

IDEOLOGICAL DISSONANCE, DISABILITY BACKLASH, AND THE ADA AMENDMENTS ACT

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Table of Contents

I. INTRODUCTION	1268
II. WHAT THE ADA PROMISED AND WHAT WE GOT - THE UNDULY NARROW INTERPRETATION OF THE DEFINITION OF DISABILITY	1276
III. THE ADA AMENDMENTS ACT OF 2008 COMPROMISE	1284
IV. WHY CONGRESS MADE THE RIGHT CHOICE TO REJECT AN IMPAIRMENT-ONLY DEFINITION OF DISABILITY	1294
<i>A. Creating an Open-Ended Protected Class Would Lead to a Second Backlash Against Disability Rights</i>	<i>1295</i>
1. <i>Directing Courts to Apply Both an Open-Ended Definition of Disability and a Broad Right to Reasonable Accommodation Would Create an Ideological Dissonance that has Potentially Negative Consequences for the Substantive Provisions of the Act</i>	<i>1297</i>
2. <i>An Open-Ended Definition of Disability Would Exceed in Important Respects the Moral Force for Prohibiting Disability Discrimination, Thus Heightening the Magnitude of Dissonance and Undermining Acceptance of the Protected Class</i>	<i>1307</i>
<i>B. The Compromise Disability Definition Minimizes Conflict with Perhaps the Most Dissonance Producing Reasonable Accommodation: Reassignment to a Vacant Position</i>	<i>1313</i>
V. PROACTIVE USE OF THE EXPANDED DEFINITION OF MAJOR LIFE ACTIVITY WILL LIMIT THE CREATION OF DISSONANCE, RELEGATING THE LURKING REMNANTS OF THE FIRST BACKLASH TO THE MARGINS OF THE PROTECTED CLASS WHERE THERE MAY BE ROOM TO DIFFER	1317
VI. CONCLUSION	1326

I. INTRODUCTION

*Better bend than break.*¹

Upon its original passage, the ADA was described by some as the most significant civil rights legislation since the Civil Rights Act of 1964.² Not quite twenty years after the Act's passage, that characterization was severely challenged as courts took an increasingly strict approach to the definition of disability. The judicial construction of the ADA was decried as inappropriately restrictive, or more forcefully, as a "backlash" against individuals with disabilities.³ Appeals were made to Congress to amend the statute to provide for a broader interpretation of disability status.⁴

Not everyone agreed that courts had misconstrued congressional intent. As recently as 2008, a respected ADA scholar proposed that the judicial construction of the ADA had in fact not gone off track, but rather the courts gave Congress the statute it would have drafted if the statute

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1. Traditional Scottish proverb, available at http://www.en.thinkexist.com/quotation/better_bend_than/187267.html (last visited Jan. 18, 2010).

2. See Robert D. Dinerstein, *The Americans with Disabilities Act of 1990 Progeny of the Civil Rights Act of 1964*, 31 HUM. RTS. 10, 10 (2004) (characterizing the comparison of the ADA to the Civil Rights Act of 1964 as "apt"); see also Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 62, 62 (Linda Hamilton Krieger ed., 2003) (noting that the ADA was described as an "emancipation proclamation" for individuals with disabilities) (quoting 136 CONG. REC. S9689 (July 13, 1990) (statement of Sen. Harkin)).

3. Diller, *supra* note 2, at 64-65 (suggesting that the failure of judges "to comprehend and therefore to accept the conceptual underpinning" of the ADA amounts to a form of backlash against the statute); Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1268 (2006) (describing the ADA as a "massive failure" due to restrictive judicial interpretation of the definition of disability).

4. See NATIONAL COUNCIL ON DISABILITY, RIGHTING THE ADA 99 (Dec. 1, 2004), available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm (last visited Jan. 18, 2010); 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, 163-64 (2000).

had been more fully considered before its original passage.⁵ His thesis was at least reasonable, given the decade or so of extreme judicial narrowing without Congressional reaction.⁶ The most restrictive readings of the ADA occurred in 1999 and then again in 2002, with no legislative response.⁷

It seemingly took the specter of the returning war hero, discharged from employment because of limitations from combat injuries, to push fixing the problems with the ADA onto the legislative fast track.⁸ Many who have served in this time of war are returning home with serious injuries, but the judicial construction of the ADA would potentially deny them coverage, especially if they used mitigating measures such as prosthetic devices.⁹ Throughout the legislative hearings on proposed amendments to the ADA, the image of the disabled veteran was raised as

5. See Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 525 (2008).

6. *Id.* at 526 (noting that “a near unanimous Supreme Court has rewritten the ADA in a restrictive fashion without any subsequent efforts to overturn those decisions”).

7. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197-98 (2002) (concluding that disability must be given a strict reading and that limitations on major life activities must be severe to be substantial); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (requiring that disability status be determined after taking into account the effects of any mitigating measures such as medication). In contrast to Congress’ delay in responding to the Court’s interpretation of the ADA was the immediate legislative reaction to Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), a wage discrimination case. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 5-6 (2009) (amending 42 U.S.C. § 2000e-5(e) to define “unlawful employment practice” to include every time a discriminatory wage payment is made).

8. Sponsors of the amendments acts in both the House and the Senate raised concerns about how individuals returning from war service with injuries requiring the use of prosthetics and other limitations would be treated under then-existing ADA law. See 154 CONG. REC. S8350 (daily ed. Sept. 11, 2008) (statement of Sen. Hatch); 154 CONG. REC. H6062 (daily ed. June 25, 2008) (statement of Rep. Miller). Senator Harkin, one of the main sponsors of the ADAAA, introduced into the record a letter from veterans groups that implored Congress to amend the Act to insure disabled veterans have a remedy against workplace disability discrimination because “[i]t is the patriotic duty of all Americans to protect these patriots against this indignity.” See 154 CONG. REC. S8350-51 (statement of Sen. Harkin).

9. Senator Hatch articulated the concern this way:

It boggles the mind that any court would say that multiple sclerosis, muscular dystrophy or epilepsy is not a disability covered by the ADA, but that is where we are today. Think about the troops coming home from Iraq, losing limbs, getting prostheses. The Court might find they are not disabled. If they might need some reasonable accommodation to get a decent job, the Court would find they are not covered by the Americans with Disabilities Act.

154 CONG. REC. S8350 (statement of Sen. Hatch).

a moral justification for responding to the judicial construction of the statute.¹⁰

The legislative response came in the form of the ADA Amendments Act of 2008 (ADAAA), which was signed into law by President George W. Bush on September 25, 2008.¹¹ The ADAAA modifies key aspects of the definition of disability and includes several new findings and purposes to make explicit Congress' rejection of the Supreme Court's strict interpretation.¹² Most significantly, while it retains the original three part definition of actual disability, namely a physical or mental impairment that substantially limits a major life activity, the ADAAA directs courts to apply this definition broadly and the EEOC to rewrite its regulations to accurately reflect the breadth of the definition.¹³

In the legislative history of the ADAAA, Congress asserted that it was restoring the ADA to what it was originally intended to be.¹⁴ In fact, the first version of what later become the ADAAA made this clear in its very name, "The Americans with Disabilities Restoration Act" (ADARA).¹⁵ The ADARA was significantly different than the ADAAA, however, in one important regard: it proposed an open-ended, virtually unlimited protected class, eliminating the substantial limitation requirement and providing that an individual need only have an impairment to have a statutory disability.¹⁶ "Impairment" has consistently received a very broad interpretation even as courts were construing other parts of the definition of disability narrowly.¹⁷

10. See *supra* note 8.

11. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008). The ADAAA took effect on January 1, 2009. *Id.* § 8 at 3559.

12. The ADAAA is discussed in detail in Part III, *infra*.

13. ADAAA § 2(b)(5)-(6), Pub. L. No. 110-325, 122 Stat. at 3554.

14. See 154 CONG. REC. S8345 (daily ed. Sept. 11, 2008) (statement of Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008) (asserting that the intent of the Act is to "establish a degree of limitation required for an impairment to qualify as a disability that is consistent with what Congress originally intended, a degree lower than courts have construed it to be").

15. The Americans with Disabilities Act Restoration Act of 2007, S. 1881, 110th Cong. (2007).

16. *Id.* § 4. The difference between the definition of disability under the two statutes is discussed in detail, *infra* Part III.

17. The ADA itself defined impairment only by exclusion of certain conditions or behaviors. See, e.g., 42 U.S.C. § 12208 (2008) (defining disability so as not to apply to individuals "solely because [those] individual[s] [are] transvestites"); 42 U.S.C. § 12210 (2008) (imposing limitations on coverage of current illegal users of drugs); 42 U.S.C. § 12211 (2008) (excluding from the definition of disability homosexuality, transsexualism, pedophilia, compulsive gambling, pyromania, among other similar conditions or disorders). The EEOC regulations define "impairment" to include: "Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more .

As Part II of this Article discusses in more detail, the open-ended impairment-only definition of disability was urged by the National Council on Disability (NCD) and other prominent disability advocates.¹⁸ This position stemmed from a belief that courts use the “substantial limitation” threshold to effectuate their view that reasonable accommodation is a form of special benefit, not part of the anti-discrimination principle.¹⁹ In order for disability to be recognized as a civil right, advocates argue, it needs to be placed on the same footing as other protected classes such as race and sex, which do not dwell on the status of the individual making the claim but rather focus on the merits of the employer’s actions.²⁰ Amending the definition to require at most a perfunctory consideration of the disability status of the plaintiff would be the best course of action to achieve the Act’s anti-discrimination goals.²¹

There was, however, opposition from the business community to an open-ended protected class.²² As discussed in Part III, in order to obtain support as broad as possible for the amendment, disability advocates, business representatives, and legislators worked out a compromise that retained the substantial limitation threshold but modified it to reject strict judicial construction.²³ Congress made clear that by keeping the

. . . body systems,” and “[a]ny mental or psychological disorder.” 29 C.F.R. § 1630.2(h)(1)-(2) (2008). Very few cases contained significant challenges to whether the plaintiff’s alleged impairment qualified under the statute, and those that did adopted a broad reading of the term. *See, e.g.,* Bragdon v. Abbott, 524 U.S. 624, 636 (1998) (finding that asymptomatic HIV infection was an impairment under the ADA). The ADARA would not have narrowed the existing definition of impairment in any respect. Had the ADA been amended to adopt an impairment-only definition, the result would have been a virtually unlimited protected class.

18. RIGHTING THE ADA, *supra* note 4, at 20-21; Feldblum, *supra* note 4, at 162-64.

19. Feldblum, *supra* note 4, at 161; *cf.* Diller, *supra* note 2, at 84-86.

20. *Cf.* Diller, *supra* note 2, at 84 (noting that “judges do not view ADA plaintiffs as potential victims of civil rights violations” and “are concerned with the character of the plaintiff, rather than the conduct of the defendant”).

21. *See* RIGHTING THE ADA, *supra* note 4, at 103-04; Feldblum, *supra* note 4, at 164.

22. *The ADA Restoration Act of 2007; Hearing on H.R. 3195 Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary*, 110th Cong. 5 (2007) (statement of Lawrence Z. Lorber, Chair, Policy Advisory Comm. on Equal Employment and Opportunity Matters Comm., United States Chamber of Commerce) (opposing amending the definition of disability to be based solely on “impairment” because it “would cast the ADA’s net too wide and diffuse protections afforded to the truly disabled”).

23. An original compromise version of the ADAAA passed the House on June 25, 2008. *See* ADA Amendments Act of 2008, H.R. 3195, 100th Cong. (2008). This version was different from the bill ultimately passed by both the Senate and the House, in that the first House version would have changed the definition of disability to define “substantial limitation” to mean a limitation that “materially restricts” a major life activity. *See id.* § 3(2).

substantial limitation requirement, it was not intending courts to continue their probing inquiry into that issue:

[I]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.²⁴

Nonetheless, to those advocates who sought to eliminate a threshold factual inquiry into disability status, the ADAAA is substantively disappointing.

Rather than the compromise representing a failure to secure the rights of individuals with disabilities on the same plane as other protected classes, however, this Article argues the compromise definition has greater potential to produce broader protection of individuals with disabilities than would have been achieved under the ADARA's open-ended protected class. This argument is somewhat counter-intuitive. As Part IV outlines, courts' view that reasonable accommodation confers a special benefit lead them to adopt a narrow protected class. As noted above, the impairment-only approach attempts to reverse that process by bypassing the inquiry into the status of the claimant. Courts would be compelled to equate disability with other protected classes, instead of viewing it as a special category, and this in turn would lead to accepting reasonable accommodation as part of the anti-discrimination principle. This argument has some intuitive appeal. Using a form of cognitive dissonance theory, however, this Article demonstrates that the more likely result would be a further entrenchment of the view that undeserving individuals are obtaining a special benefit.

To put it another way, the compromise definition, by retaining at least some inquiry into limitation, creates less incentive for courts to construe the substantive provisions of the Act narrowly. Such narrow construction of the substantive provisions could be termed a second wave of the backlash. Because Congress instead chose to broaden the protected class, yet keep at least some requirement that plaintiffs demonstrate their impairment produces limitation, that second backlash is less likely to occur. More individuals with disabilities will enter and remain in the workplace, but at the same time, courts will have less incentive to restrict

24. ADAAA § 2(b)(5), 122 Stat. at 3554.

access to reasonable accommodation out of concern that undeserving individuals are gaining some kind of windfall.²⁵

As indicated, the premise for this argument rests largely on a form of cognitive dissonance theory. Simply stated, cognitive dissonance arises when there is a conflict between cognitions, that is, knowledge, opinions, or beliefs about one's environment, oneself, or one's behaviors.²⁶ For example, a student may have an important exam for which she has to study, but may have also been invited to attend a friend's engagement party the night before. This situation would create dissonance between the student's desire to get a good grade on the exam and her desire to celebrate an important event in her friend's life. Cognitive dissonance theory suggests that people do not like to be in a state of dissonance and will attempt to resolve that dissonance in some fashion, by engaging in dissonance-reducing behavior in order to bring cognitions into consonance.²⁷ The student might resolve her dissonance by, among other choices, deciding to forego the party and study, deciding that the engagement party is a one-time event and she can make up any deficit in her exam performance, or going to the party for a short time and then staying up the rest of the night to study. Which dissonance-reduction option the student chooses will depend on the relative importance of the

25. It might be suggested that a better way to address status concerns about disability and avoid a backlash against the substantive provisions of the Act would be for Congress to have adopted the "impairment-only" protected class and then included additional rules regarding the scope of reasonable accommodation. This, in theory, would prevent courts from taking an overly narrow approach to the substantive rights granted by the statute in response to their concerns about an almost unlimited protected class. With the definition of disability, however, business interests had reached a consensus with disability advocates that the statute was broken and needed to be fixed. See Elizabeth Williamson & Kris Maher, *Businesses Face Push to Expand Disabled Access*, WALL ST. J., June 17, 2008, at A6 (quoting Randel Johnson, Vice President, U.S. Chamber of Commerce as stating, "[w]e couldn't beat this bill so there was a need for a compromise and there was some sense that the court had interpreted the [law] too restrictively"). There is not a similar consensus regarding reasonable accommodation. The business community would probably vigorously resist any changes that would make reasonable accommodations more readily available, such as rules overriding seniority systems or minimizing plaintiffs' burdens of proof in general. It took Congress eighteen years to address the problems with the original ADA. It is not clear whether Congress would similarly wait to respond until problems with the substantive provisions become sufficiently apparent. More to the point, it is unclear what would be gained by taking this alternative approach. As I argue in Part IV, the compromise definition excludes only those cases that are marginal claims even if we take a broad view of disability. The concerns that individuals with disabilities have been granted only second class civil rights status are not implicated by excluding those cases at the margins.

26. LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 2-3 (Stanford Univ. Press 1962) (1957).

27. See *id.* at 3.

two cognitions and their resistance to change, also known as the magnitude of the dissonance.²⁸

As explained in Part IV.A.1, there are elements of dissonance at play in the interpretation of the ADA. The current narrow interpretation of the ADA's protected class reflects a strongly held judicial ideology, or cognition, based on two related (consonant) premises—that only a narrow class of individuals are deserving of the protections of the Act, especially the right to reasonable accommodation, and that many individuals who claim disability status do so to gain a windfall, not because they are actually less able to participate in society due to conditions beyond their control. A broad statutory protected class is in conflict with those premises, which creates dissonance. Dissonance theory suggests that those judges who have strongly held “windfall” cognitions will look for opportunities to resolve that dissonance in a way that does not require them to change their cognition.²⁹ This can be, and arguably was, achieved by construing the substantive provisions of the ADA narrowly.³⁰

28. *Id.* at 16.

