IMPAIRMENT AS PROTECTED STATUS: A NEW UNIVERSALITY FOR DISABILITY RIGHTS

Michelle A. Travis[*]

TABLE OF CONTENTS

[*] Professor, University of San Francisco School of Law. I thank Bradley Areheart, Tristin Green, Nicole Porter, and Naomi Schoenbaum for their valuable comments, Jessica Simmons and Alexandria Walden for their research assistance, and Richard Dickson for his support. This Article also benefited from feedback at the Fifth Annual Colloquium on Current Scholarship in Labor and Employment Law hosted by Washington University in St. Louis School of Law and St. Louis University School of Law.

I. INTRODUCTION

On January 1, 2009, our civil rights landscape fundamentally changed as the list of protected statuses under federal employment discrimination law expanded by one. January 1, 2009, is the effective date of the ADA Amendments Act of 2008 (ADAAA),[1] which Congress enacted in response to a series of United States Supreme Court opinions that had narrowly interpreted the definition of disability in the Americans with Disabilities Act of 1990 (ADA).[2] As scholars have widely recognized, the ADAAA is designed to restore the class of individuals with disabilities to the breadth that Congress originally intended.[3] What has gone unrecognized, however, is that the ADAAA did something far more significant: it extricated disability from the broader concept of impairment. As a result, January 1, 2009, also marks the date on which impairment took its place alongside race, religion, national origin, sex, age, and disability as a protected class under federal antidiscrimination law. By implicitly elevating impairment to protected class status, the ADAAA offers a profound yet still unrealized opportunity for reframing the existing disability rights debate around a new form of universality that could meaningfully advance the disability rights movement.

The ADAAA's new form of universality has the potential to provide a cohesive alternative to the two existing theories that often divide the disability rights community regarding the most effective form of civil rights legislation. Advocates on one side of this divide contend that disability should be recognized and

---

[1] Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 29 U.S.C. § 705, 42 U.S.C. §§ 12101–12213 (Supp. II 2008, Supp. III 2009)).

[2] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)); *see* ADAAA § 2(b) (stating that Congress's purpose was to overturn specific Supreme Court decisions).

[3] *See, e.g.*, Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1270 (2009) (noting that the ADAAA's legislative history documents Congress's intent to "restor[e] the ADA to what it was originally intended to be"); Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 668 (2010) (stating that the ADAAA's "express goal" was to restore the scope of the ADA's original disability definition). *See generally* Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187 (2008) (detailing the advocacy efforts resulting in the ADAAA's restoration of the ADA's original scope).

respected as a minority group status.[4] While emphasizing that disability is not an inherent trait, these advocates highlight the distinct life experiences shared only by those individuals whose particular impairments produce significant functional limitations, widespread stigma, and pervasive social exclusion.[5] These advocates argue that civil rights coverage should be limited only to members of this socially constructed but identifiable and subordinated minority.[6]

Advocates on the other side of the divide argue that disability is better understood as a universal continuum that reflects infinite degrees of socially imposed limitation.[7] Supporters of the continuum approach question the ability to identify a discrete and insular minority, and they contend that any attempt to do so reinforces the notion of disability as an intrinsic personal deficit—a notion that both sides uniformly denounce.[8] Under this "traditional" form of universalism, civil rights law would neither distinguish nor exclude from coverage any individual who experiences any form of impairment-based disadvantage. While those in favor of minority group treatment argue that the continuum approach ignores and disrespects the existence of a unique disability identity,[9] traditional universalists believe that conceptualizing disability as a continuum is the only way to erase

---

[4] *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 20–21 (2009) (describing the minority group approach to disability); Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 213 (2010) ("According to the minority group approach, people who are 'disabled' by society are a finite, identifiable group . . . .").

[5] *See* BAGENSTOS, *supra* note 4, at 20–21 (describing the view that "society has created a distinct (though not *naturally* distinct) minority group of people with disabilities" (emphasis in original)).

[6] *Id.* at 21.

[7] *Id.* at 7–8, 20–21; Barry, *supra* note 4, at 217; *see also* Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 519–22 (1997) (summarizing evidence that all aspects of human ability lie along a spectrum); Susan Stefan, *"Discredited" and "Discreditable": The Search for Political Identity by People with Psychiatric Diagnoses*, 44 WM. & MARY L. REV. 1341, 1342 (2003) (arguing that "impairments exist along a spectrum, both physical and functional").

