.[65] They offer the ADA Restoration Act, as its title suggests, as a restoration of the ADA's definition and coverage. It is appropriate, therefore, to examine the ADARA's language and likely impact to determine whether the ADARA is consistent with the ADA's basic principles, language, and coverage. This article will address three of the ways in which the ADARA, as introduced in July 2007, would change the original Act.

A. Mitigating Measures

Disability advocates focus their most consistent criticism on the Supreme Court's holding that mitigating measures must be considered in determining whether an impairment is

a disability. When he introduced the ADARA, Senator Harkin said that this holding "ignored Congressional intent,"[66] creating "an absurd and unintended catch 22-type situation."[67] On the one hand, an unmitigated impairment might be a disability, but also render someone unqualified for a particular job. On the other hand, a mitigated impairment might make someone qualified for the job, but no longer disabled. The "Dear Colleague" letter Senator Harkin circulated with Senator Arlen Specter (R-PA), the legislation's principal co-sponsor, similarly criticized the Supreme Court for creating an "unintended catch-22," and said: "That is why we have introduced [the ADARA]."[68] True to its sponsors' word, the ADARA would prohibit consideration of mitigating measures that "the individual may or may not be using" in determining whether an individual has a disability.[69]

The mitigating measures issue has similarly been the primary target of articles, letters, press releases, congressional testimony, and other statements by scholars[70] and advocacy groups such as the American Association of People with Disabilities,[71] National Council on Independent Living,[72] American Association of Retired Persons,[73] American Civil Liberties Union,[74] Leadership Conference on Civil Rights,[75] United Spinal Association,[76] and American Diabetes Association.[77] This issue also dominated the hearings on the ADARA in the Senate Health, Education, Labor, and Pensions Committee (HELP)[78] and the House Judiciary Committee[79] and Education and Labor Committee.[80] News reports about the *Sutton* decision,[81] and even attorneys advising employers on ADA issues, have similarly highlighted mitigating measures as the primary issue.[82]

Properly understanding and addressing the mitigating measures issue requires two important distinctions. The first is that the ADA is silent on the mitigating measures issue. Reading the statute belies claims that "Congress explicitly stated that it did not intend mitigating measures to be considered in determining whether a person has a disability."[83] The ADA's so-called legislative history does contain statements, as in the Senate committee report, that "whether a person has a disability should be assessed without regard to the availability of mitigating measures."[84] But a statement in a committee report is not a statement by Congress. As the Seventh Circuit recently put it, "Congress did not enact its members' *beliefs*; it enacted a text."[85] Neither did it enact its committees' legislative reports. While courts can use legislative history material to clarify ambiguous language that Congress did enact into law, that material cannot be used as a proxy for statutory language that Congress never enacted at all. The Supreme Court has repeatedly held that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."[86] The ADA contains no terms whatsoever, ambiguous or otherwise, regarding mitigating measures.

In *Sutton*, the Supreme Court had to "say what the law is"[87] regarding mitigating measures by construing a statute that says nothing about the issue. The Court based its conclusion on what Congress did say in other provisions of the ADA. As such, since its conclusion regarding mitigating is consistent with those provisions, the Court's conclusion in *Sutton* was a reasonable construction of the statute. Criticizing the Supreme Court for refusing to go beyond construing the existing ADA to in effect create a statutory provision Congress did not enact is misplaced. Prohibiting consideration of mitigating measures, then, does not restore the ADA on this issue, because the ADA does not address it.

The second important distinction is between the definition of disability and criteria, such as mitigating measures, for applying that definition. The Supreme Court clearly made this distinction in *Sutton*, citing the ADA's definition of disability[88] and the EEOC regulations defining its components,[89] but identifying the issue in the case as "whether disability is to be determined with or without reference to corrective measures."[90] Mitigating measures are a criterion for determining whether an impairment is a disability, but does not implicate the definition of disability.