29. *See id.* at 21-22. Festinger articulates how individuals may resolve dissonance between cognitions by adding new cognitive elements which reduce the magnitude of dissonance and, thereby, the pressure to change a cognition. *See id.* The example he uses is of a smoker who experiences dissonance between his smoking behavior and his knowledge of health research which indicates that smoking is harmful. *Id.* at 22. That smoker can reduce the magnitude of the dissonance by seeking out new information critical of that health research and avoiding information praising that research. FESTINGER, *supra* note 26, at 22. The new critical information reduces the magnitude of the dissonance, putting less pressure on the individual to give up smoking. *Id.*

30. In making this argument, I recognize arguments that law can play an expressive function in shaping social norms. *See, e.g.,* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-25 (1996) (describing how law plays an expressive function in “making statements” designed to change social norms); *cf.* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 5 (2005) (characterizing the ADA as a “transformative law” designed to displace established social norms that are barriers to full participation of individuals with disabilities in the workplace). Expressive function theory might suggest that by adopting the broadest definition of disability (one based solely on impairment), the law can serve a normative role by establishing that one's degree of impairment is irrelevant to one's status, which through court implementation can change negative social attitudes toward disability issues. While not explicitly stated in expressive function terms, this theory indeed seems to underlay impairment-only arguments. Cognitive dissonance theory makes a similar case for changing attitudes after first changing behavior. *See* FESTINGER, *supra* note 26, at 19 (discussing how cognitions are responsive to reality, and “if the behavior of the organism changes, the cognitive element or elements corresponding to this behavior will likewise change”). My argument doesn't ignore the potential expressive function that the definition of disability might play; rather, it suggests there may be a practical barrier to accomplishing that outcome, one that argues for a more incrementalist approach. Even under the compromise definition

By retaining at least some filtering mechanism at the definitional stage, however, the ADAAA lessens (although does not eliminate) the magnitude of dissonance. While some courts will construe the right of reasonable accommodation narrowly regardless, if there is less potential for dissonance, the narrowing should not happen on the same level that occurred with the original statutory definition. In other words, a second backlash may be avoided.

Part IV.A.2 then considers how an open-ended protected class might be seen by both courts and society as illegitimate, which would increase the magnitude of dissonance. As Congress itself indicated, the ADA was never intended to cover every person with a physical or mental impairment as having an actual disability.³¹ A virtually unlimited protected class potentially would have extended the protections of the statute to individuals far outside the range of individuals that society is willing to accept as entitled to civil rights protection. Should that have occurred, courts would have had social support for resolving their dissonance by restricting the substantive reach of the statute to the extreme degree that the original definition was restricted.

Next, Part IV.B considers how the breadth of the protected class may undermine the rationale for broad interpretation of what might be the most dissonance-creating accommodation, reassignment to a vacant position. The lower courts are currently debating the extent of the right to reassignment when the employer has a more qualified individual it wishes to place in the vacant position.³² If arguments advanced for reasonable accommodation in general rest in concepts of corrective

adopted in the ADAAA, the desired result is expressive—that disability becomes less about who is deserving of status protection and more about the justifications for exclusionary actions.

31. See 154 CONG. REC. S8345 (Statement of Managers to Accompany S3406, The Americans with Disabilities Act Amendments Act of 2008).

32. The circuit courts that have considered the issue have split on whether the individual with a disability has a right to the open position, or only a right to compete with other qualified applicants. Compare *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1169 (10th Cir. 1999) (holding an employee with a disability is entitled to be reassigned), and *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (declining to adopt rule that the right to reassignment is nothing more than a right to submit an application along with other candidates) with *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483-84 (8th Cir. 2007) (concluding an employer is not required to reassign employee to vacant position when it has a policy to prefer the most qualified candidate), and *E.E.O.C. v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027 (7th Cir. 2000) (holding an employee with a disability is only entitled to be considered for position). The Supreme Court granted certiorari to decide this issue in *Huber* but subsequently dismissed the case when the parties settled. See *Huber v. Wal-Mart Stores, Inc.*, 128 S. Ct. 1116 (2008) (dismissing writ of certiorari).

justice,³³ arguments advanced to justify reassignment rest more on concepts of distributive justice, namely the reduced ability of individuals with disabilities to obtain other employment.³⁴ With a virtually unlimited protected class, it would be much more difficult to offer that rationale to justify the preference. The compromise definition is less dissonance-creating because it is as consistent with distributive justice rationales as the original definition was.

Finally, Part V argues that proactive use of the new definition will limit the potential to create dissonance, thus mitigating concerns about the fact that Congress retained the substantial limitation requirement. Among these tools is an expanded definition of "major life activity." If there are any lingering elements of the first backlash, they should be found at the margins of the definition only. Exclusion of these marginal cases would not impair disability's status as a protected civil right, but rather would create less dissonance for courts when applying reasonable accommodation law. Because courts have less incentive to do to the reasonable accommodation provisions of the ADA what they did to the definition of disability, the overall goal of protecting the rights of individuals with disabilities will be better achieved.

II. WHAT THE ADA PROMISED AND WHAT WE GOT - THE UNDULY NARROW INTERPRETATION OF THE DEFINITION OF DISABILITY

As noted at the outset of this Article, at the time of its passage, the Americans with Disabilities Act was characterized as the most

33. The United States Supreme Court, in rejecting U.S. Airways's argument that its seniority system could not be modified to provide a plaintiff with a reasonable accommodation because that would be an unlawful preference, noted that the ADA at times requires what seems to be a preference as a means of ensuring an equal playing field. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (reasoning that the ADA requires "preferences in the form of 'reasonable accommodation' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy"); see also Linda Hamilton Krieger, *Sociolegal Backlash, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 340, 367-68 (noting arguments regarding the corrective justice foundations of the ADA).

34. See Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 962 (2004) (noting that "[d]isabled employees, once they are bumped from their jobs by more senior employees, have fewer options than their able-bodied counterparts"); Stephen F. Befort, *Reasonable Accommodation and Reassignment under the Americans with Disabilities Act: Questions and Suggested Solutions After U.S. Airways, Inc., v. Barnett*, 45 ARIZ. L. REV. 931, 982-83 (2003) (contrasting the impact on the individual with a disability, for whom reassignment to a vacant position is a "last chance" to remain employed, with the impact on an employee without a disability, for whom the consequences are "less severe").

significant civil rights legislation since the Civil Rights Act of 1964.³⁵ Testimony presented to Congress attested to the level of societal exclusion experienced by individuals with disabilities.³⁶ The Act was based upon the Rehabilitation Act of 1973, in particular Section 504, which itself had provided access to many excluded from the services and activities of government funded programs.³⁷ The high expectation was that the ADA would similarly open doors for individuals with disabilities to all sectors of the economy, not just those that were federally-funded.³⁸

The ADA largely borrowed from existing language in the Rehabilitation Act and its regulations. Under the Rehabilitation Act, "individual with a disability" has a three part definition.³⁹ The ADA adopted the same language: A disability is "(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁴⁰ As Professor Chai Feldblum recounts, the ADA's drafters believed there was little cause for concern about that definition, because the issue had proven to be of little controversy in the federal courts under Section 504.⁴¹ Expectations were that the ADA would chart a similarly smooth path.

That, obviously, is not how it worked out. Whereas counsel representing government contractors focused their attention primarily on the substantive provisions of the statute, counsel representing private sector companies frequently disputed the threshold issue of disability.⁴²

35. See *supra* note 2 and accompanying text.

36. See H.R. Rep. No. 101-485(II), at 28-31, *reprinted in* 1990 U.S.C.C.A.N. 303, 310-13; see also Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 419-20 (1991) (compiling the anecdotal instances of discrimination recounted by individuals with disabilities during Congressional hearings on the ADA).

37. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 20 U.S.C. §§ 701-94(a) (2008)).

38. See H.R. Rep. No. 101-485(II), at 48, *reprinted in* 1990 U.S.C.C.A.N. 303, 330 (noting that one of the ADA's "most impressive strengths is its comprehensive character").

39. 29 U.S.C. § 705(20)(A) (2009).

40. 42 U.S.C. § 12102(1) (2008).

41. Feldblum, *supra* note 4, at 92; see also Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Construction of the Meaning of Disability*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 122, 127 (commenting that "one is struck by how seldom the question of disability was litigated" in the almost twenty years between enactment of the Rehabilitation Act and the ADA).

42. See Feldblum, *supra* note 4, at 106 (noting that early Rehabilitation Act cases seldom raised issues about disability but rather mainly focused on whether the plaintiff had been discriminated against solely because of her disability); *id.* at 139 (noting the greatly increased number of challenges to disability status after the passage of the ADA).

Courts in turn emphasized that the individualized assessment required by the ADA meant plaintiffs had to prove their disability.⁴³ They concluded that the term "substantial limitation" gave them a gate-keeping function to keep claims based on lesser impairments out.⁴⁴ Even impairments that had been specifically referenced in the congressional debate, such as diabetes and epilepsy,⁴⁵ were found on the facts of cases not to be substantially limiting of plaintiffs' major life activities.⁴⁶ The result, as documented by Professor Ruth Colker in her seminal survey of ADA judicial outcomes, was a statute construed so narrowly on the threshold issue that few cases were able to survive past a motion for summary judgment.⁴⁷

The nadir came in 2002 with the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*.⁴⁸ In *Toyota*, the Court held that in order to prove a substantial limitation in the major life activity of performing manual tasks, the plaintiff must show how her impairment substantially limited her ability to perform the tasks central to daily living.⁴⁹ These tasks included things such as "household chores, bathing, and brushing one's teeth."⁵⁰ The Court's unanimous opinion, authored by Justice O'Connor, cautioned that the definition of disability must be "interpreted strictly to create a demanding standard," and only a "severe" restriction would qualify.⁵¹ Subsequent to the *Toyota* decision,

43. See, e.g., *Albertson's, Inc., v. Kirkingburg*, 527 U.S. 555, 567 (1999) (holding that an ADA plaintiff must "prove a disability by offering evidence" regarding the extent of his limitation).

44. See *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184, 197 (2002) (stating that ADA's definitional terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled"); cf. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (suggesting it would "debase [the Rehabilitation Act's] high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor").

45. See H.R. Rep. No. 485(II), reprinted in 1990 U.S.C.C.A.N. 303, 310-34 (noting that individuals with diabetes and epilepsy, whose conditions are controlled by medication, are nonetheless covered under the first prong of the definition of disability).

46. See, e.g., *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724-25 (8th Cir. 2002) (finding plaintiff's diabetes did not substantially limit any major life activity in light of the insulin shots and diet plaintiff followed to keep the symptoms under control); *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349, 352-53 (4th Cir. 2001) (finding individual with epilepsy did not present sufficient evidence that it substantially interfered with the major life activities she identified).

47. See generally Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1998).

48. 534 U.S. 184.

49. *Id.* at 198.

50. *Id.* at 202.

51. *Id.* at 197.

some lower courts began adopting the “tasks-central-to-daily-living” standard for other major life activities.⁵² As I noted in a prior article, “courts appear[ed] to be developing a new, one-size-fits-all standard for evaluating substantial limitation, one that requires plaintiffs to prove inability to perform very basic tasks (what might be called a toothbrushing inability threshold).”⁵³

With hindsight, the definitional problems could have been anticipated. The ADA was essentially a cause without a movement.⁵⁴ Unlike the Civil Rights Act of 1964, which came out of a time of civil unrest and a public demand that the system be righted, the ADA did not come into being as a result of massive public outcry. Although there had been various bursts of disability advocacy occurring throughout the country, there was no organized movement and disability issues were not at the forefront of public debate.⁵⁵ The Act made its way onto the legislative agenda because several high ranking government officials and key members of Congress had either personally or through their family experienced issues related to disability, and they used their personal experiences to paint a compelling rationale for the statute.⁵⁶

The ADA’s drafters adopted the definition of disability from Section 504 in part because they thought using something familiar would avoid slowing down passage of the bill.⁵⁷ The Supreme Court had seemingly already endorsed an expansive approach to that definition in *School*

52. See *Philip v. Ford Motor Co.*, 328 F.3d 1020, 1025 (8th Cir. 2003) (finding that plaintiff could not prove substantial limitation in his ability to grip, reach, lift, stand, sit, or walk because he did not present evidence showing how these limitations “impacted tasks central to most people’s daily lives”); *E.E.O.C. v. United Parcel Serv., Inc.*, 306 F.3d 794, 802-03 (9th Cir. 2002) (requiring plaintiff with monocular vision to show how his eyesight was restricted in comparison to how unimpaired individuals “use their eyesight in daily life”).

53. Cheryl L. Anderson, *Comparative Evidence or Common Experience: When Does “Substantial Limitation Require Substantial Proof Under the Americans with Disabilities Act?”*, 57 AM. U. L. REV. 409, 447 (2007).

54. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 626 (2004); see also Selmi, *supra* note 5, at 542-43.

55. See Stein, *supra* note 54, at 626-27 (describing the disjointed advocacy for disability rights prior to enactment of the ADA); cf. RICHARD SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS* 51-52, 54 (Temple University Press 2001) (1984) (describing how § 504 came to be included in the Rehabilitation Act with no hearings on the need to prohibit discrimination on the basis of disability).

56. JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 102-04 (2004); Selmi, *supra* note 5, at 538; Stein, *supra* note 54, at 627.

57. Feldblum, *supra* note 4, at 129.

Board of Nassau County, Florida, v. Arline.⁵⁸ Professor Michael Selmi characterized the ADA's passage as emerging "in the face of simultaneously broad congressional support and widespread congressional indifference."⁵⁹ The main opposition to the Act came from conservative senators, concerned more about whether homosexuals and pedophiles would be covered than the specifics of the rest of the Act's coverage.⁶⁰

Beyond the walls of Congress, supporters avoided bringing media attention to the legislation.⁶¹ The lead lobbyist for the Act has been quoted as saying they did not want press coverage because "[they] would have been forced to spend half [their] time trying to teach reporters what's wrong with their stereotypes of people with disabilities."⁶²

As a result, the potential problems with the statute's definition were not fully vetted.⁶³ Without broader public discussion, courts were left to interpret this statute with a limited sense of the history of discriminatory treatment of individuals with disabilities.⁶⁴ Some courts fell back on the pity and paternalism-based concerns lobbyists avoided discussing prior to enactment.⁶⁵ For example, in *Chevron U.S.A., Inc., v. Echazabal*,⁶⁶ the Supreme Court interpreted the ADA's "direct threat" defense to allow an employer to refuse to employ a willing and otherwise able individual because the job posed a risk of injury to that individual.⁶⁷ While the

58. 480 U.S. 273 (1987). *Arline* is discussed in more detail in Part V. See *infra* notes 267-278 and accompanying text.

59. Selmi, *supra* note 5, at 531 (2008).

60. SWITZER, *supra* note 56, at 107; Selmi, *supra* note 5, at 542.

61. SWITZER, *supra* note 56, at 108.

62. *Id.*

63. Selmi, *supra* note 5, at 543 ("Had there been a public dialogue, it is also quite likely that the disability community would have opted for a more narrow statutory definition because the community would have been required to articulate a justification for the statute . . .").

64. Professor Lennard J. Davis characterizes this approach as "ableist." See Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 98, 107 (noting how ableist thinking leads individuals "without a disability consciousness" to characterize certain accommodation requests as "trivial").

65. See Stein, *supra* note 54, at 633-36 (discussing Supreme Court decision-making that stems from a belief that "ADA rights involve something more than equality and are motivated by pity rather than by social justice").

66. 536 U.S. 73 (2002).

67. *Id.* at 87. Professor Selmi ties the Court's attitude in *Echazabal* to "the lack of a social movement on disability, as it suggests that we have failed to move the debate forward regarding the treatment of those with disabilities and instead remain locked in what should be an outdated viewpoint." Selmi, *supra* note 5, at 560. The Court in that case approved an Equal Employment Opportunity Commission regulation that expanded the direct threat defense from the statutory requirement that the individual pose a "danger

Court denied that it was adopting a paternalistic rule,⁶⁸ the outcome in the case allows someone other than the individual with a disability to decide whether or not a job poses too great a risk to the individual himself. The inherent message is that the individual with a disability is not capable of deciding for himself.⁶⁹

Alternatively, some courts refused to merit the significance of the limitations experienced by the plaintiffs. One such example is *Littleton v. Wal-Mart Stores, Inc.*,⁷⁰ in which the Eleventh Circuit found that an adult who had been diagnosed with mental retardation since childhood did not have a disability because he did not present sufficient evidence that he was unable to perform major life tasks substantially less well than average.⁷¹ Although the court acknowledged that the plaintiff's mental impairment limited him, the long history of exclusion and negative stereotyping of individuals with intellectual development disabilities apparently was not considered in the court's evaluation of that limitation.⁷² Whether the court was unaware of that history, or the court

to others" in the workplace to include whether the individual posed a danger to him or herself. *Echazabal*, 536 U.S. at 76. The Court unanimously upheld the E.E.O.C. regulation. *Id.* at 87. Selmi asserts that "the Court's decision evinced a paternalistic attitude, an attitude that has long prevailed when it comes to the disabled, and one that demonstrates that, certainly to the Court, disability discrimination is different from discrimination based on gender or race, or the other traditional categories." Selmi, *supra* note 5, at 560.