[8] *See* BAGENSTOS, *supra* note 4, at 7–8, 21.

[9] *See infra* notes 250–54 and accompanying text.

the stigmatizing line that society has drawn between "us" and "them."[10]

The ADAAA offers an alternative approach to disability civil rights coverage—an approach that has the potential to bridge the existing divide and thereby strengthen the disability rights movement. Understanding the ADAAA as having implicitly elevated impairment to protected class status alongside disability—rather than as having merely expanded the definition of disability—could reveal the statute as having combined the most compelling elements of *both* traditional universalism *and* of the minority group approach.

By granting legal protection for nearly all physical and mental impairments, the ADAAA recognizes the critical insight of traditional universalists about the importance of broad statutory coverage in reducing socio-legal backlash. Yet unlike the traditional universalist endeavor, the ADAAA does not erase the line between the disabled and the nondisabled—either as a matter of formal law or of public perception. To the contrary, the ADAAA embraces difference by distinguishing disability from impairment and by using that distinction as the dividing line between the affirmative right to workplace accommodations and the negative right to be free from simple discrimination.[11] In this way, the ADAAA's new universality offers the opportunity to achieve the traditional universalist objective of expanding the group of workers who view themselves as ADA stakeholders, while at the same time acknowledging the respect for difference that plays such a central role in the minority group approach.

Unfortunately, the ADAAA's potential for charting such a new and unifying path for disability civil rights has largely gone unrecognized, in part because the primary drafters made the necessary strategic decision to frame the ADAAA as merely a restorative bill, rather than as an innovative piece of civil rights legislation. Until recently, the ADAAA's potential has also remained dormant in the courts because of the statute's non-

---

[10] *See* BAGENSTOS, *supra* note 4, at 7–8 (explaining the view that a minority group approach "entrenches the erroneous social view that there is a fundamental difference between people who have disabilities and people who do not").

[11] *See infra* notes 58–70 and accompanying text.

retroactivity,[12] which has meant that pre-ADAAA law has continued to govern many cases long after the ADAAA's effective date. But now that enactment is behind us and the development of ADAAA case law has finally begun, it is time to render more explicit the full opportunity that the ADAAA presents for advancing a disability civil rights agenda.

Part II begins by explaining more specifically how the ADAAA extricated disability from the broader concept of impairment and effectively bestowed upon impairment the status of an independent protected class. It is this implicit elevation of impairment—as distinct from disability—that enables disability advocates to conceptualize a new universality that combines both broad-reaching coverage with respect for difference.

Part III examines the first component of the ADAAA's new universality: the nearly universal expansion of antidiscrimination protection to almost all physical and mental impairments. While applauding this development as a major success for traditional universalists, Part III also explores the realistic limits to true universal coverage. Because the ADAAA elevated impairment without providing any additional guidance on how to define the concept or prove its existence, judicial interpretations of the term will dictate how universal the ADAAA's coverage will really become. Part III analyzes pre-ADAAA case law and administrative guidance and reveals how both an under-theorization and an over-medicalization of impairment create a risk that judges may use the term as a legal hook to restrict the ADAAA's potential reach. Part III further examines the more fundamental critique of the legal approach to impairment raised by disability theorists' recent attempts to reveal impairment as a social construct altogether. While acknowledging the problems with vesting definitional control in the hands of medical professionals, this analysis ultimately takes a pragmatic view about the role that disability advocates may play in policing judicial interpretations of impairment.

Part IV examines the second component of the ADAAA's new universality: the respect for difference. At the same time that the

---

[12] *See* Nyrop v. Indep. Sch. Dist. No. 11, 616 F.3d 728, 734 n.4 (8th Cir. 2010) (stating that "Congress did not provide for retroactive application in the amendments").