Disability advocates fail to make this distinction, mistakenly asserting that the Court changed the definition itself. As the American Diabetes Association put it, for example, "[a]t the heart of the problem lies the definition of disability."[91] Others have gone even further, claiming that these Supreme Court decisions have excluded altogether certain impairments or conditions from ADA coverage. The Consortium for Citizens with Disabilities, for example, asserts that courts have "dramatically changed the meaning of 'disability' under the ADA" in a way that "exclud[es] individuals with serious health conditions like epilepsy, diabetes, cancer, HIV, muscular dystrophy, mental health conditions, and multiple sclerosis."[92] At the Senate HELP Committee hearing on the ADARA, this group distributed a list of 14 impairments under the heading "People NOT Covered Under the ADA." At that same hearing, advocates displayed a chart asserting that each of these impairments is "not a disability under the ADA today." The ACLU also claims that people with eight listed "and many other impairments" do not qualify for ADA protection.[93]

These categorical claims are incorrect. No court has ever held that these or any other impairments are either always or never disabilities.[94] No impairment has ever been excluded from coverage under the ADA. To the contrary, Congress has consistently rejected such per se generalizations in federal disability statutes for more than three decades. Under the Rehabilitation Act, under the ADA before *Sutton*, and under the ADA today, courts decide whether individuals with these impairments are disabled based on the impact, not the identity, of their impairment. The definition of disability has not changed.

If the Supreme Court in *Sutton* changed the definition of disability in a way that simply excludes certain impairments from ADA coverage, there should be a noticeable shift since that decision in the outcomes of discrimination cases involving those impairments. The Equal Employment Opportunity Commission, which administers the ADA's Title I employment provisions, compiles such statistics, reporting the percentage of disability discrimination claims that the agency concludes have merit.[95] In the aggregate, the proportion of disability claims with such reasonable cause outcomes rose by 30% from the

1997-'99 fiscal years before *Sutton* to the 2000-'07 fiscal years since that decision.[96]

The EEOC also provides claim resolution figures for cases involving individual impairments, including the specific conditions that disability advocates claim are now categorically excluded from ADA coverage. The EEOC could not conclude that a discrimination claim has merit under the ADA if the impairment underlying that claim is not covered by the ADA. Merit factor resolutions of cases involving some impairments did decline from the 3 years before *Sutton* to the years since that decision: asthma cases by 8%, epilepsy cases by 7%, and hearing impairment cases by 2%.[97] But merit factor resolutions in cases involving other impairments rose by much larger margins: diabetes cases by 12%, bipolar disorder cases by 13%, cancer cases by 14%, multiple sclerosis cases by more than 27%, and mental retardation cases by more than 59%.[98] Each of these is an impairment that disability advocates claim is now entirely excluded from ADA coverage, and each is obviously still covered by that statute.

Because the Supreme Court did not change the definition of disability, these and other impairments will continue to constitute disabilities if they substantially limit an individual's major life activities. As a result, if Congress chose (which it certainly may) to prohibit consideration of mitigating measures as a criterion for determining whether an impairment is a disability, it would be changing, rather than restoring, the ADA.

B. Definition of Disability

The discussion above outlined that the mitigating measures issue is the primary concern raised by disability advocates, that Congress did not address that issue in the ADA, and that it is distinct from the definition of disability. The ADARA would nonetheless go beyond prohibiting consideration of mitigating measures and change the ADA's definition of disability itself. Under the ADARA, a disability would be simply "a physical or mental impairment"[99] unlimited by factors such as duration, severity, or limitation on an individual's function, and without regard to whether "any manifestation of the impairment is episodic"[100] or the impairment is "in remission or latent."[101]

By retaining and codifying the extremely broad definition of impairments currently found in the ADA's legislative history and implementing regulations, the ADARA would thus define every condition that affects the body or mind as a disability. This would change not only the definition of disability but the very concept of disability on which that definition is based, and for the first time place the ADA at odds with other federal disability statutes. And it renders inexplicable the ADARA's provision prohibiting consideration of mitigating measures. There would be no need to prohibit consideration of mitigating measures if all impairments, including unmitigated ones, are automatically disabilities.

