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LET'S TRY THIS AGAIN: THE ADA AMENDMENTS ACT OF 2008
ATTEMPTS TO REINVIGORATE THE "REGARDED AS" PRONG
OF THE STATUTORY DEFINITION OF DISABILITY

Stephen F. Befort*

I. INTRODUCTION

The Americans with Disabilities Act (ADA)¹ was enacted in 1990 with considerable fanfare and support. A broad-based coalition of supporters testified in favor of the legislation before committee hearings,² and both houses of Congress passed the legislation by wide margins.³ President George Bush, signing the ADA into law, described the new statute as "an historic opportunity" representing "the full flowering of our democratic principles."⁴ Disability rights activists were optimistic⁵ that the new legislation would accomplish its stated purpose of providing a "national mandate for the elimination of discrimination against individuals with disabilities."⁶

An important component of the ADA's antidiscrimination formula is its definition of disability. The ADA furthers the elimination of disability discrimination by extending coverage not only to those individuals who currently have an impairment that substantially limits a major life activity,⁷ but also to those individuals who are "regarded as having such an impairment."⁸ By this extension, Congress affirmatively sought to curb "society's accumulated myths and fears about disability."⁹

Reality, however, fell short of expectations. In several decisions beginning in 1999, the Supreme Court significantly narrowed the class of protected "disabled"

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¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213).

² See H.R. REP. NO. 101-485, pt. II, at 25-28 (1989), *reprinted in* 1990 U.S.C.C.A.N. 267, 306-10.

³ The House of Representatives passed the ADA with a vote of 403-20. See 136 CONG. REC. 11,466-67 (1990). The Senate voted to approve the ADA with a margin of 76-8. See 135 CONG. REC. 19,903 (1989).

⁴ Presidential Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070, 1070 (July 26, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601, 602.

⁵ See generally Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 19 (2000) (noting that the ADA was "enacted amid hopes that it would have a sweeping impact").

⁶ 42 U.S.C. § 12101(b)(1) (2006).

⁷ *Id.* § 12102(2)(A).

⁸ *Id.* § 12102(2)(C).

⁹ *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987).

employees. The most significant of these decisions was *Sutton v. United Air Lines, Inc.*¹⁰ in which the Court ruled that mitigating measures, such as medication and prosthetic devices, should be taken into account in determining whether a person is disabled for purposes of the ADA.¹¹ The Court also ruled that a plaintiff is not protected by virtue of being regarded as disabled unless the employer perceives the plaintiff's impairment as one that would substantially limit a major life activity.¹² These excessively narrow rulings significantly raised the bar for ADA plaintiffs and posed a serious obstacle to eliminating disability discrimination.

Following extensive negotiations between representatives of the disability and business communities,¹³ Congress enacted the ADA Amendments Act of 2008 (ADAAA).¹⁴ The ADAAA explicitly overrules four Supreme Court decisions that had narrowly interpreted the ADA's definition of disability,¹⁵ and emphasizes that the definition should be broadly construed.¹⁶ Although the ADA's basic definition of disability remains intact, the ADAAA clarifies in several ways that the statutory definition should be interpreted in a more encompassing fashion.¹⁷

An individual may be covered by the ADA under any of the three prongs that comprise the statutory definition of an individual with a disability: prong one, which encompasses individuals who currently have an impairment that substantially limits a major life function; prong two, which encompasses individuals who have a record of such an impairment; or prong three, which encompasses individuals who are regarded as having such an impairment.¹⁸ One of the most significant changes made by the ADAAA is to the third, or "regarded as," prong of the definition of disability. In a sweeping overruling of the *Sutton* decision, the ADAAA protects an individual from adverse action taken by an employer "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."¹⁹ As a compromise, however, Congress inserted two important statutory limitations. The first limitation is that the "regarded as" prong does "not apply to impairments that are transitory and minor."²⁰ The second limitation is that an

¹⁰ 527 U.S. 471 (1999).

¹¹ *Id.* at 482.

¹² *Id.* at 489.

¹³ See Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 228–40 (2008) (describing the negotiations and procedural steps culminating in the enactment of the ADAAA).

¹⁴ ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (to be codified in scattered sections of 29 and 42 U.S.C.).

¹⁵ *Id.* sec. 2(b)(2)–(5) (to be codified at 42 U.S.C. § 12101 note).

¹⁶ *Id.* sec. 4(a), § 3(4)(A) (to be codified at 42 U.S.C. § 12102(4)(A)).

¹⁷ See *infra* Part V.

¹⁸ 42 U.S.C. § 12102(2) (2006).

¹⁹ ADAAA, sec. 4(a), § 3(3)(A) (to be codified at 42 U.S.C. § 12102(3)(A)).

²⁰ *Id.* sec. 4(a), § 3(3)(B) (to be codified at 42 U.S.C. § 12102(3)(B)).

employer need not provide a reasonable accommodation “to an individual who meets the definition of disability . . . solely under [the ‘regarded as’ prong].”²¹

This Article focuses on the likely consequences of the “regarded as” compromise embodied in the ADAAA. One positive consequence is clear: the ADAAA’s elimination of any functional limitation requirement with respect to the “regarded as” prong—that is, the elimination of any need to show that an impairment, as perceived, substantially limits a major life activity—will greatly expand the class of those with standing to assert a claim of disability discrimination. On the other hand, the two accompanying limitations raise several areas of uncertainty that will warrant close scrutiny. In particular, these two limitations may provide a loophole by which the judiciary again may subvert the intended reach of the ADA.

This Article proceeds in five parts. Part II discusses the origins and intended scope of the ADA’s initial definition of disability with particular reference to the reach of the “regarded as” prong. Part III then examines the judicial backlash that resulted in the severe narrowing of the class of employees with a qualifying disability under the ADA. Part IV describes the scholarly and legislative efforts to override the limiting Supreme Court decisions. Part V summarizes the ADAAA override generally and the “regarded as” provisions more specifically. Finally, part VI takes a forward look at the likely impact and lingering concerns implicated by the “regarded as” compromise.

II. THE ADA’S DEFINITION OF DISABILITY

The antidiscrimination formula adopted by Congress in the ADA is more complicated than that employed by either Title VII or the Age Discrimination in Employment Act (ADEA). Both of these older federal statutes use a relatively simple formula for banning discrimination. Title VII, for example, makes it unlawful for an employer to discriminate against an employee *because of* such individual’s race, color, religion, sex, or national origin.²² Although matters of proof may be complicated under these two statutes, the legal principle is clear and straightforward: discrimination because of a listed trait is unlawful.

The ADA’s ban on disability-based discrimination is considerably more complicated. Paraphrasing three different portions of the statute, the ADA’s original antidiscrimination formula can be stated as follows:

No employer shall discriminate against a *qualified individual with a disability* because of the disability of such individual when the individual, with or without *reasonable accommodation*, can perform the

²¹ *Id.* sec. 6(a)(1), §501(h) (to be codified at 42 U.S.C. § 12201(h)).

²² 42 U.S.C. § 2000e-2(a) (2006) (emphasis added). The ADEA uses similar language in banning discrimination because of age. *See* 29 U.S.C. § 623(a)(1) (2006) (“It shall be unlawful for an employer . . . to . . . discriminate against any individual . . . because of such individual’s age.”).

essential functions of the employment position, unless the accommodation would impose an *undue hardship* on the operation of the business of that employer.²³

Accordingly, the ADA's antidiscrimination formula is more complicated in two significant respects. First, only individuals who have a qualifying disability have standing to assert a claim under the ADA.²⁴ Second, in ascertaining whether an employer is discriminating in violation of the ADA, the statute asks whether the employee is qualified for the job "with or without reasonable accommodation,"²⁵ unless such accommodation would impose an "undue hardship."²⁶ The more complicated ADA formula has engendered uncertainty and a greater degree of judicial interpretation,²⁷ including six Supreme Court decisions construing the ADA's definition of disability.²⁸

In defining a covered disability, the ADA borrowed the Rehabilitation Act's three-prong definition of a "handicapped individual."²⁹ Section 504 of the Rehabilitation Act, as originally enacted in 1973, prohibited discrimination against an "otherwise qualified handicapped individual" in federally funded activities and programs.³⁰ A "handicapped individual" was defined as someone who "has a

²³ See 42 U.S.C. §§ 12112(a), 12111(8), 12112(b)(5)(A).

²⁴ See *id.* § 12112(a).

²⁵ *Id.* Neither Title VII nor the ADEA generally impose any affirmative obligation on employers to assist employees in satisfactorily performing the essential functions of their jobs. These statutes, instead, merely invoke a negative prohibition against discrimination. See Diller, *supra* note 5, at 40–44 (contrasting how the ADA employs a different-treatment model of discrimination with how most antidiscrimination statutes employ an equal-treatment model of discrimination). While Title VII does impose a duty on an employer to accommodate the religious observances and practices of its employees, see 42 U.S.C. § 2000e(j), the Supreme Court has construed this duty as far more limited than that imposed by the ADA, see *TWA, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (ruling that an employer need not incur more than a de minimis hardship in providing an accommodation for religious purposes).

²⁶ See 42 U.S.C. § 12112(b)(5)(A). The term "undue hardship" is defined in 42 U.S.C. § 12111(10)(A) as "an action requiring significant difficulty or expense."

²⁷ See Stephen F. Befort, *The Story of Sutton v. United Airlines, Inc.: Narrowing the Reach of the Americans with Disabilities Act*, in *EMPLOYMENT DISCRIMINATION STORIES* 329, 332–35 (Joel Wm. Friedman ed., 2006).

²⁸ See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193–96 (2002); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 536–37 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520–25 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478–88 (1999); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801–05 (1999); *Bragdon v. Abbott*, 524 U.S. 624, 630–42 (1998).

²⁹ See 29 U.S.C. § 706(8)(B) (1988) (current version at 29 U.S.C. § 794(a) (2006)); see also *Bragdon*, 524 U.S. at 631 (explaining that "[t]he ADA's definition of disability is drawn almost verbatim" from the Rehabilitation Act).