ADAAA greatly expanded its antidiscrimination coverage, it also clarified that the right to workplace accommodation exists only for a subset of individuals whose impairments meet a functional-limitations test.[13] Although the ADAAA expands this subset of accommodation-eligible individuals,[14] it nevertheless retains a minority group approach when drawing the line between an accommodation mandate and simple antidiscrimination protection. While traditional universalists could still claim victory by continuing to characterize the expanded antidiscrimination protection as having codified a disability continuum, such a position misses the way in which the ADAAA also incorporates elements of the minority group approach. Part IV suggests that acknowledging the ADAAA's respect for difference might better serve the disability rights movement, not only by illuminating common ground with those who value recognition of a unique disability identity, but also by more successfully achieving the goals of traditional universalists themselves.

While the ultimate goal of traditional universalists to dissolve the illusory line between the disabled and the nondisabled remains an important ideal, a wealth of social science research reveals deeply entrenched social, cognitive, and psychological barriers to widespread embrace of the notion that we all exist along a disability continuum.[15] Fully realizing the opportunity that the ADAAA's expanded coverage provides for broadening the ranks of ADA stakeholders will therefore require advocates to rethink the traditional notion of universality in a way that will resonate more deeply with the large group of workers with non-substantially limiting impairments who have yet to identify the ADA as personally relevant. Given the challenges facing the traditional universalist endeavor, even in a post-ADAAA world, Part IV suggests that society might achieve greater interest convergence by moving away from the continuum concept and instead characterizing the amended ADA as providing legal protection to both the disabled and the *non*disabled workforce. In other words, Part IV urges traditional universalists to consider whether the

---

[13] *See infra* notes 58–70 and accompanying text.

[14] *See infra* notes 279–81 and accompanying text.

[15] *See infra* notes 215–42 and accompanying text.

disability rights movement may be better served by viewing the amended ADA as protecting individuals with *and without* disabilities, rather than continuing to await a broad-based enlightenment that the disability label really fits us all.

II. IMPAIRMENT AS PROTECTED STATUS

Referring to the "disability rights movement" as a single, uniform entity elides the reality of a pluralistic and fluid social endeavor with diverse adherents who have coalesced around different and sometimes conflicting goals.[16] That being said, the movement does embrace some common objectives, including opposing paternalism, advancing integration, and achieving independence for individuals with disabilities.[17] Movement participants also widely agree on the importance of developing a social model of disability as a necessary step toward realizing these goals.[18]

Theorists developed the social model of disability to replace the medical model, in which disability had been viewed as an intrinsic, individual deficit in need of a cure.[19] The social model reconceptualized disability as a social construct created by the interaction between a physical or mental characteristic and contingent aspects of our environment that restrict accessibility or limit functioning.[20] Critical to the social model is the distinction

---

[16] BAGENSTOS, *supra* note 4, at 3–4.

[17] *Id.* at 4; JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 52, 144 (1993).

[18] *See* BAGENSTOS, *supra* note 4, at 13 (describing "the endorsement of a social rather than a medical model of disability" as "the one position that approaches consensus within the movement"); *see also* Vlad Perju, *Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States*, 44 CORNELL INT'L L.J. 279, 281 (2011) (arguing that the social model obtained international consensus in the 2007 United Nations Convention on the Rights of Persons with Disabilities).

[19] BAGENSTOS, *supra* note 4, at 18; Barry, *supra* note 4, at 210–12; Tom Shakespeare, *The Social Model of Disability, in* THE DISABILITY STUDIES READER 266, 268 (Lennard J. Davis ed., 3d ed. 2010); Shelley Tremain, *On the Government of Disability*, 27 SOC. THEORY & PRAC. 617, 620, 630 (2001) [hereinafter Tremain, *Government of Disability*]; Shelley Tremain, *On the Subject of Impairment, in* DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY 32, 41 (Mairian Corker & Tom Shakespeare eds., 2002) [hereinafter Tremain, *Impairment*]; *see also* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649–53 (1999) (describing the medical model and its societal effects).