In addition to its language, the ADARA's likely results show that it would expand, rather than restore, the ADA's coverage and impact. Congress stated in the ADA that "some 43,000,000 Americans"[102] have disabilities, or approximately 17% of the population at the time it was enacted.[103] Estimating the coverage of much broader definitions need not proceed arbitrarily. In a significant 1986 report, available to Congress when it passed the ADA, the NCD described a "health conditions approach" to defining disability which would include "all conditions… which impair the health or interfere with the normal functional abilities of an individual."[104] This tacitly functional definition is broader than the ADA in two respects. The "normal functional abilities" category is broader than the ADA's "major life activities." And the "interfere with" degree of functional impact is broader than the ADA's "substantially limit." The NCD estimated that this broad health conditions approach would cover more than 160 million Americans,[105] or approximately two-thirds of the American population in 1986.[106]

The California Fair Employment and Housing Act uses a definition of disability that is even broader than the NCD's health conditions approach. It defines a disability as a mental[107] or physical[108] condition that merely "limits a major life activity." By diluting an impairment's degree of functional impact even further, this definition appears to be minimally functional in form, but is virtually per se in substance. If applied nationally, this virtual per se definition would classify as disabled at least as many, and probably more, Americans as the NCD health conditions approach. As a result, a definition of disability which requires only a demonstrable impact or limitation on an individual's function, as opposed to the ADA's substantial limitation, would cover more than two-thirds of the population.

The ADARA is at the far end of this spectrum, deleting entirely all limiting factors and using an explicitly per se definition of disability.[109] Any impairment, no matter what its duration, intensity, functional impact, or symptoms would be a disability under the ADARA. As a result, the percentage of Americans covered by the ADARA would be substantially greater than under the NCD health conditions approach, perhaps 90% or higher, which today would constitute at least 275 million Americans. Significantly, when Senator Harkin introduced the ADARA, he stated that today there are "50 million Americans with disabilities,"[110] or approximately 16.5% of the current population.[111] While the disabled population has thus remained stable since the ADA's passage, the ADARA's per se definition would likely cover more than six times as many people as Congress intended the ADA to cover. Changing the definition of disability is not only unnecessary to address the mitigating measures issue, but changing it from a functional to a per se definition fundamentally changes the ADA to cover far more Americans than Congress ever contemplated, let alone intended.

C. Rules of Construction

Various statutes, including the ADA, contain rules of construction intended to guide courts in construing and applying statutory provisions. The Supreme Court has said that "in interpreting a statute a court should always turn to one, cardinal rule before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[112] In other words, legislating, which the Constitution assigns to Congress alone,[113] involves determining what statutes mean as well as what they say. To that end, the ADA's rules of construction focus on particular words or phrases, clarifying their definition

and guiding their application in discrete situations covered by individual statutory provisions.[114]

The ADARA contains so-called rules of construction of an entirely different kind which the Congressional Research Service has been unable to find in any other federal statute. Rather than the internally-focused process of explaining the meaning and application of the language Congress enacted, the ADARA's externally-focused rules of construction would invite, perhaps even mandate, the judicial and executive branches to continue changing the ADA's meaning and application. The ADARA, for example, would require that the ADA's provisions "be broadly construed"[115] and that deference be given to regulations and guidelines issued by executive branch agencies, "including provisions implementing and interpreting the definition of disability."[116]

In other words, the ADARA would treat Congress as beginning, but not ending, the legislative process. Ironically, disability advocates say that the ADARA is necessary because the courts changed the meaning of the ADA's provisions from what Congress intended. The ADARA's rules of construction, however, would essentially require exactly what its backers condemn. These provisions are not properly called rules of construction at all. Statutory construction involves determining what the legislature meant by what the legislature said. Changing the meaning of a statute's words changes that statute as surely as changing the words themselves. Because neither the judicial nor the executive branch has such power, Congress in the ADARA would be abdicating its constitutional authority by passing its lawmaking baton to the other branches.

III. Enhancing Disability Protection Without Abandoning Principle

The ADARA's language and likely results demonstrate that it would significantly expand, rather than restore, the ADA's coverage and impact. A per se definition of disability—whether explicit, virtual, or incremental—would abandon the principles of individuality and functionality that today form the basis of federal disability policy, and go far beyond addressing the mitigating measures issue that disability advocates have identified. And the ADARA's rules of construction would invite the judicial and executive branches to change, rather than interpret and apply, the statute.