68. See *Echazabal*, 536 U.S. at 86.

69. In this regard, *Echazabal* reflects the thinking of the medical model of disability, under which individuals with a disability were subordinated to "experts" who determined whether their impairment could be rehabilitated, and the individuals thus made "'productive' and [able to] contribute to society, or must permanently remain outside of the community." See Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1365-66 (1993); Alexandra G. White, *Paralyzed Discord: Workplace Safety, Paternalism and the Accommodation of Biological Variance in the Americans with Disabilities Act*, 63 LA. L. REV. 509, 572 (2003) (characterizing the Supreme Court's reasoning in *Echazabal* as "hearken[ing] back to the not so distant past when the disabled were robbed of their autonomy by trained experts who made decisions regarding their potential to become productive citizens and, thus, their societal inclusion").

70. 231 F. App'x 874 (11th Cir. 2007).

71. *Id.* at 875, 877-78.

72. *Id.* at 877-78. The Eleventh Circuit acknowledged that the plaintiff experienced "certain limitations" because of his impairment but insisted that he had to provide evidence to create a genuine issue of material fact on whether the limitations were substantial. *Id.* The court ignored the long history of second-class citizenship experienced by individuals with intellectual disabilities, which is the same context-less, "ableist" thinking described by Professor Davis. See Davis, *supra* note 64, at 107.

was taking a “you wanted individualized assessment, you got it” approach, cannot be determined.

The choice to use the term “disability” instead of handicap, as had initially been used in section 504, contributed to the problem with the courts’ interpretation.⁷³ As some commentators have pointed out, courts have a long experience with “disability” in the context of disability insurance benefits.⁷⁴ In benefits cases, disability denotes a level of impairment so severe that the individual is unable to provide for him or herself.⁷⁵ This is the plain meaning of disability that textualist judges brought to the table when they were faced with ADA cases challenging the plaintiff’s protected status. The ADA, which defined disability as a “substantial limitation” without further clarification, provided judges little incentive to depart from their already established sense of that meaning. This thought process is illustrated by Justice O’Connor in *Toyota*, when she described the ADA as requiring plaintiffs to prove a “severe” limitation, a word that appears nowhere in either the statute or the regulations implementing the statute.⁷⁶

The anti-special rights perspective also poses a problem for the ADA. Because it does not merely require a defendant to treat individuals with disabilities the same as those without, but to accommodate those disabilities, the ADA raises concerns about special rights.⁷⁷ Moreover, there is a lack of reciprocity in the rights that are granted. Only individuals with disabilities have rights under the statute, whereas under race and sex discrimination laws, any race and either sex can pursue

73. Professor Feldblum, one of the drafters of the ADA, acknowledged this in her testimony before Congress on the proposed ADA Restoration Act. See *Hearing on H.R. 3195*, *supra* note 22 (statement of Chai Feldblum, Professor of Law, Georgetown University Law Center) (noting “the instinctive understanding by many courts of the term ‘disability’ is that it is synonymous with an ‘inability to work or function’”).

74. Parmet, *supra* note 41, at 146; Kay Schriener & Richard K. Scotch, *The ADA and the Meaning of Disability*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 164, 175.

75. Parmet, *supra* note 41, at 146; see also Feldblum, *supra* note 73, at 14-15 (noting courts’ familiarity with the standard for disability payments under Social Security, which requires plaintiffs to show they are unable to work, may have made it difficult for them to grasp the intent to capture a much broader range under the ADA).

76. See *Toyota Motor Mfg.*, 534 U.S. at 198.

77. See *Humiston-Keeling, Inc.*, 227 F.3d at 1028-29 (characterizing a reasonable accommodation rule that would require the employer to reassign an individual with a disability to an open position over someone the employer prefers as more qualified “affirmative action with a vengeance”); see also Alex B. Long, *The ADA’s Reasonable Accommodation Requirement and “Innocent Third Parties,”* 68 MO. L. REV. 863, 869 (2003) (suggesting that “[t]he most controversial accommodations are not those that are expensive, but those that limit the discretion of employers or adversely impact other employees”).

claims.⁷⁸ This statutory scheme is acceptable, if at all, to individuals opposed to special rights because in the broader societal view “disability” is equated with “incompetence,” and society endorses benevolence towards those who are incompetent and need special assistance.⁷⁹ But because these rights are special, only the truly deserving should have access to them. Courts construing the statute were unlikely to adopt a reading that could bestow special rights on those they believe to be undeserving, lazy workers.⁸⁰

Professor Selmi makes that latter point in support of his argument that there has not been a backlash against the principal of the ADA itself, but rather that courts merely crafted the narrow statute Congress itself would have crafted if the issues had been fully discussed through the legislative process.⁸¹ Others argue there has in fact been a backlash against protecting individuals with disabilities, and that certain cases such as *Echazabal* demonstrate a “disquieting view” that the court may be hostile to the policy choices of the Act.⁸²

If Selmi is correct that courts were just engaging in adjustment of an ambiguous statute, the ADAAA may potentially achieve the ADA’s original integrationist goals despite being more narrowly cast than disability advocates wished. The ADAAA is undeniably more clear about congressional intent. At the same time, it maintains at least some buffer against bestowing rights on lazy workers. Where courts followed a narrow path before because they thought that’s what Congress directed, they should be willing to follow the clearer, broader path now.

78. Samuel A. Marcossan, *Of Square Pegs & Round Holes: The Supreme Court’s Ongoing “Title VII-ization” of the Americans with Disabilities Act*, 8 J. GENDER, RACE & JUST. 361, 380 (2004). Age discrimination has reciprocity concerns because only individuals within the protected age group (40 and older) may seek the protection of the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 631(a) (2008). Unlike the ADA, however, the ADEA does not have an accommodation mandate. Rather, it contains a substantial exception for decisions made based on “reasonable factors other than age” (RFOA) even if those factors affect individuals in the protected age group more significantly. 29 U.S.C. § 623(f)(1) (2008). This essentially makes it difficult to prove age discrimination claims unless there is evidence of age-based animus, which invokes traditional equal treatment anti-discrimination principals. *Cf. Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (concluding that while the ADEA allows for claims based on disparate impact theory, the scope of that theory is narrower than under Title VII because of the RFOA provision). Thus, the ADEA raises fewer concerns about special rights.

79. Parmet, *supra* note 41, at 146.

80. Selmi, *supra* note 5, at 544 (noting that “to the extent the ADA was perceived as providing statutory protections to lazy workers, malingerers, and whiners—those who have a difficult time coping with everyday stresses in the workplace—it was a virtual certainty that courts would cut back on the statute to eliminate those protections”).

81. *See id.* at 525.

82. Marcossan, *supra* note 78, at 380 (discussing *Echazabal*, 536 U.S. 73).

On the other hand, if there truly was (and is) a backlash against disability rights, it may not matter how carefully crafted any amendment to the ADA is. Nothing short of a restrictive scope of the ADA would be acceptable.

One thing is clear—the ADAAA should finally move the judicial focus away from the definitional stage and onto the substantive rights granted under the statute. Courts should begin to address more questions of what is discrimination on the basis of disability, and what is a reasonable accommodation. As they do, we will see whether the restrictive interpretations have simply been shifted from one arena to another. This Article argues that by adopting a compromise definition of disability that retains a threshold measure of significance of limitation, the ADAAA may avoid triggering a second, substantive backlash.

III. THE ADA AMENDMENTS ACT OF 2008 COMPROMISE

On July 26, 2007, the seventeenth anniversary of the passage of the ADA, Representative Steny Hoyer and Senator Tom Harkin introduced in their respective chambers two similar bills to amend the ADA, both entitled “The Americans with Disabilities Restoration Act” (ADARA).⁸³ As the short title of the bills indicated, both H. R. 3195 and S. 1881 sought to amend the ADA and “restore” it to what was described as the original Congressional intent.⁸⁴ This legislation was not the first attempt in recent years to amend the ADA. Bills had been introduced previously,⁸⁵ but those attempts stalled without hearings after being referred to subcommittee.⁸⁶ The 2007 bills did not suffer the same fate.⁸⁷ The momentum truly changed when a compromise version of H.R. 3195, renamed the Americans with Disabilities Amendments Act of 2008,

83. H.R. 3195, 110th Cong. (2007); S. 1881, 110th Cong. (2007). Although the House and Senate versions of the bill were structured somewhat differently, the substance of the two bills was almost identical except for some language in the section authorizing and directing various government agencies to issue regulations implementing the Act, which will be discussed *infra*.

84. See H.R. 3195 (“To restore the intent and protections of the Americans with Disabilities Act of 1990”); S. 1881 (“To amend the Americans with Disabilities Act of 1990 to restore the intent and protections of that Act, and for other purposes”).

85. Americans with Disabilities Act Restoration Act of 2006, H.R. 6258, 109th Cong. (2006).

86. See H.R. 6258: Americans with Disabilities Act Restoration Act of 2006, available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-6258> (last visited Jan. 18, 2010).

87. See 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (summarizing the committee action on the ADAAA).

passed in the House on June 25, 2008, by a vote of 402-17.⁸⁸ After subsequent hearings in the Senate, a modified version of the ADAAA, S. 3406, was proposed and passed in that Chamber by a voice vote.⁸⁹ S. 3406 was then presented in the House, again passing by a voice vote.⁹⁰ President George W. Bush signed the ADAAA into law on September 25, 2008.⁹¹

The reason for the overwhelming vote in favor of the ADAAA was simple—the business lobby saw the writing on the wall and rather than fight any change to the statute, engaged in negotiations with disability advocates to propose the compromise version that led to the final bill.⁹² The resulting legislation was described by Committee Chairman George Miller as coming out of discussions between “much of the disability and business communities” and “reflect[ing] the bipartisan consensus” reached by ranking Democrats and Republicans on the House Education and Labor Committees.⁹³

Significant portions of the ADAAA are similar to the ADARA. Both versions direct that mitigating measures may not be taken into account when determining whether the plaintiff has a disability,⁹⁴ although the ADAAA creates an exception for “ordinary eyeglasses or contact lenses” which may still be considered.⁹⁵ Both also changed the substantive prohibition of discrimination in section 102 of the ADA⁹⁶ from prohibiting discrimination “against an individual with a disability” to prohibiting discrimination “on the basis of disability.”⁹⁷ Both Acts

88. 154 CONG. REC. H6081 (daily ed. June 25, 2008).

89. 154 CONG. REC. S8342 (daily ed. Sept. 11, 2008).

90. 154 CONG. REC. H8298 (daily ed. Sept. 17, 2008).

91. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

92. See Bonnie Conrad, Julie Davidson & Melissa Turley, *ADA Compromises on Tap*, HUMAN RESOURCE EXECUTIVE ONLINE, May 30, 2008, available at <http://www.hreonline.com/HRE/story.jsp?storyId=98513292> (last visited Jan. 18, 2010).

93. *The ADA Amendments Act of 2008, Comm. Mark-Up of H.R. 3195 Before the H. Educ. and Labor Comm.*, 110th Cong. 3 (2008) (opening statement of Hon. George Miller, Chair, House Education and Labor Comm.) available at <http://edlabor.house.gov/markups/pdfs/HR3195/GM%20ADA%20restoration%20markup%20statement%20FINAL%206-18-08.pdf> (last visited Jan. 18, 2010).

94. See H.R. 3195, § 4(2)(A) (ADARA); Pub. L. No. 110-325 § 4(a) (ADAAA).

95. See ADAAA § 4(a)(4) (excluding “ordinary eyeglasses or contact lenses” from “low-vision devices” that otherwise cannot be taken into account). The ADAAA adds a new substantive provision, however, that requires employers using uncorrected vision standards to justify those standards as job-related and consistent with business necessity. ADAAA § 5(b) (inserting a new subsection into 42 U.S.C. § 12113 which addressed qualification standards).

96. H.R. 3195, § 5(a) (ADARA); ADAAA § 5(a).

97. H.R. 3195, § 5(a) (ADARA); ADAAA § 5(a).

explicitly grant the relevant federal agencies the authority to implement regulations interpreting the definition sections.⁹⁸

The versions, however, contain significantly different basic definitions of disability.⁹⁹ The ADARA would have adopted the definition of disability urged by the National Council on Disability (NCD).¹⁰⁰ That definition removed any reference to either substantial limitation or major life activities: “The term ‘disability’ means, with respect to an individual—(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.”¹⁰¹ As stated in *Righting the ADA*, the NCD’s explicit goal in recommending this change was to “recognize[] the social conception of disability and reject[] the notion of a rigidly restrictive protected class.”¹⁰² Eliminating the probing first stage inquiry into the existence of disability has indeed been a major goal of disability advocates.¹⁰³

The House’s initial compromise version of the ADAAA instead retained the basic definition of disability from the original ADA, namely “a physical or mental impairment that substantially limits one or more major life activities of [an] individual.”¹⁰⁴ That compromise, however, would have further defined “substantial limitation” to mean an impairment that “materially restricts” a major life activity.¹⁰⁵ When this version reached the Senate, concern was expressed about the ambiguity of that standard.¹⁰⁶ The alternative approach adopted in the final version

98. H.R. 3195 § 7(f) (ADARA); ADAAA § 6(a)(2). The ADARA would have explicitly directed courts to defer to federal regulations and guidance implementing the ADA including the definitions section. H.R. 3195 § 7(g).

99. The ADAAA also contains several substantive provisions the ADARA would not have, including a new provision denying reasonable accommodations to individuals who are only perceived as having a disability. ADAAA § 6(a)(1).

100. *RIGHTING THE ADA*, *supra* note 4, at 20-21.

101. H.R. 3195 § 4.

102. *RIGHTING THE ADA*, *supra* note 4, at 13.

103. *See, e.g.*, Feldblum, *supra* note 4, at 164 (advocating for “an over-inclusive” definition of disability that would direct judges and attorneys away from spending time arguing whether plaintiffs are “really ‘disabled’” to determining whether the person’s impairment was the basis for the adverse employment action and, if so, whether that action was justified).

104. H.R. REP. NO. 110-730 pt. 1, at 2 (2008).

105. *See id.* No further definition of “material” was provided, however.

106. *Defining Disability Down: The ADA Amendments Act’s Dangerous Details: Hearing on S. 1881 Before the S. Comm. on Health, Educ., Labor & Pensions*, 110th Cong. (2008) (statement of Andrew M. Grossman, Senior Legal Policy Analyst, Center for Legal & Judicial Studies, The Heritage Foundation) (criticizing the lack of clarity about what it means to “materially restrict” a major life activity).

keeps the original “substantial limitation” language,¹⁰⁷ but deletes the “materially restricts” definition and instead adds Rules of Construction designed to clarify Congress’ intent regarding how “substantial limitation” is to be interpreted:

(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY- The definition of ‘disability’ in paragraph (1) shall be construed in accordance with the following:

(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.

(B) The term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(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;

107. ADAAA § 4(a).

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) 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.

(iii) As used in this subparagraph--

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.¹⁰⁸

Keeping with the House's initial compromise, the final version of the ADAAA further added a definition of "major life activity" rather than deferring it to regulations.¹⁰⁹ The statute now identifies two categories of functional life activities, general and bodily function, both of which are to be expansive.

(2) MAJOR LIFE ACTIVITIES-

(A) IN GENERAL – For purposes of paragraph (1) [setting out the three categories of disability], major life activities 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.