[20] BAGENSTOS, *supra* note 4, at 18; *see* Crossley, *supra* note 19, at 654–55 (explaining that

between impairment and disability.[21] The social model views "impairment" as simply a description of one's physical or mental condition, which is not inherently limiting outside of the social context in which it exists.[22] "Disability," in contrast, refers to the exclusion or limitations that are socially imposed "on top of one's impairment."[23] The social model of disability is thus best described as a causal description of the source of disadvantage for individuals with impairments.[24] The social model shifts causal responsibility away from an individual's impairment and onto the "architectural, social, and economic environment" that renders an impairment limiting.[25]

While many have invoked the social model's causal-attribution theory as a basis for making normative arguments about employers' obligations to modify the workplace, the social model of disability does not by itself produce any necessary policy prescriptions.[26] Nor does the social model dictate the appropriate target group for civil rights laws aimed at dismantling the social exclusion that all activists agree exists.[27] Consensus around the social model of disability has thus helped mask an important debate within the disability rights movement regarding two

---

"the social model of disability sees disadvantages as flowing from social systems and structures"); 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, 100 (2000) (describing the social model's understanding that "actual limitations that flow from an individual's physical or mental impairment often result from the manner in which society itself is structured"); Shakespeare, *supra* note 19, at 268 (explaining that the social model views disability as "a relationship between people with impairment and a disabling society").

[21] Shakespeare, *supra* note 19, at 268; *see also* Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL'Y REV. 347, 351 (2011) (describing the impairment/disability dichotomy as "the linchpin for a social model"); Tremain, *Government of Disability*, *supra* note 19, at 620 (describing the social model's distinction between impairment and disability as "two terms of reference, which are taken to be mutually exclusive").

[22] MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 35 (1996); Shakespeare, *supra* note 19, at 268; Tremain, *Government of Disability*, *supra* note 19, at 620.

[23] Tremain, *Government of Disability*, *supra* note 19, at 620.

[24] Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1251, 1255 (2007).

[25] *Id.* at 1255.

[26] *Id.* at 1252–53, 1275.

[27] *See* BAGENSTOS, *supra* note 4, at 20–21 (explaining that the social model can support either a minority group approach or a universal approach to legal coverage).

different approaches to coverage under disability discrimination law.[28]

As noted above, some advocates argue that although disability is not an inherent trait shared by a naturally distinct group of individuals, society has constructed an identifiable minority group whose impairments result in widespread stigma and exclusion.[29] Under this minority group status approach, the law would protect (and direct resources toward) a distinct group of individuals whose impairments produce the most serious socially imposed limitations.[30] Others argue that the social construction of disability—which recognizes that impairments and their social effects fall along a continuum for all individuals—not only renders arbitrary any definition of a discrete and insular minority, but also risks reinforcing the notion that disability is an intrinsic personal characteristic.[31] Under this traditional universal approach, the law would recognize that we all possess or are at risk of possessing various impairments, and the law would neither distinguish nor exclude from protection anyone who experiences any form of impairment-based disadvantage.[32] Both of these approaches to disability civil rights law—the minority group status approach and the traditional universal approach—are consistent with the social model of disability, which cannot by itself resolve the debate about which approach to prioritize within a disability rights agenda.[33]

Scholars disagree about exactly how the disability rights movement resolved this internal tension when lobbying for the original ADA, which extended disability discrimination protection into the private employment sector. The ADA's drafters incorporated a pre-existing definition from the Rehabilitation Act of 1973, which already had prohibited disability discrimination by certain federal agencies, federal contractors, and federally funded programs.[34] The Rehabilitation Act had defined its protected class

---

[28] *Id.* at 7, 20.

[29] *Id.* at 20–21.

[30] *Id.* at 21; Barry, *supra* note 4, at 213–17.

[31] BAGENSTOS, *supra* note 4, at 7–8, 21; Barry, *supra* note 4, at 217–18.

[32] BAGENSTOS, *supra* note 4, at 7–8, 21.

[33] *Id.* at 20.

[34] Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361; *see also* Feldblum, *supra* note 20, at 92 (explaining that the ADA's disability definition came "directly from" the Rehabilitation Act);

to include "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities [the 'actual' disability prong], (B) has a record of such an impairment [the 'record of' prong], or (C) is regarded as having such an impairment [the 'regarded as' prong]."[35] Some scholars have viewed the decision to adopt the Rehabilitation Act's definition as a conscious political choice to advance the minority group model.[36] Others have argued persuasively that advocates not only intended the original ADA to incorporate a traditional universal approach but that advocates had every reason to believe that would be the result based on how broadly judges had interpreted the definition in prior Rehabilitation Act cases.[37] In particular, advocates reasonably believed that the "regarded as" prong reflected the continuum notion and would protect against all forms of impairment-based discrimination.[38]

Regardless of this dispute over original intent, disability scholars widely agree about the outcome of the ADA's original disability definition. Judges interpreted the ADA's disability definition much more narrowly than they had done with the same

---

Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 908–09 (2000) (detailing the Rehabilitation Act's coverage and the ADA's extension into the private sector).