Congress can, however, enhance the ADA's protections without abandoning its basic principles by addressing the mitigating measures issue without changing the definition of disability. This balanced approach both requires something from and provides something for the disability and business sides of the equation. On the disability side, this approach requires remaining focused on the truly disabled, but provides a more generous application of the criteria for doing so, thereby minimizing the "catch-22" situations brought about by the consideration of mitigating measures. On the business side, this approach requires a broader view of the impairments that may qualify as disabilities but provides the same underlying definition of disability. Defining disabilities as a subset of impairments keeps the ADA focused on the truly disabled and keeps its directives toward business reasonable. It was this balanced approach, incorporating various interests, that led to the consensus behind the ADA in 1990 and it can provide the basis for consensus in enhancing the ADA's protection today.

In September 1991, *Time* magazine said that I was "the key Republican in the deal" that, one year earlier, had produced the ADA.[117] I believe the ADA remains a model of bipartisan legislative compromise that continues to help millions of Americans. The final product was more balanced, focused, and consistent with other disability statutes than the original. It accommodated the interests of business while promoting the interests of the disabled. Congress can take the same approach, with the same result, with legislation that enhances the ADA's protections without abandoning its principles.

Endnotes

1 Senator Tom Harkin (D-IA) introduced S.1881 and Rep. Steny Hoyer (D-MD) introduced H.R.3195 on July 26, 2007, the 17th anniversary of the date that President George H.W. Bush signed the ADA into law.

2 S.1881, §2(b)(2).

3 Cong. Rec., July 26, 2007, at S10151 (statement of Sen. Harkin).

4 *Id*.

5 Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 Lab. Law. 417,417 (2003).

6 Nancy Lee Jones, *The Americans with Disabilities Act (ADA): The Definition of Disability*, CRS Report for Congress (Apr. 23, 2008), at 1.

7 Introduced on May 9, 1989, S.933 would eventually attract 63 cosponsors and pass the Senate by a vote of 76-8 on Sept. 7, 1989. After working out differences with the House version, the Senate passed the ADA conference report by a vote of 91-6 on July 13, 1990.

8 Cong. Rec., July 13, 1990, at S9529 (statement of Sen. Harkin).

9 Cong. Rec., Sept. 7, 1989, at 19804 (statement of Sen. Hatch).

10 Cong. Rec., July 11, 1990, at 17365 (statement of Sen. Hatch).

11 42 U.S.C. §12102(2)(A) ("a physical or mental impairment that substantially limits one or more… major life activities").

12 *Id*. §12102(2)(B) ("a record of such an impairment").

13 *Id*. §12102(2)(C) ("being regarded as having such an impairment").

14 Title I.

15 Title II.

16 Title III.

17 Title IV.

18 42 U.S.C. §12112(b)(5)(A).

19 Rehabilitation Act of 1973, Public Law 93-112, Section 2(1). The ADA uses "individuals with disabilities" rather than "handicapped individuals" because it is more "in line with the sensibilities of most Americans with disabilities." The Americans with Disabilities Act of 1989, Senate Report 101-116, Committee on Labor and Human Resources (1989), at 21 (hereinafter S.Rep.101-116). Nonetheless, "[n]o change in definition or substance is intended to be attributed to this change in phraseology." *Id*. *See also* Americans with Disabilities Act of 1990, House Report 101-485, Part 2, Committee on Education and Labor (1990), at 55 (hereinafter H.Rep.101-485,Pt.2) (Congress intended that the ADA's definition be "comparable to the definition used in… the Rehabilitation Act of 1973."). *See also* Chai Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 Lab. Law. 11, 11 (1991) (the ADA's definition of "person with a disability" is "the same definition which Congress adopted to define a 'person with a handicap' for purposes of Title V of the Rehabilitation Act of 1973.").

20 E.E. Black, Ltd. V. Marshall, 497 F. Supp. 1088, 1099 (D. Hawaii 1980).

21 29 U.S.C. §705(20)(B)(i).

22 49 U.S.C. §41705(a)(1).

23 42 U.S.C. §3602(h)(1). This was "the first time that 'disability' was added to the list of traditionally protected groups in a general federal anti-discrimination statute." Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 Lab. Law. 1, 3 (1991).

24 The Individuals with Disabilities Education Act of 1975 implements the same principles in the specialized context of education. In addition to its title, the statute's first congressional finding describes the "national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for *individuals with disabilities*." 20 U.S.C. §1400(c)(1) (emphasis added). Like the Rehabilitation Act before it, this statute requires that an individual not only have an impairment but also, "by reason thereof, needs special education and related services." 20 U.S.C. §1401(3)(A)(ii).