(B) MAJOR BODILY FUNCTIONS – For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not

108. ADAAA § 4.

109. ADAAA § 3(2).

limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.¹¹⁰

Finally, the third prong of the definition of disability was modified to eliminate the substantial limitation requirement.¹¹¹ Individuals asserting disability under that prong, however, will not be entitled to reasonable accommodations.¹¹²

Beyond the modifications to the statutory definitions, the ADAAA incorporates several specific findings and purposes directly addressing Congress's dissatisfaction with the judicial interpretation of the ADA. Congress singles out the Supreme Court's decision in both *Sutton v. United Airlines, Inc.*,¹¹³ and *Toyota*¹¹⁴ as having construed disability far more strictly than Congress intended.¹¹⁵ Specifically, Congress outlined its intent:

2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying

110. *Id.*

111. ADAAA § 3(1).

112. ADAAA § 6(a)(1).

113. 527 U.S. 471.

114. 534 U.S. 184.

115. ADAAA §§ 2(b)(2), (3).

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”; [and]

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for ‘substantially limits’, and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis[.]¹¹⁶

The original ADA’s finding that 43 million individuals in the United States have disabilities was deleted, as was a reference to individuals with disabilities as a “discrete and insular minority,” because Congress considered both of those findings integral to the judicial misconstruction of the statute.¹¹⁷ The findings and purposes also articulate Congress’ disagreement with the E.E.O.C.’s regulations defining substantial limitation, to the extent those regulations describe the standard as requiring plaintiffs to prove they are “significantly restricted” in performing a major life activity.¹¹⁸

One result of the ADAAA should be to increase the number of impairments that will fall into the common sense category. As I have written about elsewhere, some courts found the plaintiff’s showing of disability sufficient based on the fact finder’s common sense and life experience.¹¹⁹ These disabilities were characterized as “plain on [their] face.”¹²⁰ Courts required little to no consideration of disability status in those cases.¹²¹

116. *Id.* §§ 2(b)(2)-(5).

117. 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008) (statement of Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008).

118. ADAAA § 2(b)(6); *see* 29 C.F.R. § 1630.2(j) (2008) (defining “substantially limits”).

119. Anderson, *supra* note 53, at 430-34.

120. *See id.*

121. *See id.*

The Statement of the Managers to Accompany S. 3406 reflects the common sense standard in an example reiterated from the original passage of the ADA:

We believe that the manner in which we understood the intended scope of “substantially limits” in 1990 continues to capture our sense of the appropriate level of coverage under this law As we described this in our committee report to the original ADA in 1989[, “a] person is considered an individual with a disability for purposes of the first prong of the definition when [one or more of] the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.”¹²²

The legislative record further suggests the types of impairments Congress thought the ADA should cover with limited consideration of disability status. These include “amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer.”¹²³ These would seem to be the impairments Congress had foremost in mind when in the Purposes section, it directed courts not to “demand extensive analysis.”¹²⁴

Plaintiffs raising certain other types of disabilities will have to rely more heavily on courts to follow the congressional mandate, however, because the compromise leaves room for debate. By retaining the original requirement that an impairment must substantially limit major life activities, Congress indicated that some disability claims should still fall beneath the threshold for coverage.¹²⁵ As quoted above, the Managers’ Statement suggests the threshold is based on what “most

122. 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of Managers to Accompany S.3406, The Americans with Disabilities Act Amendments Act of 2008), (quoting S. Rep. No. 101-16, at 23 (1989)).

123. 154 CONG. REC. S8345.

124. ADAAA § 2(b)(5). The Managers’ Statement also cautions, however, that “plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.” 154 CONG. REC. S8346.

125. See 154 CONG. REC. S8345 (“[W]e reaffirm that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability . . .”).

people” are able to do.¹²⁶ How exactly the ADAAA’s more generous standard will work is unclear for some types of disability claims when that standard continues to require comparisons to what others experience.

For example, claims involving sleep impairments may pose difficulties. When does interrupted sleep cross the threshold between common, episodic difficulty sleeping and a disorder substantially limiting the ability to sleep? Similarly, any of the physical activities such as walking, standing, sitting, and lifting may pose these same questions. Although Congress used an example with someone walking ten miles, what about five miles, or even two miles? Will courts give these issues to a jury to make a “most people” determination, or will courts continue their pre-ADAAA practice of making the determination themselves at the summary judgment stage?¹²⁷

As noted above, in the Act’s Findings and Purposes, the ADAAA indicates courts are not to demand extensive analysis on the issue of disability but instead concentrate on whether discrimination has occurred.¹²⁸ The Manager’s Statement interprets the ADAAA’s purposes section as clarifying “that the definition of disability should not be unduly used as a tool for excluding individuals from the ADA’s protections.”¹²⁹ Given the Court’s refusal to consider legislative history before, will it give due regard to the new legislative record?

The ADAAA further directs the EEOC to revise its definition of “substantial limitation” but does not expressly indicate any definition other than that the current “significantly restricted” standard is not in line with the Act.¹³⁰ The Manager’s Statement provides only that the EEOC’s definition “sets too high a standard,” in conjunction with the Act’s rejection of the *Sutton* and *Toyota* standards.¹³¹ Presumably, Congress intends that the EEOC retain that part of its regulatory definition that

126. See *supra* note 122 and accompanying text.

127. The ADAAA might increase the reliance on medical experts. In sleeping cases, for example, courts might consider a limitation substantial as compared to most people once a doctor diagnoses a sleep condition or disorder and recommends some kind of treatment. If the ADAAA adopts such a standard, it would not be without some irony given that the original ADA was envisioned as a step away from the medical model of disability. See generally Deirdre M. Smith, *Who Says You’re Disabled? The Role of Medical Evidence in the ADA Definition of Disability*, 82 TUL. L. REV. 1 (2007) (suggesting that courts should rely less on doctors to make determinations as to disability status because it “pathologizes” and ultimately demeans disability as a civil right).

128. ADAAA § 2(b)(5).

129. See 154 CONG. REC. S8345.

130. See *id.* (indicating “[t]he bill expresses the clear intent of Congress that the EEOC will revise its regulations that similarly improperly define the term ‘substantially limits’ as ‘significantly restricted’; again, this sets too high a standard”).

131. *Id.*

considers how the plaintiff's abilities compare to the average person in the general population.¹³²

Despite the emphatic language that the ADA is to be construed broadly and more emphasis placed on the merits of claims, the compromise may not satisfy all those who have argued for a better understanding of disability as a socially constructed barrier to full participation in society.¹³³ By keeping the required proof of protected class status, the compromise may not change the perception of disability rights as special rights.¹³⁴ The compromise continues to place individuals with disabilities in a different position than other civil rights categories, because it will still be necessary to prove the extent of an individual's limitations. Although more plaintiffs will survive summary judgment under the new definition, courts still play the role of gate-keeper.

The specific change these advocates sought, however, namely to redefine disability to create an open-ended class of "impairment," had as much potential to increase the backlash against the ADA as to reduce it. The impairment-only version of the ADARA would have pushed the definition of disability to the extreme, effectively reinforcing the special rights view. As the next section discusses, the ADAAA's compromise approach may produce the far better outcome of further developing society's understanding of disability as a civil rights issue while neutralizing the potential for a second backlash against the substantive provisions of the Act.

132. See 29 C.F.R. § 1630.2(j)(1) (2008) (defining substantial limitation as being unable to do something the "average person" can do or being significantly restricted in the "condition, manner or duration" under which an activity can be performed as compared to the "average person in the general population").

133. The social construct theory of disability posits that much of what is disabling stems not from the incompetence of the individual, but from arbitrary barriers that keep those individuals from fully participating in society. Disability is "the product of interaction between individuals and the environment. . . . [T]he major problems confronted by people with disabilities can be traced to the restraints imposed by a disabling environment instead of personal defects or deficiencies." Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, in *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 26, 33; see also Mary Crossley, *The Disability Kaleidoscope*, 74 *NOTRE DAME L. REV.* 621, 653-57 (1999) (articulating the social construct, or social model, of disability).

134. The Disability Rights Education & Defense Fund's comments on the initial compromise version of the ADAAA reflected this concern. See *DREDF on the May 23, 2008 ADA Restoration Act (ADARA) Language*, June 16, 2008, at 2-3 available at http://www.dredf.org/programs/DREDF_ADARA_Memo_6_16_06_Final.pdf (last visited Jan. 18, 2010).

IV. WHY CONGRESS MADE THE RIGHT CHOICE TO REJECT AN IMPAIRMENT-ONLY DEFINITION OF DISABILITY

Much has been written about a backlash against the ADA and disability civil rights.¹³⁵ It cannot be gainsaid that there has indeed been judicial resistance (some would say hostility¹³⁶) toward disability discrimination claims. What can be debated, however, is exactly what is being lashed back against. As commentators have argued, the judiciary may perceive the challenges faced by individuals with disabilities not as civil rights concerns, but more as social welfare or rehabilitation concerns.¹³⁷ Perhaps just as significant may be a belief that many disability claims lack factual legitimacy. As Professor Samuel Bagenstos has put it, there is “a fear of falsification” that lends itself to a narrow construction of the Act’s protected class.¹³⁸

In either respect, the most significant challenge facing the ADAAA is changing the negative attitudes toward disability claims. Disability advocates argue that to change attitudes, judicial and otherwise, we need to divorce disability from special entitlement.¹³⁹ In theory, defining disability as impairment, thereby creating an open-ended protected class, would accomplish that change, because it would “help break down the myths, stereotypes, and fears that still surround the concept of disability.”¹⁴⁰ In reality, adopting that sort of open-ended protected class might result in a level of ideological dissonance that would have additional negative consequences for both the ADA and other disability-related issues. Congress’ compromise decision to retain the substantial limitation requirement, but define it more broadly, may ultimately prove

135. Articles on the subject have in fact been compiled into a book whose title speaks for itself. See *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS*, *passim*.

136. See Hahn, *supra* note 133, at 27 (describing judicial perspectives on the ADA as characterized by “covert hostility and paternalism”).

137. See Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 881 (2004) (noting the historic understanding of disability as either a welfare issue or an economic issue to be addressed through rehabilitation); Hahn, *supra* note 133, at 33 (suggesting the courts have failed to embrace the sociopolitical perspective of disability that animates anti-discrimination law).

138. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 469 (2000) (suggesting that “lower courts’ use of the term truly disabled suggests that . . . a fear of falsification [is at work]”).

139. See Parmet, *supra* note 41, at 146, 148 (describing the problem with continued linkage between disability, incapacity, and special entitlement).

140. See Feldblum, *supra* note 4, at 165 (suggesting that redefining disability to require only impairment “will ultimately help break down the myths, stereotypes, and fears that still surround the concept of disability”).

to be more successful in changing attitudes than adopting an impairment-only threshold.

A. Creating an Open-Ended Protected Class Would Lead to a Second Backlash Against Disability Rights

In one respect, defining disability as “a physical or mental impairment” would make the definition so clear courts could not avoid adopting a broad definition of disability. As noted previously, “disability” is commonly understood to suggest a significant level of incapability, or incompetence.¹⁴¹ The current statutory definition of disability lends itself by analogy to that common understanding of disability, because the statute requires proof of substantial limitation of a major life activity. The ADAAA, while loosening the standard for “substantial limitation,” nonetheless continues to require consideration of the degree of limitation.¹⁴² Some have argued that even a broadened statutory definition of substantial limitation does not sufficiently distance the two meanings of disability, and that eliminating consideration of degree of limitation altogether is the only way to overcome judicial resistance to a broad interpretation of the Act.¹⁴³

Indeed, advocates for the broadest definition argue that requiring anything more than impairment as the sole consideration makes the ADA less clearly a civil rights statute.¹⁴⁴ Adopting the broadest definition of disability would persuade judges that the statute is, in fact, a civil rights statute and not one granting special rights to a narrow class of individuals deemed worthy of the statute’s benefits.

The flip side to that argument is that an impairment-only definition divorces the ADA from another context, namely the social consensus for imposing affirmative obligations to individuals with disabilities.¹⁴⁵ Because disability is equated with incompetence, and because this incompetence stems from factors beyond individual control, the broader

141. See *supra* notes 77-79 and accompanying text.

142. ADAAA § 4(a).

143. See Feldblum, *supra* note 4, at 164 (suggesting that while Congress could amend the ADA to make its meaning clearer under the original definition, “a better policy approach” would be simply to adopt an impairment-only definition and direct courts to spend their time evaluating the merits of the employers’ actions).

144. See *DREDF*, *supra* note 134, at 1 (asserting that “it is necessary to send a clear message to the courts to look at disability in a civil rights context by making [it] clear that severity of disability is irrelevant to whether the plaintiff’s impairment resulted in discrimination”).

145. Cf. Parmet, *supra* note 41, at 146 (characterizing the equation of disability with incompetence as explaining “why disability is widely accepted as creating affirmative societal obligations”).

society believes individuals with disabilities are entitled to assistance from others.¹⁴⁶ While disability advocates would likely argue this explanation fails to recognize the social construct theory of disability, it nonetheless demonstrates a major pitfall of adopting an open-ended definition. That pitfall is the increased potential for a second backlash against the ADA.

If the first backlash was centered on the definition of disability, the second would be on the substantive provisions of the Act. Courts have already shown a tendency to construe some substantive aspects of the statute narrowly.¹⁴⁷ Adopting the broadest definition of disability would create a form of ideological dissonance¹⁴⁸ for courts, as they are asked to impose affirmative obligations to benefit individuals they may feel do not have legitimate status. They may resolve this dissonance by taking even more restrictive approaches to the ADA's substance. This may be especially true for accommodations such as the right to reassignment to a vacant position, because the rationale for that type of accommodation would no longer have a substantial fit with the scope of the Act's protected class. The compromise definition creates less dissonance, and therefore may avoid judicial over-reaction.

146. *Id.*

147. *See, e.g., Echazabal*, 536 U.S. at 87 (upholding 29 C.F.R. § 1630.15(b)(2), which extends the "direct threat to the health or safety" defense to include not just threats posed to third parties but to plaintiffs themselves); *Barnett*, 535 U.S. at 406 (holding that ADA plaintiffs who seek reassignment as a reasonable accommodation when the employer has a seniority system in place must prove special circumstances warrant not upholding that system).

148. Linda Hamilton Krieger has identified something she calls "normative dissonance" that describes one process through which social norms shape behavior. *See Krieger, supra* note 33, at 342 ("[W]e generally expect other people to comply with the major social norms associated with a particular context" Violation of these norms by oneself or others "creates an unpleasant situation that people generally attempt to reduce"). I have characterized the form of dissonance associated with the definition of disability as "ideological" rather than normative. The difference between the two characterizations may not be substantial, except that I wish to examine the way in which disruptions to one's internal belief system are motivational more so than focus on conflicts between norms *per se*, and "ideology" as a broader term that also encompasses normative beliefs, better fits what I describe.

1. Directing Courts to Apply Both an Open-Ended Definition of Disability and a Broad Right to Reasonable Accommodation Would Create an Ideological Dissonance that has Potentially Negative Consequences for the Substantive Provisions of the Act

The relationship between the definition of disability and the substantive provisions of the ADA sets up a potential ideological dissonance for judges applying the statute. This ideological dissonance borrows from concepts of cognitive dissonance. As briefly outlined at the beginning of this Article, cognitions are one's knowledge, opinions, or beliefs about one's environment, oneself, or one's behaviors.¹⁴⁹ Dissonance arises from "the existence of nonfitting relations among cognitions."¹⁵⁰ Dissonance is a psychologically uncomfortable state, which motivates a person to try to reduce that dissonance (dissonance-reduction) and achieve consonance.¹⁵¹ Some dissonance is probably inevitable any time an opinion is formed or an action taken, because there will be some elements of cognition that point in a different direction.¹⁵² Not all dissonance motivates the individual to engage in dissonance-reduction. The degree to which dissonance is motivational depends on the importance of the two elements that are in dissonance.¹⁵³

The body of law leading up to the ADAAA demonstrates that for many judges, a narrow construction of the protected class is an important element of cognition about the scope of the ADA. This may be explained by an ideology about the nature of disability rights and not simply by reference to the statutory language. For example, some lower courts have expressed concerns that granting accommodations to a certain class of individuals (such as plaintiffs who are asserting coverage under the "regarded as" prong of the definition of disability) will give them a "windfall."¹⁵⁴ Similarly, they have expressed concern that the ADA not

149. *Id.*

150. FESTINGER, *supra* note 26, at 3.

151. *Id.*

152. *See id.* at 5 (noting that "very few situations are clear-cut enough so that opinions or behaviors are not to some extent a mixture of contradictions").

153. *Id.* at 16, 18; *see also* Ziva Kunda, *Can Dissonance Theory Do It All?*, 3 PSYCHOL. INQUIRY 337, 337 (1992) (noting that dissonance theorists recognize that "the mere inconsistency between two beliefs does not suffice to produce the motivational state termed dissonance").