[35] Pub. L. No. 93-516, 88 Stat. 1617, 1619 (1974).

[36] *See, e.g.*, BAGENSTOS, *supra* note 4, at 44 (arguing that "disability rights advocates subordinated [the] universalist notion to the . . . minority-group arguments in the campaign to enact the ADA").

[37] Barry, *supra* note 4, at 240; Feldblum, *supra* note 20, at 129; *see also* Michael Ashley Stein, *Foreword: Disability and Identity*, 44 WM. & MARY L. REV. 907, 914–15 (2003) (describing the ADA drafters' "deliberate and conscious choice" to adopt the Rehabilitation Act's disability definition because prior courts had interpreted that definition broadly). Congress itself acknowledged this original expectation when enacting the ADAAA. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), 122 Stat. 3553, 3553 (describing Congress's expectation that the ADA's disability definition "would be interpreted consistently with how courts had applied the [same] definition . . . under the Rehabilitation Act").

[38] Barry, *supra* note 4, at 230–31; *see also* Feldblum et al., *supra* note 3, at 225 ("[I]t was . . . expected during passage of the ADA that a person with any type of impairment, even a minor one, would be covered under the ['regarded as'] prong . . . ."); Feldblum, *supra* note 20, at 92, 158–60 (explaining that the ADA drafters adopted the Rehabilitation Act's disability definition believing that the third prong would "capture any individual who had been discriminated against because of *any* impairment" (emphasis in original)).

language in the Rehabilitation Act, resulting in an increasingly restricted protected class under the ADA.[39] Case law applying the ADA's disability definition was clearly inconsistent with a traditional universalist view of disability as an all-encompassing continuum.[40] Yet despite the extensive criticism that has been levied against these narrow judicial interpretations,[41] even the most maligned cases are arguably consistent with a minority group approach to disability law.[42]

The judicial tendency to view the ADA's disability definition through a minority group lens was particularly evident in cases applying the "regarded as" prong. Judges interpreted the ADA's "regarded as" prong consistent with a minority group approach to disability coverage in at least two distinct but related ways. First, courts required plaintiffs to prove not just that an employer regarded them as having an impairment but that an employer regarded them as having an impairment *that substantially limited a major life activity*.[43] By incorporating a functional-limitations

---

[39] *See* ADAAA § 2(a)(3) (noting Congress's unfulfilled expectation that courts would interpret the ADA's disability definition consistently with the same definition in the Rehabilitation Act); Barry, *supra* note 4, at 245–51 (discussing Supreme Court decisions that restricted the disability definition under the ADA); Feldblum, *supra* note 20, at 139–59 (identifying the interpretational methods that federal courts used to restrict the disability definition under the ADA).

[40] BAGENSTOS, *supra* note 4, at 44.

[41] *See*, *e.g.*, Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 109 (1997) (arguing that the ADA's disability definition "has become increasingly narrowed to the point where it is in danger of becoming ineffective"); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 321 (2000) (arguing that the Supreme Court "drastically curtailed" the ADA's protected class); *see also* BAGENSTOS, *supra* note 4, at 5 (noting that commentators "have been harshly critical of the Supreme Court decisions that have narrowly read the ADA's definition of 'disability' ").

[42] BAGENSTOS, *supra* note 4, at 5; *see also* Burgdorf, *supra* note 7, at 569 (describing judges' narrow interpretations of the ADA's disability definition as consistent with a "protected-class approach"); Feldblum, *supra* note 20, at 161 (arguing that the Supreme Court's narrow interpretations of the ADA's disability definition "rest[ed] on the premise that anti-discrimination protection is necessary and appropriate for a limited group of individuals").