³⁰ Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (2006)).

physical or mental disability which for such individual constitutes or results in a substantial handicap to employment.”³¹ One year later, Congress expanded the definition of a “handicapped individual” to include any person who “(A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.”³² Accordingly, the 1974 amendment extended protection beyond those individuals with actual disabilities to also encompass individuals who are perceived, either correctly or incorrectly, as being disabled.³³ This revision demonstrated Congress’s concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from “archaic attitudes and laws.”³⁴

The federal courts generally adopted a broad reading of the disability definition under the Rehabilitation Act. Professor Chai Feldblum, in reviewing pre-ADA era decisions, summarized her findings as follows:

Courts deciding cases under [the Rehabilitation Act’s] definition had decided that individuals with a wide range of serious medical conditions could invoke the protections of the law. Indeed, courts had rarely even parsed the language of the definition to decide whether a plaintiff was a “handicapped individual” under the law. Rather, the definition was understood to include any medical condition that was non-trivial, and the courts had applied the law’s coverage in that manner.³⁵

The Supreme Court appeared to concur in this assessment. In *School Board of Nassau County v. Arline*, the Supreme Court described the act’s definition as “broad” and explained that by extending the definition to include those regarded as handicapped, “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”³⁶ Professor Feldblum interpreted this language as meaning that the “regarded as” prong was sufficiently broad to cover “any individual who had been discriminated against because of *any* impairment.”³⁷

When Congress debated the proposed Americans with Disabilities Act in 1989 and 1990, legislative committee reports explained that the definition of disability borrowed from the Rehabilitation Act was meant to incorporate the

³¹ *Id.*

³² Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111, 88 Stat. 1617, 1619 (codified as amended at 29 U.S.C. § 794(a) (2006)).

³³ S. REP. NO. 93-1297, at 37–39, 63–64 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388–6390, 6413–6414.

³⁴ *Id.* at 50.

³⁵ Chai R. Feldblum, *Definition of Disability under Federal Anti-discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB L. 91, 91–92 (2000).

³⁶ *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987).

³⁷ Feldblum, *supra* note 35, at 94.

prevailing judicial and regulatory interpretation given the latter provision.³⁸ The “interpretative guidance” adopted by the Equal Employment Opportunity Commission (EEOC) following the enactment of the ADA explicitly made this link as well, finding “that the relevant caselaw developed under the Rehabilitation Act [is] generally applicable to the term ‘disability’ as used in the ADA.”³⁹ With specific reference to the “regarded as” prong of the proposed ADA definition, a House Report stated:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities would be inferred and the plaintiff could qualify for coverage under the “regarded as” test.⁴⁰

Congress enacted the Americans with Disabilities Act in 1990 using essentially the same definition as in the Rehabilitation Act except with the term “disability” substituted for the term “handicapped.”⁴¹ Under the ADA, “the term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁴² As a general rule of construction, the ADA provides:

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 Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.⁴³

Following the ADA’s enactment, the EEOC issued both formal regulations⁴⁴ and “Interpretive Guidance”⁴⁵ with respect to the ADA’s employment provisions.⁴⁶

³⁸ See S. REP. NO. 101-116, at 21 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1238, 1258; H.R. REP. NO. 101-485, pt. 3, at 27 (1990); *see also* Feldblum, *supra* note 35, at 126–29 (explaining that disability advocates concurred in the decision to borrow the Rehabilitation Act’s definition for the ADA because of the broad interpretation that definition had received).

³⁹ 29 C.F.R. pt. 1630 app. § 1630.2(g) (2010). Throughout this Article, the appendix to Part 1630 will be referred to as “Interpretive Guidance.”

⁴⁰ H.R. REP. NO. 101-485, pt. 3, at 30–31 (1990).

⁴¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §3(2), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12102(2) (2006)).

⁴² 42 U.S.C. § 12102(2).

⁴³ *Id.* § 12201(a).

⁴⁴ 29 C.F.R. § 1630.1 to .16.

⁴⁵ 29 C.F.R. pt. 1630 app. § 1630.1 to .16.

⁴⁶ The ADA provisions relating to employment are contained in Title I of the act, 42 U.S.C. §§ 12111–12117.

In terms of the reach of the ADA's "regarded as" prong, the EEOC Interpretive Guidance expressed the following view:

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition.⁴⁷

The Interpretive Guidance goes on to conclude that an individual will be covered by the "regarded as" prong if he or she "can show that an employer made an employment decision because of a perception of disability based on 'myth, fear or stereotype.'"⁴⁸

At this point, many activists and observers were optimistic that the ADA was structured to go a long way toward achieving the stated objective of eradicating disability discrimination.⁴⁹ And, the "regarded as" prong was a major weapon in this arsenal, providing a safety valve of coverage for many individuals who did not otherwise qualify as having a current, functionally limited disability.⁵⁰

But the optimists overlooked one important fact: unlike the all-encompassing nature of race and gender under Title VII, the notion of disability under ADA is a term of limitation.⁵¹ While everyone has a race and gender, not everyone is disabled. If the threshold for establishing disability status is raised, the scope of protection afforded by the Act is correspondingly reduced.

III. JUDICIAL BACKLASH: THE SHRINKING CLASS OF THE DISABLED

The enactment of the ADA contributed to a significant rise in the incidence of employment litigation. In the four years following 1991, the number of employment claims in federal court jumped by 128%.⁵² Between the ADA's effective date in 1992 and the end of fiscal year 1998, claimants filed more than

⁴⁷ 29 C.F.R. pt. 1630 app. § 1630.2(1).

⁴⁸ *Id.* The interpretive guidance further states that "[i]f the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear or stereotype' can be drawn." *Id.*

⁴⁹ See *supra* notes 5–6 and accompanying text.

⁵⁰ See Feldblum, *supra* note 35, at 157.

⁵¹ See Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 69 (1999).

⁵² See Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 22 (1997).

108,000 charges of disability discrimination with the EEOC.⁵³ This litigation explosion, coupled with the rather imprecise language of the statute, resulted in conflicting judicial interpretations on a host of key ADA issues⁵⁴ and led the Supreme Court to decide sixteen cases construing the ADA in a relatively short time span from 1998 to 2004.⁵⁵ This increased activity also tested the patience of the federal judiciary charged with managing the caseload, as illustrated by the following comment:

The court advised that the ADA as it was being interpreted had the potential of being the greatest generator of litigation ever, and that the court doubted whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker's compensation claim into a federal case.⁵⁶

Perhaps as a partial response to the burdens of this growing caseload, federal court decisions began to adopt a more restrictive view of the ADA's disability definition. By 1997, Arlene Mayerson, directing attorney of the Disability Rights Education and Defense Fund, authored an article disquietly chronicling the fact that a growing number of federal courts were imposing a functional limitation on the "regarded as" prong.⁵⁷ Under this approach, courts would find a plaintiff to have standing only if the impairment that an employer perceived an employee to possess would result in a substantial limitation on a major life activity.⁵⁸ From

⁵³ See Befort & Thomas, *supra* note 51, at 29–30 (citing Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges 1992–FY 1998).

⁵⁴ See *generally id.* (describing ten contentious ADA issues on which the circuit courts and/or the EEOC took conflicting positions and also discussing the reasons for this widespread judicial dissonance).

⁵⁵ *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003); *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440, 446 n.6 (2003); *Barnes v. Gorman*, 536 U.S. 181, 189–90 (2002); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296–98 (2002); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 577–78 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492–94 (1999); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805–07 (1999); *Bragdon v. Abbott*, 524 U.S. 624, 647 (1998); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998).

⁵⁶ *Pedigo v. P.A.M. Transp.*, 891 F. Supp. 482, 485 (W.D. Ark. 1994), *rev'd*, 60 F.3d 1300 (8th Cir. 1995).

⁵⁷ See Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 590–91 (1997).

⁵⁸ *Id.* at 592–95.

Mayerson’s perspective, this additional requirement was never intended by the ADA’s drafters,⁵⁹ and it was one that few plaintiffs could meet.⁶⁰

This was only the precursor of a much larger judicial backlash. Beginning in 1999, the Supreme Court issued four decisions that severely narrowed the class of protected “disabled” employees.

A. *The Supreme Court Cases*

The first and most significant of these decisions was the landmark case of *Sutton v. United Air Lines, Inc.*⁶¹ Karen Sutton and Kimberly Hinton were twin sisters who both suffered from severe myopia.⁶² Each had uncorrected visual acuity of 20/200 in one eye and 20/400 in the other, but with corrective lenses their vision improved to 20/20 or better.⁶³ In 1992, both sisters applied for employment with United Air Lines (United) as commercial airline pilots.⁶⁴ United rejected both sisters because they did not meet minimum uncorrected vision requirements.⁶⁵ Petitioners brought suit under the ADA, alleging that they fit within the protected class of individuals with a disability due to their respective vision impairments (prong one), or, alternatively, because they were regarded as having a substantially limiting impairment (prong three).⁶⁶

The key issue in determining the twins’ prong one disability claim concerned whether mitigating measures should be considered in determining whether a person is substantially limited in a major life activity.⁶⁷ The EEOC had issued Interpretive Guidance suggesting that the issue of disability status should be assessed without regard to mitigating measures.⁶⁸ Under this approach, for example, an individual with diabetes who could perform normally with insulin injections, but who without insulin would lapse into a coma, would be considered disabled and thus protected by the ADA. The *Sutton* Court, in a 7-2 decision, disagreed, stating:

It is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is “substantially limited” in a major life activity and thus “disabled” under the Act.⁶⁹

⁵⁹ *Id.* at 597–98.

⁶⁰ *Id.* at 590–91, 599.

⁶¹ 527 U.S. 471 (1999).

⁶² *Id.* at 475.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 476.

⁶⁶ *Id.*

⁶⁷ *Id.* at 481–82.

⁶⁸ 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998).

⁶⁹ *Sutton*, 527 U.S. at 482.

The Court rejected the agency guidance as an “impermissible interpretation of the ADA.”⁷⁰ The Court reasoned that a person whose impairment is corrected by mitigating measures does not have an impairment that *presently* substantially limits a major life activity, and therefore should not be considered disabled under the ADA.⁷¹ The Court also stressed the importance of making an individualized inquiry with respect to each person asserting an ADA claim. The Court opined that following the EEOC’s instruction to assess claimants in an uncorrected state would impermissibly create a system in which persons would be treated as members of a group rather than as individuals.⁷² Finally, the Court placed great weight on congressional findings set out in the ADA’s preamble to the effect that the Act would protect some forty-three million Americans.⁷³ The Court explained that this figure would be much higher if all persons with corrected conditions were intended to be covered by the statute.⁷⁴

The Supreme Court also rejected the alternative contention that the twins were protected under the ADA because they were regarded as disabled. The *Sutton* majority explained that an individual may fall within this “regarded as” prong of the statutory disability definition in either of two ways: “(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.”⁷⁵ In either situation, the Court explained, the impairment, as perceived, must be one that substantially limits one or more major life activities.⁷⁶ Applying that standard to the *Sutton* facts, the Court ruled that the mere allegation that an employer has a vision requirement does not establish that the employer regarded the petitioners as substantially limited in the major life activity of working.⁷⁷ At best, the Court stated, the employer only regarded them as unable to perform the single job of a global airline pilot.⁷⁸

The Court issued two companion decisions on the same day as *Sutton* that reached similar results. In *Murphy v. United Parcel Service, Inc.*, the Court held that a mechanic with hypertension was not disabled or regarded as disabled when

⁷⁰ *Id.*

⁷¹ *Id.* at 482–83.