154. *See, e.g.,* Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (describing the granting of reasonable accommodations to "regarded as" employees as "improvidently provid[ing] those employees with a windfall").

turn their courts into "garden variety" workers compensation courts.¹⁵⁵ The Supreme Court itself has reflected normative concerns in narrowing the definition of disability beyond that required by the statute, for example asserting in *Toyota* that the definition must be interpreted strictly to require a severe (not just substantial) limitation, and further requiring plaintiffs to show limitations on all activities central to daily living, which it defined to include such basic activities as brushing one's teeth.¹⁵⁶ Moreover, in *Sutton*, the Court has emphasized that the employer is "free" to prefer one employee over another based on non-substantial physical or mental conditions.¹⁵⁷

Asking courts to apply a broadened definition of disability creates for them an ideological dissonance between the breadth of the protected class and the breadth of the substantive aspects of the statute. Prior case law having established that only a deserving few may impose the burden of reasonable accommodation on the employer, courts are now required to open up that remedy to a new class of individuals, many of whom courts may believe should not be entitled to assert civil rights protections. Predicting the nature of any dissonance-reducing behavior will thus depend on the magnitude of the dissonance these courts experience.¹⁵⁸

One means of dissonance-reduction would be attitudinal change about the proper scope of the protected class.¹⁵⁹ In other words, dissonance-reduction can be achieved by changing one's opinion that only a narrow protected group of individuals deserve to be protected by the Act. Some judges, those primarily responsive to the language of the statute who did not hold the narrow protected class ideology strongly,

155. See *Pedigo v. P.A.M. Transp., Inc.*, 891 F. Supp. 482, 485 (W.D. Ark. 1994), *vacated on other grounds*, 60 F.3d 1300 (8th Cir. 1995). As the court in *Pedigo* expressed it,

[t]he court still finds it difficult to believe that Congress really intended to cover employees such as the plaintiff in this case and has a firm conviction that the Act, although having laudatory purposes, because of its ambiguities and intended or unintended broadness of coverage, has the potential of turning federal courts into worker's compensation commissions, deterring such courts from competently and expeditiously handling important, traditionally federal controversies.

Id.

156. *Toyota Motor Mfg.*, 534 U.S. at 197-98.

157. *Sutton*, 527 U.S. at 490-91.

158. See FESTINGER, *supra* note 26, at 16, 18 (discussing the relationship between the magnitude of the dissonance and the motivation to either eliminate the dissonance or avoid situations that create it).

159. See *id.* at 23 (explaining that one response to cognitive dissonance is to change or modify an underlying belief to bring it in consonance with other cognitions).

will do this. For others, however, the “deserving” element of the cognition may be a dominant norm that will not change readily.

Moreover, courts are in a position of forced compliance. Forced compliance occurs when a person behaves in a manner that is not consistent with what they believe as the result of some external influence or pressure.¹⁶⁰ In the legal context, this situation might arise when a judge must apply a law in a manner that conflicts with that judge’s convictions about the proper scope of that law, because judges are compelled to apply the law as it is written. Specific to the ADA, judges may be required to recognize a broad protected class when their strongly held underlying belief is, for example, that civil rights status should be granted to severely limited individuals only. The magnitude of dissonance from a challenge to a strongly held belief plus compelled compliance would be great, and more likely to resist attitudinal changes.¹⁶¹

At this point, a concept that Professor Linda Hamilton Krieger calls “capture by construal” provides some insight into what dissonance-reducing behavior might be expected from those with strongly-held preexisting beliefs about the proper scope of the ADA’s protected class.¹⁶² Capture by construal occurs when loopholes and ambiguities in transformative formal legal rules, meaning those rules meant to displace existing social norms, are “systematically skew[ed]” by those charged with interpreting them such that the transformative rules “increasingly come to resemble the normative and institutional systems they were intended to displace.”¹⁶³ This can be placed in a dissonance context, as a means to predict courts’ approach when their ideology about the proper scope of the protected class is resistant to attitudinal change.

There are at least two potential sources of loopholes and ambiguities for construal by capture after the ADAAA. First, as noted above, there is still the potential to apply a narrow definition of disability to the extent Congress directed courts to compare what the plaintiff can do to what

160. *Id.* at 84.

161. While dissonance might be found in many situations where a judge’s personal belief conflicts with the law the judge is required to apply, this analysis posits that preexisting schema regarding disability, and lack of awareness about how those schema influence attitudes toward disability, contribute toward a greater magnitude of dissonance in this context. The fact that individuals might think they have a beneficent attitude toward persons with disabilities may actually serve to increase the dissonance from being directed to find the protected class includes individuals who do not meet previously understood criteria for being disabled.

162. See Krieger, *supra* note 33, at 347-49 (identifying the process through which a formal legal rule can become “captured” by resistance to the norms it expresses).

163. *Id.* at 349.

“most people” can do.¹⁶⁴ To do this on any significant level, however, would require courts to ignore the express intent of Congress set out in the ADAAA that the standard not be narrowly applied.¹⁶⁵ This approach, therefore, has as much potential to increase dissonance as to resolve it.

Courts are more likely to turn to a second place the ADA allows them to resolve their dissonance—the provisions for reasonable accommodation. The basic standards for reasonable accommodation were not affected by the ADAAA. For the ADAAA to have its intended purpose, courts cannot use the reasonable accommodation provisions for dissonance-reduction.

Professor Mary Crossley has noted the relationship between the definition of disability and courts’ willingness to grant reasonable accommodations.¹⁶⁶ She suggests that “[t]he unwillingness of courts to interpret the ADA’s definition of disability broadly may reflect in part a concern that the ADA’s right to reasonable accommodation is truly in the nature of a welfare benefit, rather than being an integral part of the ADA’s protection against disability discrimination.”¹⁶⁷ She further suggests that “courts may be more willing to grant civil rights, as compared to welfare rights, to individuals whose disability status is contested.”¹⁶⁸ In other words, to the extent courts are persuaded that disability discrimination claims mirror other civil rights claims, such as race or sex discrimination, disability claims are less likely to face judicial resistance regardless of how disability is defined. To the extent the ADA appears to grant a “potentially costly ‘special’ or ‘extra’ benefit, [courts] willingness to dole out that benefit only to [certain individuals]—the so called ‘truly disabled’—is unsurprising.”¹⁶⁹

Crossley argues that courts need to be persuaded to accept the similarities between reasonable accommodation and anti-discrimination: “[B]ecause society’s physical and institutional structures reflect a disregard for people with disabilities as full and equal members of society, we should comprehend accommodation as remedying discrimination by demanding the removal of socially imposed barriers to

164. See *supra* note 122 and accompanying text.

165. A related possibility is for courts to impose greater evidentiary burdens on what it takes to establish impairment. This possibility seems slight as well, however, when the ADAAA’s admonitions to construe the protected class broadly are combined with the existing regulation defining impairment as “any physiological disorder, or condition,” and “any mental or psychological disorder.” See 29 C.F.R. § 1630.2(h)(1)-(2) (emphasis added).

166. Crossley, *supra* note 137, at 945.

167. *Id.*

168. *Id.*

169. *Id.*

equal employment opportunity for people with disabilities.”¹⁷⁰ She then acknowledges that “[i]t is not clear the [pre-ADAAA] statutory definition of disability serves this purpose.”¹⁷¹

Crossley is exactly correct, in that the original ADA definition reinforced the idea that accommodation is a special benefit by fostering a “deserving class” mentality.¹⁷² Courts need to be persuaded that disability discrimination occurs because of forces similar to those behind race and sex discrimination. This does not argue, however, for adopting the broadest definition of disability, as some have advocated.¹⁷³ Such a definition would extend beyond remedying the physical and institutional structures that reflect a societal disregard for full and equal participation by individuals with disabilities.¹⁷⁴ The scope of the protected class needs

170. *Id.*

171. *Id.* at 945-46.

172. Congress recognized this in its explanation of why the ADAAA deletes the findings 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” from the original statute. *See* 154 CONG. REC. S8329, S8344 (daily ed. Sept. 11, 2008) (statement of Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008) (noting that the findings “had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose”).

173. Professor Feldblum has pointed out that Title VII itself is an over-inclusive statute, extending protections to individuals who arguably have not experienced the same degree of disadvantage as others, such as Caucasians and men. Feldblum, *supra* note 4, at 162. She argues that while technically, an impairment-only protected class would cover “a number of people who might never need the ADA’s anti-discrimination protection, the statute would mirror Title VII which similarly technically provides protection to a large number of people who might never need Title VII’s anti-discrimination protection.” *Id.* at 163. She would make use of the “identified component” (i.e., impairment) unlawful regardless of whom it is used against, just as use of the identified component (i.e., race or sex) is unlawful under Title VII. *Id.* at 164. The problem with this analysis is that it presupposes a normative equivalence between the use of impairment and the use of race or sex in making employment determinations. As discussed in more detail in Part IV.A.2 *infra*, while race and sex as characteristics seldom relate to ability to do a job, impairment often does. This fundamental distinction undermines the argument that a technically overbroad protected class under the ADA is no different than a technically overbroad protected class under Title VII.

174. Professor Crossley herself does not appear to advocate for such a definition. *See* Crossley, *supra* note 137, at 946 (citing Bagenstos, *supra* note 138, at 401, in which the author argues for a definition of disability based on systemic disadvantage of individuals considered outside the norm). Crossley’s argument is geared toward a definition of “reasonable” in accommodation law that

consider[s] whether the requested accommodation, if provided, would function to remedy discrimination by removing a socially imposed and disability-related barrier to equal opportunity for the disabled individual. If the policy, practice, or physical structure that the disabled individual seeks to have modified is one that would not be likely to exist if persons with a wide range of disabilities

to correlate to some sense that the deprivation was, indeed, one of a civil right. Otherwise, courts will view the protection as a windfall, thus increasing the magnitude of the ideological dissonance and in turn increasing the likelihood of further backlash.¹⁷⁵

Professor Samuel Bagenstos has articulated a social subordination and stigma-based explanation for why individuals with disabilities should receive protection under civil rights legislation, which also establishes why the protected class cannot be open-ended:

While every person at some point has some physical or mental condition that could be described as an impairment, and many may suffer some physical instances of poor treatment as result, only a smaller group of people is “designated handicapped” in the process. That is a class of people who are likely to experience systemic disadvantage through the mechanisms of prejudice, stereotypes, and neglect. Discrimination against members of that socially defined group—precisely because they are members of that socially defined group—is not just individually irrational. It also entrenches second-class status. Because unfair discrimination against people with conditions defined as “disabilities” is not likely to be a one-time problem, there is a particular need for a legislative response to that conduct. And, because people with those conditions are especially likely to be ignored when society’s institutions are designed, there is a particular need to impose a universal requirement that they receive accommodation.¹⁷⁶

Bagenstos’ framing of disability explains why a broadened definition that retains substantial limitation is more consistent (and therefore less dissonant) with the Act’s civil rights purposes than an open-ended

were welcome, common, and fully participating members of society, then it can be deemed to be discriminatory and its removal or modification can be seen as furthering the ADA’s goals.

Id. at 947-48. As will be discussed later in this section, the types of impairments that would become disabilities under the broadest definition extend much farther than Crossley describes.

175. Professor Hamilton Krieger distinguishes backlash from capture by construal in that she sees backlash as overt whereas capture is “often subtle and accretive.” Krieger, *supra* note 33, at 357-58. In the distinction she draws, the explicit normative grounds of attack on the scope of the ADA amounted to backlash. *See id.* At the same time, she suggests the two are not discrete phenomena, that backlash effects can be found in situations of capture, in the more overt and confrontational rhetoric about the superiority of preexisting normative systems. *Id.* at 361.

176. Bagenstos, *supra* note 138, at 479.

protected class. An individual is not entitled to accommodation merely because she has a physical or mental condition. That would do as Justice Scalia suggested, merely “make up for” having the impairment.¹⁷⁷ Rather, she is entitled to accommodation because of the systemic disadvantage that prevents individuals with that condition from participating as first-class citizens.

Civil rights statutes protect against group-based disadvantage, not merely individual-based disadvantage.¹⁷⁸ Impairments that result in significant difficulties related to major life activities are more likely to result in group-based disadvantage, at least when accommodations are at issue. The ADAAA recognized this when it eliminated any consideration except impairment from claims based on attitudes (the “regarded as” prong of the definition, for which there is no right of reasonable accommodation) but retained a disadvantage-type inquiry into major life activity limitations under the actual disability prong.¹⁷⁹

Similar themes are inherent in the arguments commentators make that disability discrimination is not different from other forms of discrimination, in the way they describe the barriers disability poses. For example, Professor Stein has argued that “[t]he ADA’s accommodation mandate is an appropriate antidiscrimination remedy because, like Title VII, the statute remedies the avoidable workplace exclusion of a targeted group.”¹⁸⁰ He describes one such targeted group as including individuals who have faced a history of exclusion because of the way our physical surroundings have been structured.¹⁸¹ Along similar lines, the Findings and Purposes section of the original ADA itself referred to individuals

177. See *Barnett*, 535 U.S. at 413 (Scalia, J., dissenting) (arguing that reasonable accommodations should be available only to remove “disability-related obstacles” that would not be barriers “but for” the plaintiff’s disability).

178. See Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 78 (2007) (noting that although Title VII “protects employees as individuals, it does so only insofar as the individual has been treated badly as a member of a group, and does not protect the individual from all forms of arbitrary and unjustified treatment by the employer”).

179. ADAAA § 4(a).

180. See, e.g., Stein, *supra* note 54, at 637.

181. *Id.* at 640-41 (arguing that the architectural concepts of Universal Design demonstrate that the accommodation mandate remedies physical barriers to the inability to walk that are artificial as opposed to natural); see also *id.* at 671-72 (noting author’s opposition to limiting disability to only the “seriously” disabled); cf. Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 648-49 (2001) (arguing that disparate treatment law has a number of characteristics similar to the accommodation requirement of the ADA and defining that requirement with an example of a blind individual who needs to be provided a reader in order to do the individual’s job).

with disabilities as a “discrete and insular minority,”¹⁸² “classic group-based civil rights language.”¹⁸³

In a sense, when courts narrowly construed the ADA’s protected class to require severe restriction, it reflected their belief regarding who has experienced group-based disadvantage. Individuals with severe disabilities certainly have, while others are at least more questionable. Rules that require impairments to be long rather than short-term, or to exclude individuals from more than one job (when working is the major life activity alleged to be substantially limited), can be seen as distinguishing between individual and group-based exclusion.¹⁸⁴ The key to dissonance-avoidance after the ADAAA will be the judiciary’s understanding that the new definition is similarly based on historic disadvantage. An impairment-only definition was simply unlikely to be understood that way.

In their article on “behavioral realism,” in which they call for courts to adopt empirically accurate premises for various doctrines applied in discrimination cases, Professors Linda Hamilton Krieger and Susan T. Fiske make a corollary observation:

Even if people want to conform their behavior to the norms underlying antidiscrimination law, full compliance with the law’s prescriptions is unlikely if the relevant legal doctrines fail to capture accurately how and why discrimination occurs, how targets respond to it, and what can be done to prevent it from occurring.¹⁸⁵

Similarly, again in cognitive dissonance terms, while judges may conform their interpretation of the definition of disability to what the statute tells them they must, they may not internalize that norm and

182. 42 U.S.C. § 12101(7) (2004).

183. See Diller, *supra* note 2, at 77-78 (noting that the ADA’s “discrete and insular minority” finding draws on the civil rights model’s premise that “a powerless minority group is systematically subordinated by the majority”).

184. Cf. *Sutton*, 527 U.S. at 492 (reasoning that “[t]o be substantially limited in the major life activity of working . . . one must be precluded from more than one type of job, a specialized job, or a particular job of choice”); *McDonald v. Pa., Dep’t of Pub. Welfare*, 62 F.3d 92, 96 (3d Cir. 1995) (finding under the Rehabilitation Act that an abdominal condition that necessitated a two-month leave of absence after surgery was not of sufficient duration to qualify as a disability); see also 29 C.F.R. app. § 1630.2(j) (2008) (noting that “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities”).

185. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1001 (2006).

interpret the rest of the statute accordingly. The law would fail to capture accurately their understanding of disability discrimination because of an overbroad protected class. This sets up the dissonance between their understanding of disability and the legal prescriptions they are directed to apply.