[43] *E.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999); *see also* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 223 (2008) (describing how pre-ADAAA cases linked the "regarded as" prong to the actual disability definition by requiring proof that "the defendant regarded the [plaintiff] as having . . . an impairment

test into "regarded as" claims, courts endorsed the notion that the ADA should only protect a discrete group of individuals who have—or are perceived as having—significantly limiting conditions. Courts further entrenched the minority group model by erecting a nearly insurmountable hurdle for plaintiffs who were seeking to meet the functional-limitations test by demonstrating a perceived limitation in the major life activity of working. In such cases, courts required plaintiffs to demonstrate that their employer mistakenly regarded them not just as unfit for the particular job in question but as unable to work in a wide range or class of jobs.[44] By refusing to allow an individual to sue for an employer's (often admitted) decision to reject the individual for a particular job because of a real or perceived impairment, courts effectively rejected a continuum notion of disability.[45]

A second way in which many judges interpreted the ADA's "regarded as" definition through a minority group lens was by requiring proof that an employer's mistaken perception was the result of myths, fears, or stereotypes about disability.[46] Many courts rejected "regarded as" claims against employers that had engaged in impairment-based decision making, as long as the

---

that substantially limits a major life activity").

[44] *See, e.g.*, Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523 (1999) ("[T]o be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job."); *Sutton*, 527 U.S. at 491 ("When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.").

[45] *See* BAGENSTOS, *supra* note 4, at 37–38 (analyzing cases alleging substantial limitation in the major life activity of working as consistent with a minority approach); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability*,*"* 86 VA. L. REV. 397, 513 (2000) (describing the Supreme Court's "restrictive interpretation of substantial limitation in working" as having prioritized a "truly disabled" approach over a stigma-based approach (internal quotation marks omitted)); Barry, *supra* note 4, at 247–49 (describing cases requiring plaintiffs to prove that their employers perceived them as unable to perform a broad class of jobs as "largely foreclosing coverage under the 'regarded as' prong," but "mak[ing] sense in light of the minority group approach"); Burgdorf, *supra* note 7, at 439–69 (explaining how courts undermined the universal intent of the "regarded as" prong by requiring plaintiffs to show that their employers perceived them as unable to perform a broad class of jobs).

[46] *See, e.g.*, Wright v. Ill. Dep't of Corr., 204 F.3d 727, 732 (7th Cir. 2000) (denying plaintiff's "regarded as" claim for failure to show that the employer's conduct reflected any disability-based myths, fears, or stereotypes); Muller v. Auto. Club of So. Cal., 897 F. Supp. 1289, 1297 (S.D. Cal. 1995) (same).

employer's treatment of the plaintiff's real or perceived impairment reflected a so-called "innocent mistake" about the impairment's effects or severity made during an individualized assessment.[47] By limiting legal protection only to misperceptions grounded in group-based biases, these courts implicitly incorporated a stigma requirement into the "regarded as" prong. In doing so, these courts further endorsed a minority group approach to disability that covers only a narrow group of individuals whose impairments produce widespread social exclusion.

Congress enacted the ADAAA in response to these and other narrow judicial interpretations of the ADA.[48] The ADAAA codifies Congress's rejection of the minority group model that had

---

[47] *See, e.g.*, Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) (rejecting "regarded as" claim because the employer's perception of plaintiff's impairment was based on misinterpretation of a doctor's note rather than "upon speculation, stereotype, or myth"); Barber v. Pepsi-Cola Pers., Inc., 78 F. Supp. 2d 683, 691–92 (W.D. Mich. 1999) (rejecting "regarded as" claim because "a person with a shoulder injury does not suffer from perception of disability based on myth, fear, or stereotype"); Rondon v. Wal-Mart, Inc., No. C-97-0369 MMC, 1998 WL 730843, at *6 (N.D. Cal. Oct. 8, 1998) (rejecting "regarded as" claim because "[b]ack strains are generally not the subject of 'myth, fear, or stereotype' "); Collins v. Yellow Freight Sys., Inc., 942 F. Supp. 449, 453 (W.D. Mo. 1996) (rejecting "regarded as" claim because the employer's perception of plaintiff's impairment was based on misinterpretation of a doctor's evaluation rather than on negative attitudes, misperceptions, or myths about disability); Howard v. Navistar Int'l Transp. Corp., 904 F. Supp. 922, 930–31 (E.D. Wis. 1995) (rejecting "regarded as" claim because plaintiff "failed to produce any evidence of the existence of invidious stereotypes against individuals with tennis elbow").