⁷² *Id.* at 483–84.

⁷³ *See id.* at 484 (discussing congressional findings set out in 42 U.S.C. § 12101(a)(1)).

⁷⁴ *Sutton*, 527 U.S. at 487.

⁷⁵ *Id.* at 489.

⁷⁶ *Id.*

⁷⁷ *Id.* at 490–91. According to the EEOC regulations, in order for an individual to be substantially limited in the major life activity of working, he or she must be “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes.” 29 C.F.R. § 1630.2(j)(3)(i) (2010).

⁷⁸ *Sutton*, 527 U.S. at 493.

evaluated after considering the mitigating effect of his medication.⁷⁹ In the other case, *Albertson’s, Inc. v. Kirkingburg*, the Court held that whether monocular vision is a covered disability must be determined on a case-by-case basis, taking into account mitigating measures including the brain’s ability to compensate for the loss of vision in one eye.⁸⁰

The Court further restricted the disability standing requirement three years later in *Toyota Motor Manufacturing, Kentucky, Inc v. Williams* when it overturned a Sixth Circuit decision that had found an assembly line worker with carpal tunnel syndrome and tendonitis to be substantially limited in performing manual tasks because of her workplace difficulties in gripping tools and in performing repetitive work.⁸¹ The Supreme Court explained that the proper inquiry was to determine whether an individual has “an impairment that prevents or severely restricts the individual from [engaging in] activities that are of central importance to [daily life].”⁸² The Court stated that the terms “substantially limits” and “major life activity” “need to be interpreted strictly to create a demanding standard for qualifying as disabled.”⁸³ The Court determined that the Sixth Circuit had engaged in an overly narrow inquiry by considering only those tasks that Williams performed at work, while ignoring the impairment’s impact on her nonwork activities.⁸⁴ Since a broader view revealed that Williams could still perform household chores and personal hygiene activities, the Court concluded that the appeals court had erred in finding that she was substantially limited in performing manual tasks and hence disabled for purposes of the ADA.⁸⁵

B. The Impact

Although some critics perceived these decisions as wisely preserving the protections of the ADA for those who truly are disabled,⁸⁶ most of the scholarly response was decidedly negative. The loudest detractors, including some long-time disability rights activists, viewed these decisions as subverting the bold civil rights intent of Congress in enacting the ADA.⁸⁷ The clear consensus reaction, even from

⁷⁹ *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520–21 (1999).

⁸⁰ *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565–67 (1999).

⁸¹ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 192–93 (2002).

⁸² *Id.* at 196–98.

⁸³ *Id.* at 196–97.

⁸⁴ *Id.* at 200–01.

⁸⁵ *Id.* at 201–02. The Court remanded the issue of whether Toyota Motors was entitled to summary judgment on the manual task issue. *See id.* at 202–03.

⁸⁶ *See, e.g.*, Andrew C. Testerman, *Sutton v. United Air Lines, Inc.: The Supreme Court Applies “Corrective” and “Mitigating” Common Sense to the ADA*, 77 DENV. U. L. REV. 165, 168 (1999) (arguing that the *Sutton* decision provides “a rational and reasoned interpretation of the ADA’s definition of disability resulting in a narrowed protected class that more closely identifies the intended beneficiaries of the Act”).

⁸⁷ *See, e.g.*, Diller, *supra* note 5, at 22 (suggesting that *Sutton* and similar rulings demonstrate that the federal courts are engaged in a judicial backlash that is “systematically

those commentators outside the disability advocate community, was that the Supreme Court decisions cut too deep a swath into the ADA's protected class.⁸⁸

The four Supreme Court decisions discussed above negatively impacted disability discrimination jurisprudence in at least three ways: narrowing the ADA's coverage, spawning uncertainty, and enabling decisions based on stereotypes.

1. *Narrowing the ADA's Coverage*

The most obvious impact of these decisions was to narrow the ADA's protected class and to raise the bar for ADA plaintiffs in litigation. This impact is demonstrated by several statistical measures. First, the timing of the *Sutton* decision correlates with a significant decline in the number of charges of alleged discrimination filed under the ADA. The EEOC's charge-filing statistics show a drop in annual ADA charges from the 17,000 to 18,000 range during fiscal years 1997 to 1999 to a range of 15,000 to 16,000 charges filed in each of the four fiscal years following the *Sutton* decision.⁸⁹ Federal court filings for employment-based civil rights cases similarly declined from 23,735 in 1998⁹⁰ to 20,955 in 2002 and 14,353 in 2006.⁹¹ These numbers suggest that *Sutton* and its progeny serve to deter the assertion of discrimination claims under the ADA.

Second, several empirical studies found that the federal courts see little merit in those ADA claims that are asserted. Professor Ruth Colker, for example, has conducted a detailed analysis of decided ADA federal court decisions and reported that the courts have resolved approximately 93% of these cases in favor of employers.⁹² Many of these decisions are the result of summary judgment rulings based upon a determination that the plaintiff lacks disability status.⁹³ Another study undertaken by Professor Colker revealed that the federal courts of appeal are far

nullifying rights that Congress conferred on people with disabilities"); Feldblum, *supra* note 35, at 161 (describing a "large, gaping wound" inflicted by *Sutton* and its companion cases).

⁸⁸ See, e.g., Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L.J. 1071, 1072 (1999); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000).

⁸⁹ *Americans with Disabilities Act of 1990 Charges (Includes Concurrent Charges with Title VII, ADEA, and EPA) FY 1997-FY 2009*, U.S. EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (last visited Aug. 23, 2010).

⁹⁰ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 133 (2002), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2002.aspx> (follow "Table C-2A" hyperlink).

⁹¹ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 166 (2006), <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2006.aspx> (follow "Table C-2A" hyperlink).

⁹² Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999).

⁹³ See *id.* at 110-17; Befort & Thomas, *supra* note 51, at 80.

more likely to overturn trial court rulings favorable to ADA plaintiffs than they are to take similar action with respect to appeals arising under Title VII.⁹⁴

2. *Spawning Uncertainty*

Even though one of the Supreme Court’s apparent purposes in issuing these four decisions was to stem the rising tide of litigation under the ADA, certain aspects of these decisions actually caused more uncertainty and created the need for a continued reliance on the courts for interpretation of ADA intent. The two most significant of these factors were a lack of agency deference and the requirement of an individualized inquiry in determining disability status.

(a) *Lack of Agency Deference*

The *Sutton* majority’s treatment of EEOC regulatory guidance raised serious doubts as to the future authority of the EEOC’s Interpretive Guidance. Given the ADA’s sparse and imprecise text, the panoply of EEOC interpretations offered perhaps the most useful roadmap available. The *Sutton* Court’s rejection of this agency guidance blurred that map to a considerable extent.

Under the Supreme Court’s well-known *Chevron* doctrine, announced in 1984, a reviewing court should adhere to an agency’s regulatory interpretation where a statute is silent or ambiguous and the agency interpretation is based on a permissible construction of the statute.⁹⁵ The Court in *Sutton* markedly withheld such deference to the EEOC in a number of ways. Most directly, the Court dismissed the position of the EEOC’s Interpretive Guidance with respect to mitigating measures as “an impermissible interpretation of the ADA.”⁹⁶ Beyond directly rejecting the EEOC’s view on the mitigating measures issue, the *Sutton* opinion also raised two other warning flags concerning the status of agency

⁹⁴ Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 253–54 (2001).

⁹⁵ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). In an earlier ADA decision, the Court invoked the *Chevron* doctrine in stating that the regulatory views of the administrative agencies charged with interpreting and enforcing the ADA “are entitled to deference.” *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (stating that because agencies directed by Congress issue implementing regulations and provide technical assistance concerning the ADA, the “views [of the EEOC and the Department of Justice] are entitled to deference”).

⁹⁶ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999). Although some courts have suggested that the EEOC’s interpretive guidance is not entitled to full *Chevron* deference because that document is an interpretive guideline rather than a substantive regulation, *see, e.g.*, *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 899 n.3 (10th Cir. 1997), it is clear that the interpretive guidance, as the enforcing agency’s interpretation adopted following notice and comment procedures, is entitled, at least, to some deference. *See Colker, supra* note 92, at 153–56 (arguing that the Interpretive Guidance deserves a high level of deference due to the EEOC’s adoption of the guidelines as an appendix to regulations promulgated in accordance with formal notice and comment procedures).

guidance under the ADA. First, the *Sutton* Court suggested that agency promulgations concerning the definition of a covered disability may not be legally authorized.⁹⁷ More narrowly, the *Sutton* opinion expressed doubt as to the validity of the portion of the EEOC's regulations that set out the agency's views as to when an individual has standing under the ADA because of a substantial limitation on the major life activity of "working."⁹⁸ The Court expressed similar doubts on these two issues in *Toyota*.⁹⁹

By rejecting the EEOC's Interpretive Guidance with respect to mitigating measures and suggesting (without deciding) that the EEOC's regulations concerning the meaning of "disability" and "working" may be invalid, the Court fueled judicial reluctance to follow agency guidance. In short, the Court's decisions called the EEOC's power to issue authoritative guidance into question and fostered an ongoing climate of unpredictability and litigiousness.

(b) *Individualized Inquiry*

The Supreme Court's insistence on an individualized inquiry for determining disability status under the ADA also fosters unpredictability. In rejecting agency guidance with respect to the impact of mitigating measures, the *Sutton* Court stated, "The definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.' Thus, whether a person has a disability under the ADA is an individualized inquiry."¹⁰⁰ The Court

⁹⁷ While recognizing that Congress authorized three different agencies to issue regulations concerning those portions of the ADA that they are entrusted to administer, the Court stated: "No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, *see* §§ 12101–12102, which fall outside Titles I–V. Most notably, no agency has been delegated authority to interpret the term 'disability.'" *Sutton*, 527 U.S. at 479. Because neither party challenged the validity of the agency regulations on this ground, the Court concluded that it need not decide how much deference they are due. *Id.* at 480.

⁹⁸ *Id.* at 492. In this regard, the Court stated:

Because the parties accept that the term "major life activities" includes working, we do not determine the validity of the cited regulations. We note, however, that there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "'to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.'"

Id. (alteration in original) (quoting Transcript of Oral Argument at 15, Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273 (1987) (No. 85–1227) (argument of Solicitor General)).

⁹⁹ *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194, 200 (2002).