25 42 U.S.C. §12101(b).

26 S.Rep. 101-116, at 2 (emphasis added).

27 *See also* H.Rep. 101-485, Part 2, at 22-23.

28 Americans with Disabilities Act of 1990, House Report 101-485, Part 3, Committee on Judiciary (1990), at 23 (hereinafter H.Rep.101-485, Pt.3);

29 Americans with Disabilities Act of 1990, House Report 101-485, Part 4, Committee on Energy and Commerce (1990), at 23 (hereinafter H.Rep.101-485, Pt.4).

30 42 U.S.C. §12102(2)(A). *See also* 29 C.F.R. §1630.2(g)(1).

31 H.Rep.101-485, Pt.2, at 30.

32 *Id*. at 40.

33 42 U.S.C. §12101(a)(7).

34 Nancy Lee Jones, *supra* note 6, at 10.

35 One popular online dictionary defines the term *disability* as "lack of adequate… physical or mental ability" or "a physical or mental impairment that interferes with or prevents normal achievement." http://dictionary.reference.com/browse/disability.

36 42 U.S.C. §12102(2)(A).

37 S. Rep.101-116, at 22; H.Rep.101-485, Pt.2, at 52; H.Rep.101-485, Pt.3, at 28.

38 S.Rep.101-116, at 22; H.Rep.101-485, Pt.2, at 51.

39 29 C.F.R. §1630.2(h)(1).

40 42 U.S.C. §12101(a)(7).

41 National Council on Disability, Equality of Opportunity: The Making of the Americans with Disabilities Act 223 (1997).

42 *Id.*

43 S.Rep.101-116, at 20.

44 Nancy Lee Jones, *supra* note 6, at 2.

45 527 U.S. 471 (1999).

46 *Id*. at 482.

47 *Id*. at 483.

48 *Sutton*, 527 U.S. at 485.

49 527 U.S. 516 (1999).

50 *Id*. at 520.

51 *Id.* at 521.

52 *Id.*

53 *Id*. at 524. Murphy "has put forward to evidence that he is regarded as unable to perform any mechanic job that does ot call for driving a commercial motor vehicle and thus does not require DOT certification." *Id*. Murphy, in fact, "secured another job as a mechanic shortly after leaving UPS." *Id.*

54 527 U.S. 555 (1999).

55 *Id*.

56 *See* 29 C.F.R. §1630.2(j)(ii).

57 *Albertson's*, 527 U.S. at 565.

58 *Id*.

59 *Id*. at 566.

60 534 U.S. 184 (2002).

61 *Id*. at 192 (quoting Williams v. Toyota Motor Manufacturing, 224 F.3d 840,843 (6th Cir. 2000)).

62 42 U.S.C. §12101(a)(1).

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

64 S.1881, §2(a)(7).

65 Cong. Rec., July 26, 2007, at S10151 (statement of Sen. Harkin).

66 *Id.*

67 Cong. Rec., July 30, 2007, at S10211 (statement of Sen. Harkin).

68 Letter of November 13, 2007. Senator Harkin has repeatedly criticized the "absurd and unintended Catch-22" which he says the Supreme Court's decisions created. *See, e.g.,* Cong. Rec., July 26, 2007, at S10151; Cong. Rec., July 30, 2007, at S10211. This message has been echoed by commentators and reporters. *See, e.g.,* Jim Radermacher, *Congress Must Restore Rights of People with Disabilities*, Chi. Sun Times, Feb. 17, 2008, at A28 ("These decisions have created an absurd and unintended Catch-22"); Lynne Landsberg, *A Helping Hand*, Baltimore Sun, Apr. 2, 2008, at 15A ("Our courts have created an inescapable Catch-22"); Andrew J. Imparato, *Supreme Court Deals a Blow to Disabled Americans*, Milwaukee J. Sentinel, July 11, 1999, at 3 ("This puts people in a Catch-22 situation that Congress never intended").