To resolve this dissonance, courts could turn to the duty to reasonably accommodate and impose substantive standards that prevent the “undeserving” from obtaining those “special benefits.” Unfortunately, if courts were to resolve their dissonance in that fashion, it would impact *all* reasonable accommodation claims, not just those involving questionable disabilities. Even those disabilities courts specifically mentioned in the legislative record, as well as those found worthy even under the original restrictive interpretation of the Act, could ultimately lose the protection of the Act if the narrowing moves from one arena to the other.

The judiciary has already shown that it is willing to adopt rules that make accommodation claims more difficult for plaintiffs.¹⁸⁶ Even if a court does not flat out reject an accommodation claim, it may impose additional burdens that make the claim less likely to succeed. In *U.S. Airways, Inc. v. Barnett*,¹⁸⁷ for example, the Supreme Court interpreted the ADA to allow plaintiffs to assert a right to accommodation despite the presence of a company seniority system.¹⁸⁸ The plaintiff must prove, however, that there are “special circumstances” that warrant requiring the employer to forego that seniority system in favor of accommodating the plaintiff.¹⁸⁹ “Special circumstances” includes such things as the employer frequently exercising a retained right to change the seniority system unilaterally, or the system already containing exceptions that make one further exception unlikely to matter.¹⁹⁰ The Court imposed this “special circumstances” burden on the plaintiff despite the absence of any such language in the statute,¹⁹¹ and in the face of explicit language in the Act

186. One interesting related context is the way courts treat accommodation requests involving plaintiffs accused of violating work rules when the plaintiff's misconduct is a manifestation of his or her disability, and the accommodation is characterized as a request for a second chance. See generally Kelly Cahill Timmons, *Accommodating Misconduct under the Americans with Disabilities Act*, 57 FLA. L. REV. 187 (2005).

187. 535 U.S. 391.

188. *Id.* at 406. The seniority system was not based on a collective bargaining agreement or any contract. See *id.*

189. *Id.* at 405.

190. *Id.*

191. See *id.* at 420-21 (Souter, J., dissenting) (noting that “[n]othing in the ADA insulates seniority rules from the ‘reasonable accommodation’ requirement, in marked contrast to Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, each of which has an explicit protection for seniority”).

that deemed "reassignment to vacant position" a form of reasonable accommodation.¹⁹² While the Court did not adopt the position of a majority of lower courts, namely that all modifications of seniority systems are *per se* invalid,¹⁹³ it was willing to re-write the substantive provisions of the Act to accomplish much the same outcome. Indirectly, the Court defined a further narrow subset of the protected class: those disabled only by certain types of seniority barriers.

Barnett does not illustrate "damned if you do, damned if you don't," in that it does not matter what definition of disability is used. The Court will always take a narrow substantive approach. *Barnett* might be explained not by dissonance regarding the breadth of the ADA itself, but by the historic deference the Court has given seniority systems.¹⁹⁴ Given that history, the fact the Court did not reject the disability claim out of hand is significant.¹⁹⁵ The ADAAA will provide courts less incentive to engage in excessive substantive narrowing, because they retain at least some ability to eliminate coverage for minor impairments. Less dissonance is created and, accordingly, less need to resolve that dissonance by pulling back on the overall coverage of the statute.

The new definition is not without ambiguity, and without doubt at least some courts may exclude impairments that should be covered.¹⁹⁶

192. See 42 U.S.C. § 12111(9)(B) (2008) (defining reasonable accommodation to include "reassignment to a vacant position").

193. See, e.g., *Sara Lee Corp.*, 237 F.3d at 353-54 (noting that "[v]irtually all circuits that ha[d] considered the issue ha[d] held that the ADA's reasonable accommodation standard does not require an employer to abandon a legitimate and non-discriminatory company policy").

194. See, e.g., Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 AM. U. L. REV. 339, 353 (1985) (examining how the Supreme Court has "moved steadily towards striking a balance in favor of collective bargaining at the expense of title [sic] VII's equal employment opportunity goals").

195. Other aspects of *Barnett* suggest a broader view of accommodation law. The Court rejected the employer's argument that the ADA did not contemplate changing facially neutral rules because that would be an improper "preference." *Barnett*, 535 U.S. at 398. Further, the Court referenced the "run of cases" standard of prima facie proof of reasonableness, which is a somewhat easier standard for plaintiffs to meet than the standard articulated by some courts of appeal. See *id.* at 401-02; cf. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (requiring plaintiffs to show an accommodation is prima facie "reasonable in the sense both of efficacious and of proportional to costs").

196. One ambiguity in the new definition arises in comparing the definition of actual disability under the first prong with that of perceived disabilities under the third prong. The ADAAA explicitly excludes from the definition of disability under the third prong "impairments that are transitory or minor," and defines a transitory impairment as "an impairment with an actual or expected duration of 6 months or less." ADAAA § 3(3)(B). There is no similar exclusion from the first prong, raising the question whether an

Those decisions, however, will affect only claims involving those particular disabilities. While not ideal, that result is preferable to increasing the incentive to turn against the substantive provisions of the statute.

The ADA's protection of disability will continue to be different from Title VII's protection of race and sex because plaintiffs continue to have to litigate their impairment status. The ADAAA reaches those cases where people experience important exclusions due to physical or attitudinal barriers, yet retains some judicial ability to weed out insignificant limitations. The result should be less ideological dissonance and, therefore, less incentive to engage in a second, substantive ADA backlash.

2. An Open-Ended Definition of Disability Would Exceed in Important Respects the Moral Force for Prohibiting Disability Discrimination, Thus Heightening the Magnitude of Dissonance and Undermining Acceptance of the Protected Class

Cognitive dissonance theory helps frame another important aspect related to ADA backlash. On the one hand, dissonance theorists have suggested that forcing people to change their behavior ("counterattitudinal behavior") puts pressure on those individuals to change their underlying attitudes.¹⁹⁷ For example, in challenging the notion that desegregation should not take place in the South until attitudes toward people of color changed, dissonance theorists asserted instead that "a more powerful way is to induce people to change their behavior first and their attitudes will follow."¹⁹⁸ Applied to the disability context, forcing judges to find more individuals entitled to assert the protections of the ADA would cause them to change their attitudes toward disability.

On the other hand, however, behavior-change-to-attitude-change results when those holding prejudiced notions are disabused of the basis for their prejudices by virtue of the forced interaction. The reason for this may be, among other reasons, exposure to information previously avoided (such as things one has in common with a previously segregated group), or an increased social attractiveness of the group holding the

impairment that is transitory might nonetheless be substantial under that prong, allowing the plaintiff to claim a right to be reasonably accommodated for that impairment.

197. See Elliott Aronson, *The Return of the Repressed: Dissonance Theory Makes a Comeback*, 3 PSYCHOL. INQUIRY 303, 305 (1992).

198. *Id.*

previously opposing attitude.¹⁹⁹ The problem for disability is that the attitude at issue, namely that only a narrow class of individuals “deserves” reasonable accommodation, is unlikely to be changed unless the protected class sufficiently screens out individuals perceived as obtaining some kind of windfall.

Individuals experiencing dissonance due to a change in the scope of the Act’s protected class may actually perceive social support for the belief the scope of the protected class is illegitimate if individuals with “lesser” impairments are granted protection. If the protected class were perceived as illegitimate, the result would be an increase in dissonance and less likelihood of attitude change. These are the conditions for backlash, as individuals resolve their dissonance through “open assertion of the normative superiority” of the preexisting system.²⁰⁰

Had the ADA been amended as originally proposed, the amendment would not have simply undone the restrictive interpretation by the federal judiciary.²⁰¹ The statute could well have been viewed from a broader societal perspective as an illegitimate extension of rights to undeserving individuals. It has already been suggested that the ADA has increased the difficulty for individuals with disabilities to obtain employment, because employers seek to avoid the obligations under the statute.²⁰² If employers perceive the statute as having extended rights beyond generally accepted bounds, they may believe it not wrong to withhold employment opportunities and thereby not subject themselves to an illegitimate mandate.²⁰³ On the other hand, the compromise definition allows some

199. See FESTINGER, *supra* note 26, at 21 (discussing how dissonance can be reduced by adding new cognitive elements); *id.* at 183-84 (discussing how attractiveness of a group tends to induce opinion change to that held by the group).

200. See Krieger, *supra* note 33, at 357-58 (describing overt efforts to delegitimize new legal regimes as what distinguishes backlash from capture by construal).

201. Arguably, the impairment-only protected class would also have done the opposite of what proponents of the ADA advanced as a goal of the statute in the first place, which is to focus on the individual and not their impairment. *But see* Feldblum, *supra* note 4, at 151-52 (arguing that courts misconstrued the idea of individualized assessment; that it was meant to determine whether an individual was qualified for a job, not whether the individual has a disability).

202. See THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 2-5 (David C. Stapleton & Richard V. Burkhauser eds., 2003) (summarizing the data showing a “dramatic difference” in the employment of working-age individuals with and without disabilities in the years after the passage of the ADA).

203. Social support for an opinion plays a significant role in resolution of cognitive dissonance. See FESTINGER, *supra* note 26, at 188 (“By obtaining social support for some opinion, the person thus adds cognitive elements which are consonant with the opinion and this reduces the total magnitude of dissonance.”).

“buy-in” from the business community.²⁰⁴ As such, it provides less social support for exerting the superiority of the prior definition.

Of course, the parameters of civil rights laws should not simply be determined by the level of public acceptance at the time of enactment.²⁰⁵ If that approach was taken, Title VII would not have made sex discrimination unlawful.²⁰⁶ In the ADA context, as Professor Kreiger points out, using a public acceptance model would result in coverage for those individuals only “whose social inclusion could be achieved through the use of prototypic accommodations that could become readily institutionalized [and] exclude persons popularly viewed as ‘responsible for their own predicament.’”²⁰⁷ Such a narrow approach would frustrate the Act’s policy goals and violate the central tenant of the social model of disability that views disability as primarily the result of barriers erected to participation and not the personal problem of the individual.²⁰⁸

At the same time, whatever the parameters of the law, to change attitudes, there must be some moral justification, or force, that compels the wrong to be remedied.²⁰⁹ Professor Feldblum analogizes the ADA to other anti-discrimination laws, which make use of a protected characteristic irrelevant in decision-making regardless of whether the individual falls into a group that has historically faced stigma and discrimination, because any use of the characteristic is so morally

204. Expanding the definition to consider only impairment could also negatively impact other issues related to disability. Would, for example, there continue to be receptiveness to providing the kinds of special services, sought by various disability interest groups? Cf. SCOTCH, *supra* note 55, at 167 (noting that the social model of disability may have “undercut the assumption of dependency that was the rationale for many disability programs”). The need to provide for returning Middle East war veterans may well have supported continuation of those special services even with a more controversial definition of disability, but there is at least a question what impact it might have had.

205. See Krieger, *supra* note 33, at 375 (discussing how acceding to “a public-acceptance-of-accommodation perspective” would result in a narrow protected class that would frustrate other policy goals the ADA seeks to achieve).

206. *Sex Discrimination*, 84 HARV. L. REV. 1166, 1167 (1971) (discussing how sex was added to Title VII at the last minute as part of a legislative gambit to scuttle the entire statute, without a developed understanding of the need to address the issue).

207. Krieger, *supra* note 33, at 375.

208. *Id.*

209. See Samuel Issacharoff & Justin Nelson, *Discrimination With a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 49 N.C. L. REV. 207, 353 (2001) (suggesting that a subset of employers should not be subject to the higher costs of complying with the regulation “unless they in some sense ‘deserve’ to pay a higher price, either because they have not completely internalized their own costs, or because they are in some sense morally different than those who do not pay the added costs”).

questionable it should be improper.²¹⁰ The problem with that analogy is, however, that the moral force behind prohibiting use of race, sex, and similar protected characteristics is that they generally have nothing to do with the ability to do the job.²¹¹ Physical or mental impairment frequently relates to one's ability to do the job, inevitably so in reasonable accommodation cases. Of course, the civil rights model of disability would challenge the validity of an employer's judgment as based on irrational stereotypes about ability and arbitrary institutional structures,²¹² and so the rationale is not simply that disability relates to ability to do the job. More fundamentally, impairment in and of itself does not supply a compelling reason in all cases to put the employer in the position of justifying its judgment, even under the rationale offered by the social model of disability.

For example, consider the following situation. An employee spends a weekend rock climbing and in the process, he badly sprains his ankle. The employee works as a table server and tells his employer that until he recovers, he cannot carry trays and other items to the table unless he can balance them on one hand while using a crutch with his other arm. He asks for an accommodation of being able to make multiple trips and having someone lift the tray and balance it on his good arm. The employer denies him this accommodation, because the employer believes it would disrupt the flow of the kitchen. The table server is put on unpaid leave until his ankle heals. If disability is defined as requiring only a showing of impairment, the employee would have a disability due to his sprained ankle. Under the impairment-only definition, he would be

210. Feldblum, *supra* note 4, at 101-02.

211. Title VII does contain a narrow exception for bona fide occupational qualifications. See 42 U.S.C. § 2000e-2(e)(1) (2008) (allowing employer to discriminate on the basis of sex, as well as religion and national origin, when "reasonably necessary to the normal operation of th[e] particular business or enterprise"); see also *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991) (indicating that the exception is limited to situations where a sex characteristic "actually interferes with the employee's ability to perform the job").

212. See Diller, *supra* note 2, at 72 (describing the ADA under the civil rights model as "grounded on the premise that people with disabilities are denied the opportunities afforded to others because of irrational stereotypes and out-moded institutional structures and social arrangements"); Travis, *supra* note 30, at 5-6 (describing how "traditional methods of organizing the when, where, and how of work performance, including the default preferences for full-time positions, unlimited hours, rigid work schedules, an uninterrupted worklife, and performance of work at a central location" contribute to exclusionary workplace norms).

entitled to have the merits of his reasonable accommodation claim considered.²¹³

Perhaps the employer is being unreasonable in not giving the table server what he requests. To what extent, however, has the table server experienced the kind of exclusion that warrants imposing a civil rights remedy? When the social model of disability speaks of social exclusion and stigma, does it contemplate the table server's predicament? This situation is one of those "isolated instances of poor treatment" that many experience but are distinguishable from the kind of systemic, group-based exclusion and stigma that individuals with disabilities experience.²¹⁴

Put another way, there are some conditions that are widely shared. The common cold and seasonal allergies (when neither have complications) are other examples. Although those conditions may have consequences for an individual's employment, as they did in the table server's case, those consequences do not come because of a history of exclusion of individuals with sprained ankles, colds or allergies. Consideration of the impairment in making employment determinations is not like uses of race and sex; there is no implication of second-class citizen status.²¹⁵ Status, or the lack thereof, is what compels recognition of disability rights.

If impairment were the only requirement for alleging disability, employees could transfer the costs of those common maladies to their employers by requesting modified schedules or reassignment of non-essential tasks, and so forth. From the outset, as the legislative history of the ADA reminds us, Congress never intended to cover minor

213. Under the ADAAA, the table server would probably not be found to have a disability. If he brought the claim under the actual disability prong, a court would likely find his condition to be minor and therefore not substantial. *Cf.* 29 C.F.R. app. § 1630.2(j) (2008) (describing sprained joints as impairments usually not considered disabilities, absent long term or permanent impact). If he were to bring the claim under the regarded as prong, alleging he was perceived to have a disability, the statute excludes from that prong any impairments that are "transitory and minor." ADAAA § 4(a). Transitory impairments are further defined as those lasting six months or less. *Id.* Without complications, a sprained ankle most likely would be found transitory. The ADAAA also excludes regarded as claims from the provisions on reasonable accommodation. ADAAA § 6(a)(1). The ADARA did as well, but did not exclude minor or transitory impairments. *See* H.R. 3195, 110th Cong. § 4, (2008).

214. Bagenstos, *supra* note 138, at 479.

215. The Family and Medical Leave Act also espouses this distinction, by requiring the employee have a "serious health condition." 29 U.S.C. § 2612 (2008). "Serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11) (2008).

conditions.²¹⁶ The ADAAA's compromise wisely retains the distinction between common, or minor, limitations and systemically disadvantaging, or substantial, limitations.