¹⁰⁰ *Sutton*, 527 U.S. at 483 (internal citation omitted). The *Sutton* Court concluded that the guidelines approach was inconsistent with such an individualized inquiry because it

in *Toyota* similarly stressed that an individualized inquiry is particularly necessary when the impairment at issue, like carpal tunnel syndrome, varies widely in symptoms from person to person.¹⁰¹

While the Supreme Court viewed this individualized focus as beneficial, that certainly is a debatable proposition. At the standing stage of ADA litigation, a certain degree of predictability is a good thing: both employees and employers would benefit from knowing generally what types of impairments the ADA covers. An individualized focus in each and every case clearly is not conducive to that end.

Under an individualized inquiry approach, individuals with the same impairment may or may not be disabled for ADA purposes, depending upon the degree of limitation that each individual experiences because of the impairment.¹⁰² The *Sutton* Court’s mitigating measures determination aggravates this uncertainty. Even though corrective measures may render many impairments nondisabling, some employees nonetheless may be disabled because medication and treatment are ineffective to relieve their substantial limitation.¹⁰³ In addition, the side effects of a treatment regimen itself could cause a substantial limitation in a major life activity.¹⁰⁴ Finally, an open question exists as to the status of employees who could, but chose not to, use mitigating measures.¹⁰⁵ Since the individualized approach inhibits the accumulation of precedent in terms of determining disability status, it invites continual litigation to resolve uncertain rights and obligations.

“would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals.” *Id.* at 483–84.

¹⁰¹ *Toyota*, 534 U.S. at 199.

¹⁰² See Feldblum, *supra* note 35, at 152 (“[T]he idea that an individualized assessment would be used to determine whether one person with epilepsy would be covered under the law, while another person with epilepsy would not, was completely foreign both to Section 504 jurisprudence and to the spirit of the ADA as envisioned by its advocates.”).

¹⁰³ See, e.g., *Belk v. Sw. Bell Tel. Co.*, 194 F.3d 946, 948, 950 (8th Cir. 1999) (involving a plaintiff required to wear leg braces); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 301–02 (3d Cir. 1999) (involving a plaintiff with a mental disorder).

¹⁰⁴ See, e.g., *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) (noting that side effects of mental health medications can result in substantial impairment); *Taylor*, 184 F.3d at 309 (noting that side effects of mental health medications can result in substantial impairment).

¹⁰⁵ See Sarina Maria Russotto, *Effects of the Sutton Trilogy*, 68 TENN. L. REV. 705, 716 (2001). See generally Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217 (2004) (arguing that employees should be under a duty to mitigate when doing so is reasonable and reduces their need for workplace accommodation); Sarah Shaw, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 CALIF. L. REV. 1981 (2002) (arguing that nonmitigating employees are entitled to ADA protection from employment discrimination).

3. *Enabling Decisions Based on Stereotypes*

The Supreme Court's resolution of the specific issue presented by the facts in *Sutton* is not surprising. The use of eyeglasses is so common and so successful that their presence does not evoke negative stereotypical perceptions concerning the ability of an eyeglass-wearer to function in society.¹⁰⁶ But other impairments, such as missing limbs, epilepsy, and depression do evoke stereotypical assumptions that may hinder full participation in society and in the workplace. The *Sutton* Court's one-size-fits-all response to the matter of mitigating measures, unfortunately, treated these significant conditions in the same manner as the comparatively slight inconvenience of correctible nearsightedness.¹⁰⁷

The *Sutton* and *Murphy* decisions created a particularly troublesome issue with respect to the "regarded as" prong of the ADA's disability definition. The Court in *Sutton* explained that an individual is regarded as disabled if an employer mistakenly believes that a person's nonlimiting impairment substantially limits one or more major life activities.¹⁰⁸ On the other hand, the *Sutton* opinion ruled that an individual is not regarded as disabled simply because an employer believes that a person's nonlimiting impairment precludes him or her from adequately performing the job at issue.¹⁰⁹ The crucial distinction, then, is the employer's subjective perception.

Here again, this subjective inquiry may mean that two individuals who are similarly situated in terms of impairment could be treated disparately for ADA standing purposes. Take for example the situation of Karen Sutton and her twin sister Kimberly Hinton: each sister has uncorrected visual acuity of 20/200 or worse that is correctable with corrective lenses to 20/20 vision.¹¹⁰ Assume that United Air Lines decides not to hire Karen because it perceives her eyesight impairment as interfering with her ability to perform adequately as a global airline pilot. Also assume that United Air Lines decides not to hire Kimberly because it perceives her eyesight impairment as interfering with her ability to perform adequately across a class or broad range of jobs including that of a global airline pilot. With these assumptions, under the reasoning of the *Sutton* majority, Kimberly has standing as an individual with a disability whereas Karen does not. As a subjective inquiry, this individualized focus concerning the "regarded as"

¹⁰⁶ See Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 446, 496-97 (2000) (arguing that the class of "disabled" should include those individuals with impairments that subject them to systematic disadvantages in society, but concluding that individuals who wear corrective lenses are not subject to stigma in society at large).

¹⁰⁷ See Befort, *supra* note 27, at 357-58.

¹⁰⁸ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999); see also *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520 (1999) (reiterating the finding of the *Sutton* Court).

¹⁰⁹ *Sutton*, 527 U.S. at 494.

¹¹⁰ *Id.* at 475.

prong inhibited predictability and was prone to post hoc manipulation with respect to the purported rationale for employment decisions.¹¹¹

As the Supreme Court recognized in an earlier decision, *School Board of Nassau County v. Arline*, a central purpose of disability discrimination legislation is to deter employment decisions based on “society’s accumulated myths and fears about disability.”¹¹² The overly broad swath cut by the *Sutton* decision was inconsistent with this policy objective. Based on *Sutton*, an employer would not violate the ADA by deciding not to hire an insulin-aided diabetic or an individual wearing a prosthetic limb based upon a mistaken and stereotypic belief that the applicant’s underlying impairment might somehow interfere with successful job performance. A post-*Sutton* court hearing such a case would never reach the issues of stereotypical decision making or ability to perform the job because the applicants did not have standing as individuals with a disability.

IV. SEARCHING FOR A FIX

A. Scholarly Proposals

Much of the widespread criticism of these four Supreme Court decisions narrowing the scope of the ADA’s definition of disability has been accompanied by proposals for reform. A brief summary of some of the most frequently mentioned proposals is set out below.

The most far-reaching proposal would extend ADA protection to any individual with a physical or mental impairment, or to anyone who is regarded as having such an impairment.¹¹³ This proposal would confer standing upon any individual with an actual or perceived impairment regardless of whether the impairment resulted in any functional limitation on that individual’s ability to engage in any activity.¹¹⁴ A variation of this proposal would protect all individuals with an impairment that somehow limits a major life activity but would eliminate the troublesome “substantial limitation” requirement.¹¹⁵ The proponents of these approaches maintain that this change would mirror Title VII in terms of focusing

¹¹¹ According to Justice Stevens’s dissenting opinion in *Sutton*, Congress intended that impairments should be viewed in their unmitigated state under prong one of the disability definition because of the difficulty of ascertaining an employer’s subjective intent under prong three. *See id.* at 501 n.2 (Stevens, J., dissenting). By rejecting this viewpoint, the Court in *Sutton* amplified the importance of this difficult prong three inquiry.

¹¹² 480 U.S. 273, 284 (1987).

¹¹³ *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1473–74 (1999); Feldblum, *supra* note 35, at 162–64.

¹¹⁴ *See* Eichhorn, *supra* note 113, at 1473–74.

¹¹⁵ Cheryl L. Anderson, “*Deserving Disabilities*”: *Why the Definition of Disability under the Americans with Disabilities Act Should be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 128–29 (2000).

attention on an employer's reasons for its employment action rather than focusing on whether an employee is a member of the "substantially limited" subset.¹¹⁶

A second proposed alternative would be to define the ADA's protected class in light of the act's antisubordination purpose. In this vein, Professor Miranda McGowan, while agreeing with the *Sutton* Court's mitigating measures ruling, urges a broader reading of the "regarded as" prong, stating "it should suffice that an employer holds and acts on the basis of stereotypes or generalizations about the abilities (or dangers) of a person with an actual or perceived physical or mental impairment."¹¹⁷ Professor Samuel Bagenstos puts it more broadly, contending that "the statutory 'disability' category should embrace those actual, past, and perceived impairments that subject people to systemic disadvantages in society."¹¹⁸

A narrower third alternative would be for Congress to legislatively overrule the *Sutton* decision on the mitigating measures issue. A number of state laws provide a model for this approach.¹¹⁹ In California, for example, a 2000 amendment to the state Fair Employment and Housing Act provides that "whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity."¹²⁰ The Rhode Island legislature has enacted a similar measure.¹²¹

A fourth alternative proposed by a group of legal and medical experts from the University of Louisville suggests that Congress should direct the EEOC to establish medical standards for determining when most common mental and physical impairments are sufficiently severe to constitute a covered disability for ADA purposes.¹²² These standards would be premised upon medical practice guidelines and standard diagnostic and treatment protocols following notice and comment rulemaking procedures.¹²³ An individual whose medical condition met a promulgated standard would presumptively be covered by the ADA.¹²⁴

¹¹⁶ See, e.g., Eichhorn, *supra* note 113, at 1473–74; Feldblum, *supra* note 35, at 162–64.

¹¹⁷ Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 113 (2000).

¹¹⁸ Bagenstos, *supra* note 106, at 445.

¹¹⁹ See generally Alex Long, *State Anti-discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 643 (2004).

¹²⁰ CAL. GOV'T CODE § 12926.1(c) (West 2005).

¹²¹ See R.I. GEN. LAWS § 28-5-6(4) (2004).

¹²² Mark A. Rothstein, Serge A. Martinez & W. Paul McKinney, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L.Q. 243, 270–71 (2002).

¹²³ *Id.*

¹²⁴ *Id.* According to the authors, this general rule would be subject to three exceptions: First, for conditions without a published medical standard, an individual could nonetheless assert a claim of disability discrimination by establishing the existence of an impairment that substantially limits a major life activity by a preponderance of the evidence. *Id.* at 271. Second, an employer could rebut the presumption of coverage for an employee whose condition satisfied the published criteria by presenting clear and convincing evidence that the individual's condition did not constitute a substantial limitation of a major life activity.