69 S.1881, §4(2)(B)(II).

70 *See, e.g.,* Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 Alabama L. Rev. 321,342 (2000); Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 Am. U.L. Rev. 1213,1232 (2003); Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 Berkeley J. Emp. & Lab. Law 335,354 (2000); Julie McDonnell, *Sutton v. United Airlines: Unfairly Narrowing the Scope of the Americans with Disabilities Act*, 39 Brandeis L.J. 471,483 (2000); Molly Joyce, *Note: Has the Americans with Disabilities Act Fallen on Deaf Ears? A Post-Sutton Analysis of Mitigating Measures in the Seventh Circuit*, 77 Chi.-Kent L. Rev. 1389,1403 n.116 (2002); Elizabeth Theran, *'Free to Be Arbitrary and…Capricious': Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 Cornell J. Law & Pub. Pol'y 113,185 n.346 (2003); Deirdre M. Smith, *The Paradox of Personality: Mental illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 Geo. Mason U. Civ. Rts. L.J. 79,121 n.233 (2006).

71 Cheryl Sensenbrenner, who chairs the board of the American Association of People with Disabilities, testified to the House Judiciary Subcommittee on the Constitution that decisions such as *Sutton* are "at complete odds with clear Congressional intent" on issues such as mitigating measures and create a "'double whammy' for people with disabilities." http://judiciary.house.gov/Hearings.aspx?ID=182.

72 Letter to Rep. Jarrold Nadler, Oct. 4, 2007 (the *Sutton* decision on mitigating measures "creates a Catch-22 in which employees can be discriminated against on the basis of their disability but unable to enforce their rights because they cannot meet the high threshold the courts have set to prove they are disabled.").

73 Letter to Rep. Jarrold Nadler, Oct. 11, 2007 ("Recent interpretations of the ADA have diminished its protections for those who are deemed to have 'corrected' their disability through medication or other assistive devices.").

74 Letter to Senators Edward Kennedy & Michael Enzi ("The court decisions… have created an unintended Catch-22 where individuals taking medication or using other mitigation measures to manage their condition may no longer qualify as 'disabled' under the ADA."). The ACLU's legislative counsel has said that the courts "have created a Catch-22 wherein individuals taking medication or using other measures to manage their disability may no longer qualify as 'disabled' under the ADA and are denied protection

from employment discrimination." Press Release, *ACLU Commends Senate Committee for Support of ADA Restoration Act*, November 15, 2007, *available at* http://www.aclu.org/disability/32795prs20071115.html.

75 Letter to Senators Edward Kennedy & Michael Enzi, Nov. 14, 2007 (Congress never intended to exclude individuals because the effects of their conditions "could be mitigated through treatment").

76 Statement, ADA Restoration Act (undated), *available at* http://www.unitedspinal.org/advocacy/employment-discrimination/ (courts "have created an absurd 'Catch-22'whereby a person is 'too disabled' to do the job—but not 'disabled enough' to be protected by the ADA.").

77 Statement of Oct. 4, 2007 (the ADARA "prevents the courts from disqualifying an individual from [ADA] protection because of the effects of 'mitigating measures'").

78 Witness statements for the hearing held on November 15, 2007, can be accessed at http://help.senate.gov/Hearings/2007_11_15_b/2007_11_15_b.html.

79 Witness statements for the hearing held on October 4, 2007, can be accessed at http://judiciary.house.gov/Hearings.aspx?ID=182.

80 Witness statements for the hearing held on January 29, 2008, can be accessed at http://edlabor.house.gov/hearings/fc-2008-01-29.shtml.

81 *See, e.g.,* Joan Biskupic, *Five Cases at Supreme Court Could Affect Disabilities Law*, Wash. Post, Feb. 21, 1999, at A3 ("To the sisters and others with serious handicaps that can be improved by taking medicine or using some device, it is a Catch-22"); Michael Remez, *Supreme Court Limits Conditions Covered by ADA*, Hart. Courant, June 23, 1999, at A1 ("To disability rights advocates, the court's logic amounts to a Catch-22").

82 *See, e.g.,* Lawrence Postol, *To Be, or Not to Be: The ADA Catch-22, available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/july_august_2000/ada.cfm ("the case law has evolved such that there is a Catch-22 to the ADA. To qualify for ADA protection, a worker needs a condition that is severe—significantly limiting a major life activity, but not so severe that the worker cannot perform the essential functions of his or her job with reasonable accommodations.").

83 Statement by Paralyzed Veterans of America before the House Committee on the Judiciary, Subcommittee on Constitution, Civil Rights and Civil Liberties, October 4, 2007.