Some in the disability community have suggested that conflating impairment with disability negatively impacts our understanding of the experience of individuals with disabilities.²¹⁷ The interpretation of the original ADA bears out this concern, with courts showing limited insight into how disability impacts individuals in their work and interaction in society. One example that stands out in particular is Judge Richard Posner's labeling of stigma as "merely an epithet" in *Vande Zande v. Wisconsin Department of Administration*.²¹⁸ In that case, the court was unwilling to consider as reasonable a request that the employer lower a kitchenette sink so that a woman who used a wheelchair could rinse her dishes in the break room with other employees rather than having to use the sink in the office bathroom.²¹⁹ The cost to lower the sink would have been about \$150.²²⁰ Because Vande Zande had "an equivalent sink, conveniently located" and could "work in reasonable comfort," Judge Posner asserted the employer owed no more obligation to her.²²¹ If this type of ableist attitude²²² comes out of cases involving disabilities that courts had little difficulty characterizing as severe, it would surely not lead to a better appreciation of the role of stigma to equate this person's experience to that of someone with a sprained ankle.²²³

Commentators like Professor Kreiger have a valid point about definitions that require normative judgments concerning the degree of impairment and the use of public acceptance thresholds. The ADA's definitional emphasis should be more on stigma and less on functional

216. See H.R. Rep. No. 485(II), at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity").

217. See Hahn, *supra* note 133, at 26 (asserting that "[t]he distinction between impairment and disability has been obscured").

218. 44 F.3d 538, 546.

219. See *id.*

220. *Id.*

221. *Id.*

222. See Davis, *supra* note 64, at 107 (referring to the Vande Zande court's language as "ableist"); see also *supra* note 62 and accompanying text.

223. During the Senate hearings on the ADARA, which would have established the impairment-only protected class, one of the proponents suggested that minor or trivial impairments, such as the cold or the flu, were not the concern of the bill because she didn't think many people are fired for having either condition. See *Determining the Proper Scope of Coverage for the Americans with Disabilities Act: Hearing Before the Subcomm. on Health, Educ., Labor & Pensions*, 110th Cong. (2008) (remarks of Chai R. Feldblum, Professor of Law & Director of the Federal Litigation Clinic, Georgetown University Law Center).

capacity.²²⁴ A definition creating an open-ended protected class, however, stands to dilute the substantive protections of the Act as employers and courts react to what they perceive as an overbroad grant.

What the ADAAA's compromise definition accomplishes is to open the door wider to disability claims while maintaining a connection to why protection from discrimination based on disability is considered a civil right. Perhaps the compromise is an incremental step, but given the nature of disability and the reasonable accommodation mandate, this may be the situation in which incremental steps are better geared toward building understanding of the difficulties faced by individuals with disabilities. The alternative may have increased the likelihood of social support for rejecting the scope of the Act, thereby undermining rather than promoting the ultimate achievement of the ADA's integrationist goals.²²⁵

B. The Compromise Disability Definition Minimizes Conflict with Perhaps the Most Dissonance Producing Reasonable Accommodation: Reassignment to a Vacant Position

Perhaps the issue most likely to cause a high magnitude of ideological dissonance when paired with an open-ended protected class is the right of individuals with disabilities to be reassigned to a vacant position as one form of reasonable accommodation. Whether other forms of accommodations act as preferences is debatable, but the argument is much harder to deny regarding the reassignment accommodation.²²⁶ Some courts have found that the ADA requires a vacant position be

224. See Hahn, *supra* note 133, at 32-33.

225. As I see this argument, it is not inconsistent with arguments made by others why a broad definition of disability is desirable. Professor Stein has suggested, for example that the "most expedient way to transform social norms is through increasing society's familiarity with a previously unknown group that it perceives, in sociological terms, as 'other.'" Stein, *supra* note 54, at 671. For this reason, he opposed a narrow definition of disability that applied only to the "seriously" disabled. *Id.* at 672. I agree with Professor Stein's observation that the most likely way to undo the stigma attached to disability is through inclusion, as people come to know and value their coworkers and customers with disabilities. At the same time, however, I believe that progress would be impeded if the belief that reasonable accommodation is some kind of windfall is exacerbated by covering individuals with minor impairments. The compromise definition accomplishes both goals—greater inclusion while still allowing some distinction between minor and other impairments.

226. See Ball, *supra* note 34, at 985 (acknowledging that "reassignment cases are the most difficult cases for those of us who argue that that preferential treatment required by reasonable accommodation law is different from the preferential treatment that is part of affirmative action").

given to an otherwise qualified individual with a disability who needs that accommodation, even if there is a more qualified employee the employer would prefer.²²⁷ One justification offered for this type of accommodation is the limited opportunities available in general to individuals with disabilities.²²⁸ Had the impairment-only definition been adopted, and the accommodation remedy made available to individuals who have suffered less historic disadvantage, it would have been extremely difficult for change-resistant judges to reconcile this situation in a way that avoided backlash.

As noted in the prior section, a statutory definition like that proposed by the ADARA might be the clearest way to ensure that disability is given a broad definition, but it would not change another important consideration—that disability is viewed as unlike other protected classes because it often does have something to do with ability to do the job.²²⁹ The ADA itself recognizes that disability interferes with the ability to perform job-related tasks, not simply by requiring employers to reasonably accommodate but also by including within the definition of reasonable accommodation “reassignment to a vacant position” for which the employee is qualified.²³⁰

The reassignment accommodation is not an accommodation of first choice; the EEOC’s regulations indicate that reassignment “should be considered only when accommodation within the individual’s current position would pose an undue hardship.”²³¹ The Supreme Court has indicated that if there is a seniority system in the workplace, a right to reassignment applies only when the employee proves “special circumstances.”²³² As noted above, at least some courts of appeal have held that when either the employer proves undue hardship in accommodating the employee in her current position, or in the case of a seniority system, the employee proves exceptional circumstances warrant deviating from that system, the employee may assert a right to

227. See *Midland Brake, Inc.*, 180 F.3d at 1169; *Aka*, 156 F.3d at 1305.

228. See Ball, *supra* note 34, at 961-62 (noting that employees with disabilities are “more likely than able-bodied employees to face limitations in their abilities to shift positions within a company”).

229. See *supra* note 211 and accompanying text.

230. 42 U.S.C. § 12111(9)(B) (2008).

231. 29 C.F.R. app. § 1630.2(o) (2008). Undue hardship is a defense, which means that the employer must first prove that it would be too difficult or expensive to accommodate the employee in his current position, *id.* at 1630.2(p).

232. *Barnett*, 535 U.S. at 406.

reassignment even if there are other, more qualified applicants for that position.²³³

That last point is what makes this accommodation especially controversial. By granting individuals with disabilities the right to an open position, even if there are other, more qualified individuals the employer ordinarily would choose, the ADA in effect creates a straightforward preference for individuals with disabilities.²³⁴ Commentators respond to that preferential treatment argument by asserting the ADA does not give employees with disabilities any unfair advantages; rather, it levels the playing field by removing artificial barriers to full participation in the workforce.²³⁵ That level playing field argument is extremely hard to make, however, when the employee with a disability in a reassignment case is given priority over a more qualified individual.

The justification for reassignment has instead most compellingly been articulated as one of distributive justice.²³⁶ Without being accommodated into the open position, the individual with a disability who requests reassignment would lose her job and probably face limited prospects for finding another; whereas an individual who desires the same position but who does not have a disability is simply deferring the opportunity to move into a more favorable position, not losing it.²³⁷

As that justification demonstrates, however, reassignment is difficult to reconcile with arguments that disability rights are civil rights similar to those based on race, sex, and other protected classifications. Commentators who have argued that reasonable accommodation is not different, that it fits within the realm of already-existing anti-discrimination doctrine, conspicuously avoid mentioning reassignment in

233. See *supra* note 227 and accompanying text; see also *supra* note 32 (discussing circuit split).

234. See *Humiston-Keeling*, 227 F.3d at 1028 (asserting that requiring employers to reassign individual with a disability to a vacant position when there is another candidate the employer considers more qualified would “convert a nondiscrimination statute into a mandatory preference statute”).

235. See Ball, *supra* note 34, at 960. This was the same response the Supreme Court gave to the employer’s argument in *Barnett* that varying from a seniority system would have created an inappropriate preference in favor of the individual with a disability, as compared to others who were bound by the rules of the system. See *Barnett*, 535 U.S. at 397 (reasoning that “[t]he Act requires preferences in the form of ‘reasonable accommodations’ that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy”).

236. Befort, *supra* note 34, at 982-83.

237. *Id.*; see also Ball, *supra* note 34, at 962 (noting that “[d]isabled employees, once they are bumped from their jobs by more senior employees, have fewer options than their able-bodied counterparts”). Professor Befort would allow employers to avoid reassigning an individual with a disability only if the employer can show it would pose an undue hardship. Befort, *supra* note 34, at 983.

their arguments. For example, Professor Christine Jolls, in her important article asserting the doctrinal overlap between antidiscrimination and accommodation, does not once reference the right of reassignment.²³⁸

When disability is defined to include impairments that have been the subject of societal exclusion and stigma, there is a strong rationale for requiring reassignment as a reasonable accommodation. Whatever job-related barriers are preventing the individual from continuing in her current job are probably not isolated barriers. The individual's disadvantage, whether in the current position or in competing for the vacant position, may well be traced to a history of artificial barriers and social exclusion of individuals with disabilities.²³⁹ No unfair advantage inures to individuals with disabilities to allow them to overcome those barriers. When the underlying impairment is not one that has the same impact when viewed in a wider frame, however, the rationale loses its force.

For example, the employer discussed in the prior section whose employee sprained his ankle while rock climbing might establish that it would be an undue hardship to accommodate the table server's injury, so the table server requests reassignment to a bartending position. Assuming the employer had another employee or applicant with greater bartending expertise, the employer may argue a right to prefer the more qualified individual. The employee would argue a preferential right to the position because he cannot be accommodated in his current position. If the employee needed the reassignment because his epilepsy, or vision impairment, or other impairment subject to greater systemic exclusion, his employment opportunities might truly be much more limited if he lost this job. The same is not necessarily true for the table server with a sprained ankle. Extending a right to reassignment to the table server is nothing more than a job preference for individuals with any identifiable physical (or mental) condition.²⁴⁰

238. See generally Jolls, *supra* note 181. Professor Ball does address reassignment, but his thesis is that the proponents of the ADA should acknowledge that the statute calls for preferential treatment, rather than try to distinguish reasonable accommodation as not being different than other civil rights models. See Ball, *supra* note 34, at 994-95.

239. But see Stein, *supra* note 54, at 597-604 (questioning the usefulness of classifying the ADA as redistributive because reasonable accommodation remedies historic, artificial exclusion of individuals with disabilities).

240. Cf. Kelly Cahill Timmons, *Limiting "Limitations": The Scope of the Duty of Reasonable Accommodation Under the Americans with Disabilities Act*, 57 S.C. L. REV. 313, 352 (2005) (suggesting the employers "should have a duty only to accommodate disability-related limitations when the conventional workplace practice or structure poses a substantial barrier to the disabled individual").

The employee proceeding under the compromise definition, by contrast, first establishes that the impairment restricts a major life activity.²⁴¹ This better identifies individuals whose disadvantage is not isolated and for whom a remedy like reassignment is important to overcome systemic exclusion. The compromise definition does not, therefore, create the theoretical problem that the impairment-only definition would have for recognizing the right to reassignment as a form of reasonable accommodation. In this respect as well as those previously discussed, the compromise lessens the potential for backlash.

V. PROACTIVE USE OF THE EXPANDED DEFINITION OF MAJOR LIFE ACTIVITY WILL LIMIT THE CREATION OF DISSONANCE, RELEGATING THE LURKING REMNANTS OF THE FIRST BACKLASH TO THE MARGINS OF THE PROTECTED CLASS WHERE THERE MAY BE ROOM TO DIFFER

Dissonance theory may suggest that the amended ADA will produce a lower magnitude of ideological dissonance, and therefore, less incentive to narrow the statute, but it does not account for one other very important variable—the skill of plaintiffs’ attorneys in using the new tools the ADAAA has provided them. Because the amended definition retains the “substantial limitation” requirement with its comparison to what “most people” can do, it leaves room for courts to resolve dissonance by interpreting the protected class consistent with their prior restrictive view, at least in some cases. Approaching the amended statute, at least some courts will find it difficult to break old habits regardless of Congress’s directive. Proper pleading of the new definition of major life activities will make it more difficult for courts to dismiss disability claims based on those old habits.

At the same time, some impairment claims are going to pose more difficult questions even under the broadened definition. Those cases should operate primarily on the margins of the protected class, where it may be reasonable to differ on whether the impairment is one that should be protected. Even if courts continue to dismiss those claims, the status of disability as a civil right would not be undermined, unlike what happened under the original ADA.

On the first issue of plaintiffs’ need to use the new definition to their benefit, plaintiffs’ counsel should be cognizant of the fact courts were directed to compare the plaintiff’s limitations to what “most people” can do. Some prior ADA cases involve impairment-related limitations that courts have found indistinguishable from similar limitations experienced

241. See ADAAA § 4(a).

by the general public.²⁴² If those cases are pled the same way after the ADAAA, there are dissonance-creation problems and plaintiffs may still have difficulty getting past summary judgment. A recent Seventh Circuit case, *Scheerer v. Potter*,²⁴³ illustrates the potential problem.

The plaintiff in *Scheerer* had diabetes, which he alleged substantially limited his ability to walk, eat, sleep, and sexually reproduce.²⁴⁴ The Seventh Circuit noted it had found diabetes to substantially limit the plaintiffs' ability to eat in other cases.²⁴⁵ In those cases, however, the plaintiffs had shown there would be "dire and immediate consequences" to their failure to maintain their dietary regimen.²⁴⁶ In *Scheerer's* case, the court found that "the predominant purpose of his dietary restrictions was to lose weight—as millions of other non-disabled individuals seek to do—rather than to control rapid fluctuations of his blood sugar levels."²⁴⁷ His actual diet "followed the contours of the diets of most individuals seeking to lose weight."²⁴⁸ Accordingly, the court found *Scheerer* did not have a substantial limitation on his ability to eat.²⁴⁹ His other major life activity claims were similarly found to present insufficient evidence of substantial limitation.²⁵⁰

As the Seventh Circuit approach shows, even under the restrictive interpretation of disability, courts were not opposed to finding individuals with diabetes to have a disability, as long as the evidence sufficiently distinguished the disease's impact from conditions others

242. See, e.g., *Scheerer v. Potter*, 443 F.3d 916 (7th Cir. 2006) (finding plaintiff's eating restrictions no different than any person on a diet); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997) (finding that although plaintiff was an alcoholic, he had presented no evidence that "the effects of his alcoholism-induced inebriation were qualitatively different than those achieved by an overindulging social drinker").

243. 443 F.3d 916.

244. *Id.* at 919.

245. *Id.* (citing *Nawrot v. CPC Int'l*, 277 F.3d 896 (7th Cir. 2002); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001); *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004)).

246. *Scheerer*, 443 F.3d at 919 (citing *Nawrot*, 277 F.3d at 904).

247. *Scheerer*, 443 F.3d at 920.

248. *Id.*

249. See *id.*

250. The Seventh Circuit found *Scheerer's* ability to stand and walk not substantially limited when he was able to complete an eight hour shift that appeared to include significant standing and walking, and his ability to sleep not substantially limited because "intermittent disrupted sleep" was not the type of "prolonged, severe and long-standing sleep difficulties" that were required. *Id.* Finally, the court concluded that *Scheerer's* sexual reproduction claim was insufficient because he alleged only a decrease in frequency and not an actual impact on his ability to reproduce. *Id.* at 921.

commonly experience.²⁵¹ Indeed, even in *Scheerer*, the court repeatedly noted it was not minimizing the pain and inconvenience the plaintiff experienced.²⁵² The old definition of disability, however, tied the court's hands. It had to find there was no disability. Were an individual with diabetes to allege an ADA claim after the ADAAA, basing it on eating, walking, or sleeping limitations, courts might fall back into that same mindset. A comparison to "most people" might end in the same conclusion—the commonplaceness of the restrictions the plaintiff experiences. To find the plaintiff to have a disability when the court views the restriction as commonplace would be dissonant. The remnants of the prior backlash would in this sense linger under the ADAAA.

As a practical matter, to avoid this, plaintiffs' attorneys need to focus courts on the new definition of major life activity, which includes limitations on the operation of bodily functions. The only necessary finding under the ADAAA is that diabetes meaningfully restricts the plaintiff's endocrine functions.²⁵³ This allows plaintiffs to avoid raising activities, like following a diet, that are too easy for a court to dismiss as commonplace. Taking attention away from that which is commonplace (eating) and placing it on the bodily function whose limitations are not shared (the malfunction of an endocrine system) helps move the court away from the considerations that prompted the "deserving" disability mentality in the first place.