B. Congress Takes Action

In January 2002, Representative Steny H. Hoyer (D-MD) authored an piece in the *Washington Post*.¹²⁵ Representative Hoyer expressed his belief that the ADA had been misconstrued by the Supreme Court and stated that Congress’s “responsibility now is to revisit both our words and our intent in passing the ADA. In matters of statutory interpretation, unlike constitutional matters, Congress has the last word.”¹²⁶ Representative Hoyer’s attitude was shared by many others, and as a result, Congress and disability rights groups began paving the way for legislation aimed at remedying the Supreme Court’s interpretation of the ADA.¹²⁷ The National Council on Disability issued an important report two years later recommending that the ADA be amended to define a covered disability as any physical or mental impairment.¹²⁸

A major legislative development occurred during the summer of 2006 when Congressman Jim Sensenbrenner (R-WI) expressed interest in sponsoring a bill that would override the Supreme Court’s limiting decisions.¹²⁹ In September of that year, Congressman Sensenbrenner joined Representatives Hoyer and John Conyers (D-MI) in sponsoring the first ADA Restoration Act, H.R. 6258.¹³⁰

On July 26, 2007, companion ADA Restoration bills were introduced in the House (H.R. 3195) and in the Senate (S. 1881).¹³¹ The bills reflected language that the disability community had crafted.¹³² Most significantly, H.R. 3195 proposed amending the ADA’s definition of disability to mean: “(i) a physical or mental impairment; (ii) a record of a physical or mental impairment; or (iii) being regarded as having a physical or mental impairment.”¹³³ This proposed definition of disability did not require that such an impairment pose any functional limitation on life activities.¹³⁴

Id. Similarly, employees who do not satisfy the presumptive standard could nonetheless establish covered disability status by presenting clear and convincing evidence that his or her impairment substantially limited a major life activity. *Id.* at 271–72.

¹²⁵ Steny H. Hoyer, Op-Ed., *Not Exactly What We Intended, Justice O’Connor*, WASH. POST, Jan. 20, 2002, at B1.

¹²⁶ *Id.*

¹²⁷ See Feldblum et al., *supra* note 13, at 194–95.

¹²⁸ NAT’L COUNCIL ON DISABILITY, RIGHTING THE ADA 99–104 (2004), available at http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf.

¹²⁹ See Feldblum et al., *supra* note 13, at 195. Representative Sensenbrenner’s wife, Cheryl Sensenbrenner, was a board member of the American Association of People with Disabilities and an ardent supporter of disability rights. *Id.* at 195–96.

¹³⁰ H.R. 6258, 109th Cong. (2006).

¹³¹ H.R. 3195, 110th Cong. (2007); S. 1881, 110th Cong. (2007).

¹³² See Feldblum et al., *supra* note 13, at 197–98.

¹³³ H.R. 3195 § 4.

¹³⁴ See *id.*

A number of business groups expressed opposition to the companion bills.¹³⁵ In testimony before a Senate Committee in November 2007, for example, a management attorney expressed the concern that S. 1881 would convey standing to any individual with an impairment, no matter how trivial the impairment, and that individuals with minor impairments would be entitled to reasonable accommodations.¹³⁶ This blanket entitlement to accommodations, the attorney opined, would cause considerable difficulty and expense for employers.¹³⁷

Representatives Hoyer and Sensenbrenner urged disability and business leaders to work out their differences.¹³⁸ From February to May of 2008, representatives of these two groups held numerous meetings and exchanged several drafts of proposed language.¹³⁹ They finally achieved a compromise on May 15, 2008,¹⁴⁰ retaining the ADA's current definition of disability but including several measures designed to lower the bar for a plaintiff to establish a substantial limitation on a major life activity.¹⁴¹ A particularly significant component of the compromise concerned the "regarded as" prong of the disability definition. The Statement of the Managers accompanying the bill enacted as the ADA AAA summarized the essential ingredients of this compromise as follows:

The bill removes from the third "regarded as" prong of the disability definition the requirement that an individual demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity. Under the bill, therefore, an individual can establish coverage under the law by showing that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment. Because the bill thus broadens application of this third prong of the disability definition, entities covered by the ADA will not be required to provide accommodations or to modify policies and procedures for individuals who fall solely under the third prong. Such entities will, however, still be subject to discrimination claims.¹⁴²

¹³⁵ See Feldblum et al., *supra* note 13, at 234–35.

¹³⁶ *The Americans with Disabilities Act Restoration Act of 2007: Hearing on S. 1881 Before the S. Comm. on Health, Education, Labor & Pensions*, 110th Cong. 1–2, 6 (2007) (statement of Camille A. Olson, Partner, Seyfarth Shaw LLP).

¹³⁷ See *id.* at 6.

¹³⁸ See Feldblum et al., *supra* note 13, at 229.

¹³⁹ *Id.* at 229–30. As the Statement of the Managers accompanying the bill enacted as the ADA AAA described: "S. 3406 is the product of an extensive bipartisan effort that included many hours of meetings and negotiation by legislative staff as well as by stakeholders including the disability, business, and education communities." 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008).

¹⁴⁰ See Feldblum et al., *supra* note 13, at 230.

¹⁴¹ *Id.* at 236.

¹⁴² 154 CONG. REC. S8344.

A slightly revised version of the ADAA was introduced on July 31, 2008 as S. 3406.¹⁴³ Both houses of Congress passed the bill unanimously,¹⁴⁴ and President Bush signed the ADAAA into law on September 25, 2008.¹⁴⁵

V. THE ADAAA

The ADAAA, which went into effect on January 1, 2009,¹⁴⁶ explicitly disavows the reasoning of the four Supreme Court decisions that narrowed the scope of the ADA’s disability definition.¹⁴⁷ Although the ADA’s basic definition of disability remains intact, the ADAAA emphasizes that the definition of disability should be broadly construed¹⁴⁸ and clarifies how the terms “substantially limits,” “major life activities,” and “regarded as” are to be construed.¹⁴⁹ A principal objective of the ADAAA is to refocus the ADA on issues of discrimination rather than on issues of standing.¹⁵⁰

A. *The ADAAA’s Definition of Disability*

According to the ADAAA, “the term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”¹⁵¹ Thus, the ADA’s prior three-pronged definition of disability has largely been retained.¹⁵² The definition’s meaning, however, has been clarified and expanded in several ways.

¹⁴³ S. 3406, 110th Cong. § 1 (2008).

¹⁴⁴ 154 CONG. REC. S8342 (daily ed. Sept. 11, 2008); 154 CONG. REC. H8286 (daily ed. Sept. 17, 2008).

¹⁴⁵ See ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

¹⁴⁶ ADAAA, sec. 8.

¹⁴⁷ See *id.* sec. 2(b) (3)-(5).

¹⁴⁸ *Id.* sec. 4(a), § 3(4)(A) (to be codified at 42 U.S.C. § 12102(4)(A)) (“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”).

¹⁴⁹ See *infra* Part V.A.

¹⁵⁰ See 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008).

¹⁵¹ ADAAA, sec. 4(a), § 3(1)(A)–(C) (to be codified at 42 U.S.C. § 12102(1)(A)–(C)).

¹⁵² H.R. 3195, 110th Cong. (2007), as passed by the House of Representatives, proposed replacing the term “substantially limits” with the phrase “materially restricts.” The Senate sponsors jettisoned this change in language, concluding “that adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act.” 154 CONG. REC. S8345.

I. Substantially Limits

The ADAAA explicitly states that one of the purposes of the Act is to reject the Supreme Court's interpretation of "substantially limits" in *Sutton* and *Toyota* because it "created an inappropriately high level of limitation necessary to obtain coverage under the ADA."¹⁵³ Specifically, the ADAAA rejects the rule enunciated in *Toyota* that the terms "substantially" and "major" "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "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."¹⁵⁴ Accordingly, the ADAAA states that "the primary object of attention . . . should be whether entities covered under the ADA have complied with their obligations, and . . . the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."¹⁵⁵

In order to achieve this goal, the ADAAA amends the ADA's definition of the term "substantially limits" in several ways. First, the ADAAA "deletes two findings in the ADA which led the Supreme Court to unduly restrict the meaning and application of the definition of disability."¹⁵⁶ The deleted findings stated that "some 43,000,000 Americans have one or more physical or mental disabilities" and that "individuals with disabilities are a discrete and insular minority."¹⁵⁷ By deleting these findings, Congress intended to remove "this barrier to construing and applying the definition of disability more generously."¹⁵⁸

Second, the ADAAA rejects the rule enunciated by the Supreme Court in the *Sutton* trilogy "that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures."¹⁵⁹ Such measures include:

- (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology;

¹⁵³ ADAAA, sec. 2(b)(5).

¹⁵⁴ *Id.* sec. 2(b)(4) (quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197, 198 (2002)).

¹⁵⁵ *Id.* sec. 2(b)(5).

¹⁵⁶ 154 CONG. REC. S8344.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ ADAAA, sec. 2(b)(2) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999)).

(III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.¹⁶⁰

The ADAAA, however, recognizes an exception in that “the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.”¹⁶¹ The ADAAA provides that, notwithstanding the above language, “a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.”¹⁶²

Third, the ADAAA addresses the challenges that some individuals have faced when trying to establish that they have a substantially limiting impairment when that condition is episodic in nature. According to a rule of construction incorporated in the ADAAA, “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”¹⁶³ This change is noteworthy because the “Supreme Court has repeatedly emphasized that courts should refrain from engaging in hypothetical inquiries as to the severity of impairments and instead must focus on the individual in his or her present state.”¹⁶⁴ As a result of this change, however, courts are directed to speculate as to an impairment’s future course when considering whether an episodic impairment would substantially limit a major life activity when active.

Lastly, although the ADAAA does not explicitly define the meaning of “substantially limits,” it does state “that the current Equal Employment Opportunity Commission ADA regulations defining the term ‘substantially limits’ as ‘significantly restricted’ are inconsistent with congressional intent, by expressing too high a standard.”¹⁶⁵ Accordingly, the ADAAA expresses Congress’s expectation that the EEOC “will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with [the ADAAA].”¹⁶⁶

2. Major Life Activities

Under the ADA, the determination of whether an activity constitutes a major life activity was left to the EEOC and the courts.¹⁶⁷ The ADAAA changes this by including in the statute an illustrative list of major life activities. The activities

¹⁶⁰ *Id.* sec 4(a), §3(4)(E)(i) (to be codified at 42 U.S.C. § 12102(4)(E)(i)).

¹⁶¹ *Id.* sec. 4(a), §3(4)(E)(ii) (to be codified at 42 U.S.C. § 12102(4)(E)(ii)).

¹⁶² *Id.* sec. 5(c) (to be codified at 42 U.S.C. § 12113(c)).

¹⁶³ *Id.* sec. 4(a), § 3(4)(D) (to be codified at 42 U.S.C. § 12102(4)(D)).

¹⁶⁴ Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. 217, 221 (2008).