84 S.Rep. 101-116, at 23. *See also* H.Rep. 101-485, pt.3, at 28 ("The impairment should be assessed without considering whether mitigating measures… would result in a less-than-substantial limitation.").

85 Jones v. Harris Assoc., 2008 U.S. App. LEXIS 10804 (May 19, 2008) (emphasis in original).

86 Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 568 (2005). *See also* BedRoc Ltd., LLC v. U.S., 541 U.S. 176, 187 n.8 (2004) (referring to the Court's "longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text").

87 Marbury v. Madison, 5 U.S. 137,177 (1803).

88 527 U.S. at 478.

89 *Id*. at 479-80.

90 *Id*. at 481.

91 Statement of the American Diabetes Association, *supra* note 77. *See also* Letter from National Health Council to Reps. Steny Hoyer and F. James Sensenbrenner, Oct. 9, 2007 ("the courts have narrowed the definition of disability"); Statement of Epilepsy Foundation, Oct. 4, 2007 ("the courts have narrowed the definition of disability"); Letter from Leadership Conference on Civil Rights, *supra* note 75 ("court decisions narrowing the definition of 'disability'"); Statement of National Disability Rights Network, Nov. 15, 2007 ("the courts have narrowed the definition of disability").

92 Consortium for Citizens with Disabilities, *Statement in Support of the Americans with Disabilities Act Restoration Act of 2007* (undated).

93 Letter, *supra* note 74.

94 Following the hearing on the ADARA before the Senate Health, Education, Labor, and Pensions Committee on November 15, 2007, I asked each of the witnesses, which included several disability advocates, several questions in writing, including the following: "Has any court, state or federal, ever ruled that, under the Americans with Disabilities Act, any particular impairment is, by definition, a disability without regard to its effect on a major life activity? If so, please provide citations to such rulings." By the date this article was submitted to *Engage*, I had received no response from any of the witnesses.

95 These are cases in which the EEOC determines "that a charge had merit in cases where it could not be successfully conciliated." Sharona Hoffman, *supra* note 70, at 1248.

96 http://www.eeoc.gov/stats/ada-charges.html.

97 http://www.eeoc.gov/stats/ada-merit.html.

98 *Id*.

99 S.1881, §4(2)(A)(i).

100 *Id*. at §4(2)(B)(III).

101 *Id*. at §4(2)(B)(IV).

102 42 U.S.C. §12101(a)(1).

103 The Census Bureau estimates the population of the United States on July 1, 1990, at 249.5 million. http://www.census.gov/popest/archives/1990s/popclockest.txt.

104 http://www.ncd.gov/newsroom/publications/1986/toward.htm.

105 *Id*.

106 *Id*. The Census Bureau estimates that the population of the United States on July 1, 1986, at 240.1 million. http://www.census.gov/popest/archives/1990s/popclockest.txt.

107 California Government Code §12926(i).

108 *Id*. at §12926(k).

109 An incremental per se approach would begin by defining specific impairments, rather than all impairment, as disabilities. Like the ADARA, this approach would be at odds with the ADA's principles of individuality and functionality, as well as with other federal disability statutes. Treating citizens with particular impairments as members of interest groups has the additional political liability of inviting those whose impairments are not on the list to continue lobbying Congress for inclusion.

110 Cong. Rec., July 26, 2007, at S10151. *See also* Susan Gluck Mezey, *Judicial Interpretation of Title III of the Americans with Disabilities Act*, 15 J. Disability Pol'y Stud. 147,147 (2004) ("By 2000, the number of people with disabilities in the United States had risen to almost 50 million").

111 The Census Bureau estimates the population of the United States on November 13, 2007, at 303.3 million. http://www.census.gov/population/www/popclockus.html.

112 Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992).

113 U.S. Const., art. I, §1 ("All legislative powers herein granted shall be vested in a Congress of the United States").

114 *See, e.g.,* 42 U.S.C. §12112(b); *id*. at §12114(b); *id*. at §12143(f); *id*. at §12182(b); *id*. at §12188(b); *id*. at §12201; *id*. at §12210(b).

115 *Id.* at S.1881, §8(e).

116 *Id.* at §8(g).

117 Laurence I. Barrett, *Presidential Candidates "Always Attack, Never Defend*," Time, Sept. 23, 1991.