Proactively using the new definition of disability should avoid another one of the problems manifested in the courts' "deserving" disability mentality, namely a causation error in determining the plaintiff's entitlement to reasonable accommodation. Plaintiffs in some prior ADA cases found themselves shut out of reasonable accommodations because courts insisted that the accommodations had to be related to the major life activity they alleged to be limited.²⁵⁴ *Scheerer*

251. See also *Robbins v. WXIX Raycom Media*, No. 1:06cv278, 2008 WL 650330, at *5-6 (S.D. Ohio, March 5, 2008) (finding plaintiff who must eat three times a day at the same time each day, take regular snacks in between meals, avoid foods that raise her blood sugar, and check her blood sugar exactly two hours after she begins a meal, was substantially limited in the major life activity because of her Type II diabetes).

252. *Scheerer*, 443 F.3d at 920, 922.

253. ADAAA § 4(a). The new definition of major life activity does not clearly adopt a category applicable to alcoholism the way it does for diabetes, but the new rule of construction that directs courts to evaluate an episodic impairment in its active state would make pleading those cases somewhat easier. ADAAA § (3)(4); cf. *Burch*, 119 F.3d at 316 (suggesting that the court did not view the plaintiff's inebriated state as permanent and that permanency of the impairment was required).

254. See Cheryl L. Anderson, *What Is Because of Disability Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27

again provides an illustration. In addition to walking, eating, and sleeping, Scheerer claimed his diabetes substantially limited his ability to reproduce sexually.²⁵⁵ The Seventh Circuit gave three reasons for dismissing his sexual reproduction disability claim, two of which are directly resolved by the amended definition.²⁵⁶ The third reason, however, was based on causation.

The Seventh Circuit expressed a concern that even if Scheerer could provide evidence of substantial limitation of his reproductive function, “[he] fail[ed] to explain in what fashion the Postal Service could reasonably accommodate his diabetes in the context of symptoms of sexual dysfunction.”²⁵⁷ In other words, since Scheerer alleged sexual dysfunction as a result of his diabetes (i.e., impairment of the major life activity of reproduction), the Seventh Circuit’s erroneous reading of the ADA suggested the employer would only be required to accommodate the sexual dysfunction, not the other symptoms of diabetes.²⁵⁸ In a sense, this causation error proves the dissonance point—courts need to see a consistency between “disability” and the scope of accommodation. The statutory language itself, however, requires “reasonable accommodation to the known physical and mental *limitations*” of the plaintiff, not the major life activity.²⁵⁹ The Seventh Circuit’s interpretation was plainly wrong, but one to which some courts were prone due to the convoluted way that plaintiffs tried to prove their impairment was substantially limited under the old interpretation.²⁶⁰

A well-pled complaint should provide more consistency and thus not prompt courts to use causation to narrow the scope of the Act. Plaintiffs

BERKELEY J. EMPL. & LAB. L. 323, 346-56 (2006) (discussing erroneous causation standards imposed by the Second and Eighth Circuits).

255. *Scheerer*, 443 F.3d at 919.

256. First, Scheerer alleged a decrease in “sexual desire and erectile dysfunction,” which the court distinguished from impairment of sexual reproduction. *Id.* at 921. The new definition of major life activity, however, includes as major bodily functions “reproductive functions.” ADAAA § 3(b). This definition does not include reproducing itself, but reproductive functions. Erectile dysfunction would seem to be a material restriction on reproductive “function.” Second, even if the court were willing in Scheerer’s case to accept decrease in sex drive as an impairment, the plaintiff could still engage in sexual activity, which made his evidence of substantial limitation weak. *Scheerer*, 443 F.3d at 921. The court acknowledged that Scheerer needed “limited medical assistance” to engage in that sexual activity. *Id.* Under the ADAAA, Scheerer’s difficulties would be considered without regard to that medication. ADAAA § 3.

257. *Scheerer*, 443 F.3d at 921.

258. *Cf. Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 686 (8th Cir. 2003) (finding plaintiff who alleged back injury substantially limited his ability to reproduce was not entitled to accommodation of his bending, twisting, and lifting limitations).

259. *See* 42 U.S.C. § 12112(b)(5)(A) (2008) (emphasis added).

260. *See* Anderson, *supra* note 254, at 346-56.

in most cases will no longer have to take an indirect path to prove the significance of their disability by using seemingly tangential major life activities. Scheerer, who was a postmaster in a small post office, was requesting additional help so that he could respond to the physical symptoms of his diabetes.²⁶¹ Because the new definition of disability keeps the focus on his impairment by allowing him to prove limitation of his endocrine system, the court's difficulty matching the major life activity to the requested reasonable accommodation becomes a non-concern.²⁶²

The new statute's endorsement of a more common sense evidentiary approach to establishing disability also provides plaintiffs a path to avoid courts' old habits in evaluating what amounts to a disability. Under the prior definition, for example, the Eleventh Circuit decided that a plaintiff with an intellectual disability failed to provide sufficient evidence that his disability substantially limited his ability to learn, think, communicate, interact socially, and work.²⁶³ Despite having earlier acknowledged the plaintiff's life-long intellectual impairment, the Eleventh Circuit found he did not have a disability:

The record shows that Littleton is able to read and comprehend and is able to perform various types of jobs. It is apparent that Littleton is somewhat limited in his ability to learn because of his mental retardation. However, he has pointed to no evidence which would create a genuine issue of material fact regarding whether he was substantially limited in the major life activity of learning because of his mental retardation.²⁶⁴

261. *Scheerer*, 443 F.3d at 918.

262. Similarly, in a case like *Wood*, the causation issue would presumably be avoided because the plaintiff would no longer have to search for a major life activity that was impaired (sexual reproduction) in order to gain accommodation for what is really his impairment (the physical acts of bending, twisting, and lifting). If the plaintiff cannot meet the more generous standard for substantial limitation of those activities, he might fall back on the approach taken by the plaintiff in *Wood* and potentially face the same causation analysis. If the standard for substantial limitation is what the average person can do with little or no difficulty, then most bending, twisting, and lifting limitation plaintiffs should be able to meet that standard. Those who cannot are perhaps the very individuals Congress had in mind as not covered under the actual disability prong even after the ADAAA.

263. *Littleton*, 231 F. App'x at 876.

264. *Id.* at 877. Assuming they were major life activities, the court then made similar findings on Littleton's ability to think, communicate, and socially interact. *See id.* On his working claim, the court concluded that he was not substantially limited because

To the Eleventh Circuit, therefore, the issue was evidentiary. The plaintiff could not prove substantial limitation with evidence he had an intellectual disability despite the court's acknowledgement that it did "not doubt [he] ha[d] certain limitations because of his mental retardation."²⁶⁵ The court emphasized instead that the plaintiff could drive a car and had some technical school education.²⁶⁶ The fact the plaintiff could function on a basic level in society overrode any common sense understanding of the difficulties faced by an individual with intellectual disabilities.

By contrast, the more common sense evidentiary approach is modeled by the Supreme Court case that the legislative record singles out for reflecting the proper analysis, namely *School Board of Nassau County v. Arline*.²⁶⁷ *Arline* was brought under section 504 of the Rehabilitation Act of 1973.²⁶⁸ The plaintiff was an elementary school teacher who had contracted tuberculosis.²⁶⁹ She was discharged after she suffered the third relapse of the disease during a two year period.²⁷⁰ There was no question in the case that the plaintiff was discharged because of her impairment. The sole question posed was whether the school had a right to dismiss the plaintiff because she had a contagious disease and posed a threat of relapse.²⁷¹ The Court analyzed that question as a matter of whether the plaintiff's tuberculosis met the definition of disability.

The Court in *Arline* emphasized that an individualized inquiry was required under section 504.²⁷² Nonetheless, the Court engaged in a remarkably uncomplicated assessment of whether the plaintiff had a disability (or "handicap" as the statutory language provided at the time):

According to the testimony of Dr. McEuen, Arline suffered from tuberculosis "in an acute form in such a degree that it affected her respiratory system," and was hospitalized for this condition.

Littleton, his mother and an employment counselor all apparently testified "there are no jobs he cannot perform because of any alleged disability." *Id.*

265. *Id.* The fact the plaintiff had met the threshold for qualifying for social security benefits was never mentioned in the court's analysis.

266. *Id.*

267. ADAAA § 2(b)(3) (citing *Arline* 480 U.S. 273).

268. *Arline*, 480 U.S. at 277.

269. *Id.* at 276.

270. *Id.*

271. *Id.* at 281.

272. *See id.* at 284-85 (rejecting a categorical approach and asserting that "[t]he fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases").

Arline thus had a physical impairment as that term is defined by the regulations This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she "has a record of . . . impairment" within the meaning of [the statute], and is therefore a handicapped individual.²⁷³

The employer claimed that Congress could not have intended to protect individuals with contagious diseases from discrimination based on contagiousness.²⁷⁴ According to the Court, the crux of the problem with that assertion was the assumption that all individuals with contagious conditions pose the same level of threat such that Congress intended to exclude them across the board.²⁷⁵ The Court's reasoning illustrates how the perception of disability is in itself disabling:

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. . . . Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on irrational fear they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and

273. *Id.* at 280-81. A recent Minnesota state case similarly demonstrates the common sense approach in a case also involving a plaintiff with intellectual disabilities. In *Wenigar v. Johnson*, 712 N.W.2d 190 (Minn. Ct. App. 2006), the court considered a disability discrimination claim involving a plaintiff described as having "borderline intellectual functioning to mild mental retardation." *Id.* at 198. Minnesota's state statute defines disability as an impairment that "materially limits" a major life activity. Minn. Stat. § 363A.03(12) (2009). Although the Minnesota Court of Appeals cautioned that it was not concluding "having a low IQ, alone, is a disability," the court also didn't demand that the plaintiff identify a specific major life activity and then present specific evidence regarding limitation of that activity. *See Wenigar*, 712 N.W.2d at 206. The court instead simply found as follows:

Respondent is disabled because he has a mental impairment that materially limits one or more major life activities. He is illiterate and cannot obtain a driver's license. Respondent is disabled because he is vulnerable as a result of a low IQ, has limited mental capacity, and had no formal education. Coupled with his age [57], these factors materially limit his social and economic opportunities.

Id.

274. *See Arline*, 480 U.S. at 281.

275. *Id.* at 284.

medically sound judgments: the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief.²⁷⁶

In other words, *Arline* emphasized the exclusion itself as the subject of the statute. Pre-ADAAA, courts instead asked how broad and severe the perceived limitation was. The ADAAA adopts *Arline* and tosses out that inquiry. Now, at least under the perceived disability prong, when the plaintiff can establish that a job decision was based on her physical or mental condition, the ADAAA makes the impairment plus the employer's consideration of the impairment sufficient to establish the threshold for disability.²⁷⁷

Although the actual disability prong continues to require proof of substantial limitation, it should not require an analysis different from *Arline* from an evidentiary perspective. The Court in *Arline* was convinced that the plaintiff's record of hospitalization demonstrated the seriousness of her condition. In a similar actual disability case, employing the "most people" standard and the expanded definition of major life activities, the same should be true. Most people's respiratory functions do not require hospitalization (or medication, or assistive apparatus).²⁷⁸ No more consideration than that should be required.

What is then left of the old definition of disability defines the marginal case, the disability claim that even those who support the broad definition might agree does not present a substantial case for inclusion within the protected class. Even prior to the passage of the ADAAA, some disability commentators, who otherwise argued for a broadly inclusive protected class, found some disability claims frivolous and not helpful to the cause.²⁷⁹ To the extent the new definition allows courts to define a lower threshold, but mandates that threshold be set low, the new definition allows us to weed out the cases that might not be helpful to the cause.

276. *Id.* at 284-85.

277. Finding the plaintiff to have a disability under the perceived disability prong, however, will not entitle that plaintiff to a reasonable accommodation. ADAAA § 6(a)(1)(h).

278. The new definition of major life activities includes as a major bodily function "respiratory . . . functions." ADAAA § 3(2). The new definition also explicitly notes its list is not exhaustive, so that other bodily functions like pulmonary functions should also qualify. *See id.* (indicating that major bodily functions "includ[e] . . . but [are] not limited to" those listed).

279. *See* Ruth Colker, *Martin v. Professional Golf Association: Why Do We Care?*, THE COLUMBUS DISPATCH, Feb. 19, 1998 (suggesting that coverage of "trivial" impairments was distracting from the need to protect "genuine disabilities").

From an incrementalist point of view, the great benefit of the ADAAA is that it will bring and retain more individuals with disability into the workforce. With greater exposure to capable individuals with disabilities, the fear and misunderstanding that drives attitudes toward disability will dissipate. Disability (and accommodation) become a non-issue; accommodation will become commonplace rather than special.²⁸⁰ At the same time, for reasons that have been discussed in this Article, it does so in a way that minimizes the basis for ideological dissonance, which in turn minimizes judicial incentive to “fix” the statute by construing the substantive provisions narrowly.

Does excluding individuals who cannot adequately establish that their impairments make certain activities more difficult than for most people suggest that disability is any less of a civil right? If one takes the approach that a civil right can be guaranteed only when there is no inquiry into entitlement to status, the answer would be yes. While that argument might be justified for race, sex, and even religion, where those characteristics are tangential as a general rule, disability is its own category of civil right, one where the characteristic cannot be considered merely tangential.

If disability discrimination law is understood as a means to remove barriers that systemically prevent otherwise capable individuals from participation in employment (and society), barriers that most people either do not face or which cannot be said to have caused them systemic disadvantage, then individuals who cannot prove that their limitations impact them differently from those most people face should be excluded from protection of the statute.²⁸¹ This justifies continuing to define some

280. Again looking to cognitive dissonance theory, Festinger suggests that reality “will exert pressures in the direction of bringing the appropriate cognitive elements into correspondence with that reality.” FESTINGER, *supra* note 26, at 11. In the disability discrimination context, the “reality” would be the amended definition of disability under the ADAAA. Over time, as courts apply this definition repeatedly, Festinger’s model suggests they will be pushed toward changing their cognitive perception of disability and disability discrimination. While this might seem to support a more radical approach such as eliminating all functional evaluation from the definition of disability, dissonance theory also recognizes that some will deny reality and resist change even in light of pressures to do so. *Id.* at 198. The central premise of this article has been that change can be achieved by the compromise approach, much sooner, because less dissonance means less resistance to that change.

281. The standard described here is different from that proposed by Justice Scalia in *Barnett* for determining reasonable accommodations. Justice Scalia would extend the accommodation protection of the ADA to those cases only where the effect of the work rule in question operates as a unique barrier on the individual with a disability because of that disability. *Barnett*, 535 U.S. at 413 (Scalia, J., dissenting). If the effect of the barrier is one shared by anyone subject to the work rule, then the ADA should not require accommodation. *Id.* Under Justice Scalia’s formulation, an exception to a seniority

cases as at the margins, and excluding certain claims at the threshold. In this overall sense, disability discrimination law is not different than race or sex discrimination laws. And that is the ultimate resolution disability advocates want courts to reach.

VI. CONCLUSION

During the passage of the ADAAA, its proponents asserted that the Act would do no more than restore the ADA to what Congress had intended from the beginning. From the beginning, Congress did not intend to create a protected class that enveloped any person who could claim a physical or mental condition or disorder. Rather, the ADA was intended to reverse centuries of exclusion of individuals with disabilities from full participation in the benefits of society. The courts' interpretation of the ADA unfortunately impeded progress toward inclusion by creating an unduly narrow protected class. Rather than push the amended law to the extreme, however, Congress chose a more middle of the road approach.

Incrementalism is not always a good choice. There are times the law needs to be pushed to the extreme, because true change cannot occur without it. This is not one of those cases. The same forces that lead courts to be concerned about preserving discrimination protection for the "deserving disabled" would have created a backlash against a new, open-ended definition of disability. The dissonance created by "special benefits" and "fear of falsification" concerns would not be overcome by legislative fiat, potentially outweighing the benefits of a broad protected class. The compromise that is the ADAAA inherently recognizes this, while at the same time opening the door more widely.

It would be naïve to suggest the compromise will result in no dissonance and no limiting approaches. Some courts will likely continue to impose a restrictive view on ADA coverage, whether through uncertainties in the definition of disability or through the substantive provisions of the Act. Congress made it plain in the ADAAA that the courts got it wrong the first time, however, and most courts should accept that message. The next decade of the ADA will see greater inclusion, greater understanding, and more realistic outcomes in litigated cases.

system would not be required under the ADA because disabled employees and non-disabled employees alike are barred from the vacant position unless they are the employee entitled to that position under the seniority plan; therefore, the disabled employee's exclusion was not because of his disability. *See id.* at 413, 416. Justice Scalia's formulation gives no relevance to the historic, systemic exclusion of individuals with disabilities, however, while the formulation in this Article does.