¹⁶⁵ ADAAA, sec. 2(a)(8) (to be codified at 42 U.S.C. § 12101 note).

¹⁶⁶ *Id.* sec. 2(b)(6) (to be codified at 42 U.S.C. § 12101 note).

¹⁶⁷ *See* Befort & Thomas, *supra* note 51, at 34.

listed “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”¹⁶⁸ In addition, the ADAAA explicitly includes major bodily functions in the statutory definition of major life activities.¹⁶⁹ As a result, some individuals will be able to establish coverage under the Act without describing the activities in which they are limited so long as they have a serious medical condition that results in a substantial limitation on a major bodily function.

The ADAAA also contains a rule of construction that clarifies that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”¹⁷⁰ According to the congressional history, this was “intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA.”¹⁷¹

3. The “Regarded As” Prong

The revised treatment of the “regarded as” prong is a central component of the ADAAA compromise.¹⁷² One of Congress’s goals in enacting the ADAAA was to reject the reasoning of the Supreme Court in *Sutton* and “reinstate the reasoning of the Supreme Court in [*Arline*,] which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.”¹⁷³ As a result, under the amended version of the statute, an individual meets the “regarded as” prong of disability “if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”¹⁷⁴ Accordingly, unlike the first and second prong of the disability definition, courts will not have to address whether an impairment functionally limits a major life activity when an individual is alleging discrimination under the “regarded as” prong.¹⁷⁵

¹⁶⁸ ADAAA, sec. 4(a), § 3(2)(A) (to be codified at 42 U.S.C. § 12102(2)(A)).

¹⁶⁹ *Id.* sec. 4(a), § 3(2)(B) (to be codified at 42 U.S.C. § 12102(2)(B)) (“[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”).

¹⁷⁰ *Id.* sec. 4(a), § 3(4)(C) (to be codified at 42 U.S.C. § 12102(4)(C)).

¹⁷¹ 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008).

¹⁷² *See* 154 CONG. REC. S8344.

¹⁷³ ADAAA, sec. 2(b)(3) (to be codified at 42 U.S.C. § 12101 note); *see also supra* Part II.A.

¹⁷⁴ *Id.* sec. 4(a), § 3(3)(a) (to be codified at 42 U.S.C. § 12102(3)(A)).

¹⁷⁵ *See* 154 CONG. REC. S8346 (“Under this bill, the third prong of the disability definition will apply to impairments, not only to disabilities. As such, it does not require a functional test to determine whether an impairment substantially limits a major life activity.”).

As a compromise for this broad coverage, Congress inserted two important statutory limitations. The first limitation is that the “regarded as” prong does “not apply to impairments that are transitory and minor.”¹⁷⁶ The second limitation is that a reasonable accommodation does not need to be provided “to an individual who meets the definition of disability . . . solely under” the “regarded as” prong.¹⁷⁷ As a result, employers will only have to provide reasonable accommodations to individuals who actually have an impairment that substantially limits a major life activity and not to individuals who are simply regarded as disabled.

The ADA’s latter limitation effectively resolves a circuit split that had existed on the issue of whether an individual who is regarded as disabled is entitled to a reasonable accommodation.¹⁷⁸ The Fifth, Sixth, Eighth, and Ninth Circuits had ruled that employers do not have a duty to accommodate employees who only are regarded as disabled.¹⁷⁹ These courts generally focused on the “bizarre” windfall that would result if employers were obligated to accommodate disabilities that do not actually exist.¹⁸⁰ The First, Third, Tenth, and Eleventh Circuits, on the other hand, had ruled that employers must provide reasonable accommodations to employees regarded as disabled.¹⁸¹ These courts generally focused on the plain language of the ADA and on the policy of trying to deter adverse actions based on stereotypes.¹⁸² Under the “regarded as” compromise, Congress sided with the first group of courts.

The pertinent legislative history provides some additional insights into Congressional intent with regard to the “regarded as” compromise. While Congress retained a somewhat watered-down “substantially limits” standard for prong one coverage, it opted for a much broader prong three reach in order to combat discrimination based on stereotypical perceptions.¹⁸³ Under this approach, the “regarded as” prong encompasses any individual who is treated adversely because of an actual or perceived impairment, without regard for whether that

¹⁷⁶ ADAAA, sec. 4(a), § 3(3)(B) (to be codified at 42 U.S.C. § 12102(3)(B)).

¹⁷⁷ *Id.* sec. 6(a)(1) (to be codified at 42 U.S.C. § 12201(h)); *see also* 154 CONG. REC. S8354 (statement of Sen. Orrin Hatch) (“[S. 3406] balances [the expanded coverage of the ‘regarded as’ prong] by limiting the remedies available under this provision.”).

¹⁷⁸ *See generally* Sarah J. Parrot, *The ADA and Reasonable Accommodation of Employees Regarded as Disabled: Statutory Fact or Bizarre Fiction?*, 67 OHIO ST. L.J. 1495 (2006) (summarizing a prior circuit split on the issue of whether an individual who is only “regarded as” disabled is entitled to a reasonable accommodation).

¹⁷⁹ *See* Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1231 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 916–917 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998).

¹⁸⁰ *See, e.g.,* Weber, 186 F.3d at 916–17.

¹⁸¹ *See, e.g.,* Williams v. Phila. Hous. Auth. Police Dep’t, 380 F.3d 751, 773–74 (3d Cir. 2004).

¹⁸² *See* D’Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005); Kelly v. Metallics W. Inc., 410 F.3d 670, 675–76 (10th Cir. 2005); Williams, 380 F.3d at 772–76; Katz v. City Metal Co., 87 F.3d 26, 32–34 (1st Cir. 1996).

¹⁸³ *See* 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008).

impairment imposes any functional limitation on the individual's activities.¹⁸⁴ Significantly, "the 'regarded as' prong [now] focuses on how an individual is treated, rather than on the difficult to prove perception of a covered entity."¹⁸⁵ As a trade-off for this expanded coverage, the "regarded as" compromise relieves employers from any responsibility for providing reasonable accommodations to those who are disabled solely by virtue of the "regarded as" prong.¹⁸⁶ The Senate Statement of the Managers commented on this compromise, stating that while "some members continue to have reservations about this [no required accommodation] provision . . . we believe it is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition, properly applied."¹⁸⁷

B. Other Changes

1. On the Basis of Disability

The ADAAA altered the ADA's antidiscrimination formula. Prior to the 2008 amendments, the statute provided that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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."¹⁸⁸ The ADAAA changed this general rule by deleting the language "with a disability because of the disability of such individual," and replacing it with "on the basis of disability."¹⁸⁹ As a result, "the amendments conform the ADAAA with the structure of Title VII and other civil rights laws."¹⁹⁰ According to the Senate's Statement of the Managers Report, this change "ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the

¹⁸⁴ See H.R. REP. NO. 110-730, pt. 1, at 13 (2008).

¹⁸⁵ See Feldblum et al., *supra* note 13, at 236.

¹⁸⁶ 154 CONG. REC. S8344 ("Because the bill thus broadens application of this third prong of the disability definition, entities covered by the ADA will not be required to provide accommodations or to modify policies and procedures for individuals who fall solely under the third prong.").

¹⁸⁷ 154 CONG. REC. S8347.

¹⁸⁸ 42 U.S.C. § 12112(a) (2006).

¹⁸⁹ ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, § 5(a)(1), 122 Stat. 3553, 3557 (to be codified at 42 U.S.C. § 12112(a)) ("No covered entity shall discriminate against a qualified individual on the basis of disability 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.").

¹⁹⁰ Lawrence Lorber et al., *Back to the Future: Restoring the ADA's Original Intent*, HR ADVISOR, Nov.–Dec. 2008, at 6, 10.

basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.’”¹⁹¹

2. *No Reverse Discrimination*

The ADAAA also adds a provision stating that there can be no “reverse discrimination” claims under the Act. Specifically, the ADAAA states that it does not “provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”¹⁹² As a result, “nondisabled employees cannot claim [that they were discriminated against] because they were treated less favorably or were not given the same accommodations” as disabled employees.¹⁹³

3. *Regulatory Authority*

In *Sutton*, the Supreme Court stated that that “no agency . . . has been given authority to issue regulations implementing the [introductory] provisions of the ADA, which fall outside Titles I-V.”¹⁹⁴ Since the definition of disability appeared in the general provisions of the ADA, the Court questioned the degree of deference that it needed to give to the EEOC regulations.¹⁹⁵ The ADAAA addressed this issue by clarifying the scope of authority given to the EEOC to issue regulations interpreting the disability definition. The Act now explicitly states that the authority given to the EEOC, the Attorney General, and the Secretary of Transportation to issue regulations “under this chapter includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008.”¹⁹⁶ There is a chance, however, that this could result in some confusion because “while all of these agencies are directed to broadly interpret the law to cover persons with disabilities, they may do so with different results unless they all agree to abide by the same set of regulations.”¹⁹⁷

¹⁹¹ 154 CONG. REC. S8347.

¹⁹² ADAAA, sec. 6(a)(1) (to be codified at 42 U.S.C. § 12201(g)).

¹⁹³ Margaret Hart Edwards & Patrick F. Martin, *Congress Tells the Courts How to Interpret the ADA*, ASAP (Littler Mendelson, P.C.), Sept. 2008, at 1, 3, available at http://www.littler.com/PressPublications/Documents/2008_09_ASAP_CongressTells_CourtsHowTo-InterpretADA.pdf.

¹⁹⁴ 527 U.S. 471, 479 (1999) (citation omitted).

¹⁹⁵ *Id.* at 479–80.

¹⁹⁶ ADAAA, sec. 6(a)(2) (to be codified at 42 U.S.C. § 12205(a)).

¹⁹⁷ John W. Parry & Amy L. Allbright, *The ADA Amendments Act of 2008: Analysis and Commentary*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 695, 696 (2008).

VI. LIKELY IMPACT AND LINGERING QUESTIONS

A. *The Expanded Class of Individuals with a Disability*

The most obvious impact of the ADAAA is that it broadly expands the class of individuals considered to have a disability. It also readjusts the focus of the ADA away from the troublesome issue of standing to that of determining the substance of disability discrimination claims.

The ADAAA undoes much of the damage inflicted by the Supreme Court's four narrowing decisions. By systematically overriding the most egregious rulings announced in these decisions, the ADAAA will inevitably extend the protections of the ADA to a much larger class of disabled individuals.

A brief review of the major changes wrought by the ADAAA demonstrates this point. Prior to the ADAAA, courts generally found that individuals who could ameliorate the impact of an impairment by means of mitigating measures were not disabled. Most courts, for example, applying the principles espoused in *Sutton* and *Murphy*, concluded that individuals who could control their diabetes through medication were not disabled.¹⁹⁸ The ADAAA alters this analysis by now requiring that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures"¹⁹⁹ As the Supreme Court noted in *Sutton*, "courts would almost certainly find all diabetics to be disabled" if evaluated in an unmitigated state.²⁰⁰ Similar shifts in outcomes likely will result for other conditions that can be ameliorated through medication, such as epilepsy and depression.

Similarly, most courts prior to the ADAAA found chronic illnesses that are episodic in their symptoms were not disabling. For example, a number of courts found cancer was not a disabling condition because its effects were episodic and subject to periods of remission.²⁰¹ The ADAAA alters this analysis by providing as a rule of construction that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."²⁰² This alteration likely means that far more individuals with episodic conditions, including cancer, asthma, and hepatitis B, will now be covered by the ADA.

¹⁹⁸ See, e.g., *Greenburg v. Bellsouth Commc'ns, Inc.*, 498 F.3d 1258, 1264 (11th Cir. 2007); *Wilson v. MVM, Inc.*, 475 F.3d 166, 179 (3d Cir. 2007); *Scheerer v. Potter*, 443 F.3d 916, 919–22 (7th Cir. 2006).

¹⁹⁹ ADAAA, sec. 4(a), §3(4)(E)(i) (to be codified at 42 U.S.C. § 12102(4)(E)(i)).

²⁰⁰ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999); see also *Arnold v. United Parcel Serv. Inc.*, 136 F.3d 854, 859 (1st Cir. 1998) (finding, in a pre-*Sutton* decision, an individual with diabetes to be disabled when evaluated in an unmitigated state).

²⁰¹ See, e.g., *Garrett v. Univ. of Ala.*, 507 F.3d 1306, 1315 (11th Cir. 2007); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190–91 (5th Cir. 1996).

²⁰² ADAAA, sec. 4(a), § 3(4)(D) (to be codified at 42 U.S.C. § 12102(4)(D)).

The ADAAA’s explicit recognition of an expanded set of major life activity categories also will convey standing on more individuals with impairments.²⁰³ In this regard, the ADAAA’s treatment of major bodily functions as major life activities is particularly significant.²⁰⁴ Prior to the 2008 amendments, a bodily function impairment constituted a disability only if that impairment substantially limited some major life activity such as breathing, seeing, or working.²⁰⁵ The Seventh Circuit Court of Appeals, for example, held that an individual with liver failure was not disabled unless the individual could show that this bodily impairment constituted a substantial limitation on some major life activity.²⁰⁶ Under the ADAAA, a substantial limitation on a bodily function itself is sufficient for disability status.²⁰⁷

The ADAAA’s revision of the “regarded as” prong likely will constitute the largest area of coverage expansion. Under *Sutton* and *Murphy*, an employee was “regarded as” disabled only if the employer perceived the impairment as one that substantially limited a major life activity.²⁰⁸ Thus, many courts found that employers did not regard individuals with back problems as disabled when they were perceived as unable to perform a single job as opposed to a class or broad range of jobs.²⁰⁹ The ADAAA dramatically broadens the reach of the “regarded as” prong to now encompass any individual who is treated adversely because of an actual or perceived impairment, regardless of the impairment’s functional impact.²¹⁰ This change should provide protection against disability discrimination to many individuals with bad backs, allergies, and carpal tunnel syndrome.

As a final measure, the congressional findings included in the ADAAA state that the current EEOC regulations defining the term “substantially limits” set too high a standard,²¹¹ and the Act expresses the expectation that the EEOC will revise that portion of its regulations.²¹² The impact of this step is unclear at this point since the regulations have not yet been promulgated, and it is unclear how much deference the courts will give to the EEOC’s pronouncements once they are in place. However, it is likely that this less specific step also will serve to expand the ADA’s coverage.

²⁰³ See *supra* Part V.A.2.

²⁰⁴ ADAAA, sec. 4(a), § 3(2)(B) (to be codified at 42 U.S.C. § 12102(2)(B)).

²⁰⁵ See, e.g., *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378, 385 (3d Cir. 2004) (ruling that kidney failure may be disabling if it substantially limits an individual’s ability to eliminate waste from the blood); *Blanks v. Sw. Bell Commc’ns, Inc.*, 310 F.3d 398, 401 (5th Cir. 2002) (ruling that positive HIV status was not disabling for an individual who did not want to have any more children).

²⁰⁶ See *Furnish v. SVI Sys., Inc.*, 270 F.3d 445, 450 (7th Cir. 2001).

²⁰⁷ ADAAA, sec. 4(a), § 3(2)(B) (to be codified at 42 U.S.C. § 12102(2)(B)).

²⁰⁸ See *supra* note 108 and accompanying text.

²⁰⁹ See, e.g., *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 512 (3d Cir. 2001); *Dupre v. Charter Behavioral Health Sys. of Lafayette, Inc.*, 242 F.3d 610, 615 (5th Cir. 2001).

²¹⁰ ADAAA, sec. 4(a), § 3(3)(A) (to be codified at 42 U.S.C. § 12102(3)(A)).

²¹¹ *Id.* sec. 2(a)(8).

²¹² *Id.* sec. 2(b)(6).

As the legislative history recites, a central purpose of the ADAAA expansion in disability coverage is to ensure “that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.’”²¹³ As a practical matter, however, the new focus likely will center more on whether an individual is qualified to perform the job in question. Unlike Title VII cases in which the crucial question generally is whether an employer has acted because of some protected trait, the crucial issue in most disability cases is whether the plaintiff is qualified to perform the job in spite of his or her disability.²¹⁴ This switch in focus is a positive adjustment. Basing workplace decisions on qualifications rather than preconceptions is a central tenet of antidiscrimination legislation.²¹⁵ An important corollary benefit of the ADAAA’s expanded reach—particularly with regard to the reinvigorated scope of the “regarded as” prong—is that it inhibits the type of stereotypical decision making enabled by the *Sutton* and *Murphy* decisions.

In short, by expanding the class of individuals with a covered disability, clarifying the EEOC’s regulatory authority, and reducing the possibility of decisions based on stereotypes, the ADAAA effectively corrects most of the damage done by the four errant Supreme Court cases discussed earlier in this Article.²¹⁶ The good news then is that the ADA once again appears poised to provide “a national mandate for the elimination of discrimination against individuals with disabilities.”²¹⁷

B. Lingering Questions

While the ADAAA clearly is a positive step for the proponents of disability rights, some lingering questions remain. Most of these questions relate to the “regarded as” compromise. The answers to these questions need to be monitored carefully over the next few years to ensure that the judiciary does not again undercut the affirmative civil rights mission of the ADA.

²¹³ 154 CONG. REC. S8347 (daily ed. Sept. 11, 2008).

²¹⁴ See *Barth v. Gelb*, 2 F.3d 1180, 1185–87 (D.C. Cir. 1993) (explaining that the issue of discriminatory causation is less significant in disability cases than in other types of discrimination cases because employers in disability cases are more likely to admit that their decision was disability-related, but then argue that the employee was unqualified due to the disabling condition).

²¹⁵ See generally *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (“Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.”).

²¹⁶ See *supra* Part II.A.

²¹⁷ 42 U.S.C. § 12101(b)(1) (2006).

1. Do Individuals Who Are Regarded As Disabled Need a Reasonable Accommodation in Order to Be Qualified for the Job?

Some commentators believe that individuals who only are regarded as disabled do not need or deserve a reasonable accommodation. Professors Pamela Karlan and George Rutherglen describe individuals wrongly perceived as disabled as victims of “traditional [nondisability] discrimination” for whom reasonable accommodation is an irrelevant concept.²¹⁸ Professor Cheryl Anderson recommends that individuals who are only “regarded as” disabled should not be entitled to a reasonable accommodation because “no function of the individual is impaired” and “the condition of the person has no real connection to the ability to do the job.”²¹⁹

A number of pre-ADAAA court decisions ruling that an employer had no obligation to provide a reasonable accommodation to an employee who is only regarded as disabled share this view. The Eighth Circuit Court of Appeals stated that a contrary interpretation would lead to “bizarre results” by entitling such an employee “to accommodations for a non-disabling impairment that no similarly situated employees would enjoy.”²²⁰ Similarly, the Ninth Circuit Court of Appeals concluded that “to require accommodation for those not truly disabled would compel employers to waste resources unnecessarily, when the employers’ limited resources would be better spent assisting those persons who are actually disabled and in genuine need of accommodation to perform to their potential.”²²¹

Arguably, this view is correct for individuals who are mistakenly perceived to have an impairment when, in fact, they have no impairment at all. But that is not necessarily the case for an individual who “has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation.”²²² Individuals who have an impairment that is not substantially limiting may nonetheless need a reasonable accommodation to be qualified for the job.

Consider the following hypothetical situation: Nancy is an employee who works on an assembly line. Due to her carpal tunnel syndrome, she has difficulty in making repetitive motions above shoulder height. This impairment, however, does not substantially limit her ability to work in either a class of jobs or a broad range of jobs. If her employer discharges or demotes Nancy because of her impairment, she meets the test for disability under the “regarded as” prong of the amended ADA, and she would be protected against these acts of discrimination if she were qualified to perform the job.²²³ But under the “regarded as” compromise, she would not be entitled to a reasonable accommodation to assist her in being able to

²¹⁸ See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 8 (1996).

²¹⁹ Anderson, *supra* note 115, at 132–33.

²²⁰ *Weber v. Strippit, Inc.* 186 F.3d 907, 916 (8th Cir. 1999).

²²¹ *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003).

²²² 29 C.F.R. § 1630.2(1)(1) (2010).

²²³ See *supra* notes 173–175 and accompanying text.

perform this or another job. What type of reasonable accommodations might she need? She might request a restructured work schedule to enable her to attend physical therapy sessions. She might request the employer to reallocate the performance of nonessential function, such as placing unneeded parts on a high storage shelf, to another employee. Or she might request a reassignment to a vacant position for which she is qualified. Each of these requests likely would constitute a reasonable accommodation that an employer would be obligated to provide for someone with a prong one or prong two disability,²²⁴ but they would not be required to provide for someone like Nancy who is disabled solely under prong three. If she were not qualified for the job without one of these accommodations, the employer would not run afoul of the new ADA in terminating Nancy's employment.

This hypothetical demonstrates an undesirable subset of disability discrimination that is permissible under the "regarded as" compromise. The overall significance of this shortcoming depends on just how many individuals share Nancy's circumstances.

2. How Many Individuals with Impairments Who Need Reasonable Accommodations Will Qualify for Prong One Disability Status?

The ADAAA's legislative history indicates that legislators who had misgivings about relinquishing the reasonable accommodation requirement for those individuals covered solely by prong three of the disability definition ultimately decided that it was "an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition, properly applied."²²⁵ In other words, the expectation is that individuals with impairments that were not deemed to be substantially limiting prior to the adoption of the ADAAA will now be covered by the expanded scope of prong one and thereby be entitled to reasonable accommodations.

Perhaps that may be the case, but this outcome is not inevitable. While it is true that Congress adopted a number of measures that will expand the scope of prong-one coverage, it did not alter that prong's basic formula. In order to have standing under prong one, an individual still must establish that he or she has "a physical or mental impairment that substantially limits one or more major life activities."²²⁶ Rather than expressly lowering the bar posed by the "substantially

²²⁴ See generally Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 444-45 (2002) (describing five categories of reasonable accommodations under the ADA).

²²⁵ 154 CONG. REC. S8347 (daily ed. Sept. 11, 2008); see also Feldblum et al., *supra* note 13, at 238-39.

²²⁶ ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(1)(A), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102(1)(A)).

limits” language, Congress decided to punt and let the EEOC define that term in revised regulations.²²⁷

We have been down this road before. The original version of the ADA used the same “substantially limits” language and the EEOC followed by issuing relatively broad interpretive guidelines. But the courts ignored or disapproved of many of the most significant guidelines and interpreted the term “substantially limits” narrowly. It is possible that something similar could happen again. Courts are generally prone to read legislative overrides narrowly and continue the viability of judicial principles that appear at face value to have been rejected by the legislature.²²⁸ More specifically, the judiciary has a natural incentive to guard its dockets against a litigation deluge unleashed by revised legislation and broad agency guidance.²²⁹ And as Professor Matthew Diller has cogently argued, “courts do not fully grasp, let alone accept, the [ADA’s] reliance on a civil rights model for addressing problems that people with disabilities face in the workplace.”²³⁰ Instead, many judges view ADA cases “as requests for special benefits made by employees who are performing poorly.”²³¹

That makes this second question a very important one in terms of determining whether the “regarded as” compromise was a good or bad strategy. If the revamped prong one does not absorb most of those individuals sharing Nancy’s circumstances, the subset of people regarded as disabled but not adequately protected under the ADA may be much larger than anticipated.

3. Will Courts Really Undertake a Two-Step Analysis of Disability Status under the Amended Statute?

Following the ADA AAA, a court may be required to undertake two different analytical inquiries into disability status in a single ADA case. One type of analysis is needed to determine whether a plaintiff has standing to assert an ADA claim. A plaintiff can establish standing to assert a disability discrimination claim under any prong of the ADA’s three-prong definition.²³² A second type of analysis may be necessary if a plaintiff requests a reasonable accommodation in order to meet the qualifications for the job in question. Under the amended statute, an employer is obligated to provide a reasonable accommodation only for a plaintiff who establishes disability status under either prong one or prong two.²³³ Therefore, it is possible that a court may undertake a prong three analysis with respect to the

²²⁷ See Long, *supra* note 164, at 219.

²²⁸ See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 513–36 (2009).

²²⁹ See Befort, *supra* note 27, at 332–33.

²³⁰ Diller, *supra* note 5, at 23.

²³¹ *Id.* at 50.

²³² See *supra* note 151 and accompanying text.

²³³ See *supra* note 177 and accompanying text.

former issue and a prong one or prong two analysis with respect to the latter issue in the same case.

While the ADAAA clearly contemplates both types of analysis, it is conceivable that courts will be tempted to stop at a single “regarded as” inquiry for at least two reasons. First, determining disability status under the new “regarded as” prong is an easier task than determining whether an individual is substantially limited in a major life activity. All a court must decide under the “regarded as” prong is whether an employer treats an employee adversely because of the employee’s impairment.²³⁴ No “substantially limits” measuring stick is required. Second, a number of courts have expressed reluctance to go beyond determining the presence of discriminatory treatment in disability cases to consider whether an employee is also entitled to an accommodation to assist performance ability.²³⁵ Such an inquiry is not required under other antidiscrimination statutes, and some courts would prefer to read the ADA as not requiring any affirmative preferences in the form of reasonable accommodations.²³⁶ Thus, stopping at the “regarded as” inquiry may be both convenient and more palatable for some courts.

Developments under the 2008 amendments should be closely followed to ensure that such a shortcut does not become common. Indeed, one would hope that the anticipated EEOC regulations will expressly endorse a two-step analysis. Perhaps the best way to accomplish this would be for the regulations to urge a sequential approach in which the prong one (or prong two) analysis occurs first. This would keep the issue of reasonable accommodation at the forefront while retaining prong three as a safety valve against discrimination in situations where no other statutory coverage is available.²³⁷

²³⁴ See *supra* notes 171–175 and accompanying text.

²³⁵ See, e.g., *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (“[W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.”).

²³⁶ See Stephen F. Befort & Tracey Holmes Donesky, *Reassignment under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1048–49 (2000) (noting that a number of courts have questioned the perceived fairness of requiring preferential treatment in the form of reasonable accommodations); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 320 (2009) (“[T]he ADAAA is unlikely, by itself, to eliminate judicial concerns about preferential treatment and affirmative action that triggered the need for the ADAAA in the first place”).

²³⁷ Under this approach, the “regarded as” standing inquiry would play a role of “last resort” similar to that played by reassignment to a vacant position as a reasonable accommodation of last resort. See *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, para. 24, U.S. EEOC, <http://archive.eeoc.gov/policy/docs/accommodation.html> (last modified Oct. 22, 2002) (“Reassignment is the reasonable accommodation of last resort . . .”).

4. *What Is a “Transitory and Minor” Impairment Excluded from Coverage under the “Regarded As” Prong?*

A final component of the “regarded as” compromise is the ADAAA’s exclusion of “transitory and minor” impairments.²³⁸ This exclusion was adopted as a means to temper the otherwise considerable expansion of the “regarded as” coverage accomplished by the elimination of any functional limitation requirement.²³⁹ According to a House committee report, the inclusion of this exception “responds to concerns raised by members of the employer community regarding potential abuse of the Act and the misapplication of resources on individuals with minor ailments that last only a short period of time.”²⁴⁰ The unknown scope of this exclusion presents a fourth lingering question.

The ADAAA defines only one of the two operational terms used in this exclusion: it defines a “transitory impairment” as “an impairment with an actual or expected duration of 6 months or less.”²⁴¹ The Act provides no inkling as to what is meant by a minor impairment, but a House committee report explains that without this exception the third “regarded as” prong of the disability definition would extend to “common ailments like the cold or flu.”²⁴²

The “transitory and minor” exception gives rise to at least three interpretative concerns. The first concern relates to the meaning of the term “minor.” Since the ADAAA eliminates the “substantial limitation” requirement for “regarded as” claims,²⁴³ the term must refer to an impairment that has some lesser type of impact. But the dividing line between major and minor impairments is unclear. What is clear is that the “minor” impairment exclusion will generate considerable uncertainty and litigation.

Second, it is not clear from the act’s definition of transitory whether the actual or the expected duration of an impairment should be more influential in a situation where the actual and expected duration differ from each other. Take for example the situation of an employee who has a minor impairment with an expected duration of five months, is discriminated against by her employer on the basis of her impairment during the third month, and ends up having the impairment for eight months. Is this employee prohibited from bringing a claim in month eight since the discrimination occurred during the time when she had a minor impairment with an expected duration of less than six months? Or will she be allowed to assert a “regarded as” claim since the impairment turned out to have an actual duration of more than six months? Because the plain language excludes impairments with either “an actual or expected duration of less than 6 months,”²⁴⁴

²³⁸ ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(3)(B), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102(3)(B)).

²³⁹ See 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008).

²⁴⁰ H.R. REP. NO. 110-730, pt. 1, at 14 (2008).

²⁴¹ ADAAA, sec. 4(a), § 3(3)(B) (to be codified at 42 U.S.C. § 12102(3)(B)).

²⁴² H.R. REP. NO. 110-730, pt. 1, at 14.

²⁴³ See *supra* note 142 and accompanying text.

²⁴⁴ ADAAA, sec. 4(a), § 3(3)(B) (to be codified at 42 U.S.C. § 12102(3)(B)).

the former interpretation likely is stronger. But this is a question that the courts ultimately will have to decide.

Third, there is a danger that the “transitory and minor” exception will be read in the disjunctive rather than the conjunctive. As written, the exception applies only to impairments that are both “transitory *and* minor,”²⁴⁵ such that a minor impairment with a duration of more than six months apparently is covered by the “regarded as” prong. It is not inconceivable, however, that courts hostile to disability discrimination claims²⁴⁶ will read the exclusion to extend to claims involving either transitory *or* minor impairments. Similar twists in interpretation have occurred in other controversial contexts.²⁴⁷ Such a distorted construction, of course, could significantly narrow the reach of the new “regarded as” prong.

VII. CONCLUSION

Congress initially enacted the ADA in 1990 as a seemingly expansive civil rights statute aimed at eradicating disability discrimination, but a judicial backlash, highlighted by four Supreme Court cases, narrowly interpreted the ADA’s disability standing requirement and undercut the statute’s effectiveness. Operating in a “let’s try this again” mode, Congress enacted the ADAAA in 2008 as a multifaceted attempt to override the restrictive court rulings. A crucial cornerstone of the ADAAA is a compromise concerning the scope of the “regarded as” prong of the disability definition. One aspect of the compromise is a dramatic expansion in the coverage of individuals adversely treated on the basis of an actual or perceived impairment. This expansion, however, is tempered by two accompanying limitations that exclude coverage of “transitory and minor” impairments and that eliminate any duty on the part of employers to provide reasonable accommodations to individuals who qualify as disabled solely under the “regarded as” prong.

The ADAAA clearly is welcome legislation that expands the class of individuals protected against disability discrimination and deters workplace decision-making predicated on stereotypical preconceptions. The “regarded as” compromise, however, also comes with a series of lingering questions that have the potential to hinder the ultimate goals of the new legislation. These areas of uncertainty should be closely monitored in the years ahead to ensure that the courts do not again frustrate the ADA’s reinvigorated promise.

²⁴⁵ *Id.* (emphasis added).

²⁴⁶ *See supra* notes 10–12, 235–236 and accompanying text.

²⁴⁷ *See, e.g.,* *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 639–40 (1980) (interpreting statute providing that an occupational safety and health standard must be “necessary *or* appropriate” to the provision of a safe place of employment to require a showing that such standard is “necessary *and* appropriate” for such purposes (emphasis added)).