The term "innocent mistake" comes from two Third Circuit cases: *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 182–83 (3d Cir. 1999) (distinguishing misperceptions based on "negligence or malice" from those based on "an employer's innocent mistake (which may be a function of 'goofs' or miscommunications)"), and *Deane v. Pocono Medical Center*, 142 F.3d 138, 144 (3d Cir. 1998) (en banc) (distinguishing misperceptions based on "myths, fears, stereotypes, and prejudices" from "an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual's impairment"). *See also* Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481, 500–01 (2002) (distinguishing between "regarded as" claims based on motivational, group-based misperceptions and those based on cognitive processing errors during individualized assessments). The Third Circuit joined a minority of courts holding that the ADA's "regarded as" prong should cover all forms of misperception. *See Taylor*, 177 F.3d at 182 (holding that an innocent mistake may support liability under the "regarded as" prong); *Deane*, 142 F.3d at 144 (same); Travis, *supra*, at 501–06 (discussing the circuit split).

[48] *See* Pub. L. No. 110-325, § 2(b)(2)–(5), 122 Stat. 3553, 3554 (stating Congress's purpose to overturn specific Supreme Court decisions).

animated the judiciary's restrictive approach to "regarded as" coverage.[49] Congress demonstrated this intent through several general provisions not specifically related to the "regarded as" prong. Most notably, the ADAAA removed one of the congressional findings from the ADA's original text that courts often had invoked to support narrow interpretations of the disability definition.[50] That omitted finding had described individuals with disabilities as "a discrete and insular minority"—a phrase that no longer appears in the statute.[51] The ADAAA also added a construction rule that directs courts to interpret the ADA's disability definition "in favor of broad coverage."[52]

In addition to these general changes, the ADAAA specifically extricated the "regarded as" definition from its judicial tethers to the minority group approach. First, the ADAAA clarified that a "regarded as" plaintiff need only prove that an employer made an adverse employment decision because of the plaintiff's real or perceived impairment—*not* that the employer also regarded the impairment as substantially limiting a major life activity.[53] In other words, Congress clarified that the "regarded as" prong

---

[49] *See* Barry, *supra* note 4, at 251–75 (detailing the negotiations and drafts leading to the ADAAA).

[50] *See* ADAAA § 3(2) (striking the "discrete and insular minority" language from the congressional findings in 42 U.S.C. § 12101(a)(7)); Statement of the Managers to Accompany S. 3406, the Americans With Disabilities Act Amendments Act of 2008, 154 CONG. REC. 18,516, 18,517 (2008) [hereinafter Statement of the Managers] (inserted into the record by Sen. Tom Harkin) (explaining that the ADAAA deletes the "discrete and insular minority" finding, which had "led the Supreme Court to unduly restrict the meaning and application of the definition of disability").

[51] ADAAA § 3(2).

[52] *Id.* § 4(a) (codified in 42 U.S.C. § 12102(4)(A) (Supp. III 2009)).

[53] *Id.*; *see also* Statement of the Managers, *supra* note 50, at 18,520 (explaining that a "regarded as" plaintiff need only establish "an action prohibited under the [ADA] because of an actual or perceived physical or mental impairment"); H.R. REP. NO. 110-730, pt. 1, at 12–13 (2008) (explaining Congress's intent to undo judicial incorporation of the substantial limitations test into "regarded as" claims); 154 CONG. REC. 13,765 (2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner) (explaining that the ADAAA "allow[s] individuals to establish coverage under the 'regarded as' prong . . . without having to establish the covered entity's beliefs concerning the severity of the impairment"); EEOC Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,981, 16,985, 17,000–02, 17,008, 17,014 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630) [hereinafter EEOC Regulations] (amending 29 C.F.R. § 1630.2(j) & (l) and 29 C.F.R. app. § 1630.2(j) & (l) to clarify that an impairment's actual or perceived limitations are irrelevant to "regarded as" claims).

contains no functional-limitations test.[54] The ADAAA does exclude impairments that are both "transitory and minor," thereby omitting coverage for a small subset of conditions.[55] Otherwise, the ADA's "regarded as" prong now protects against impairment-based discrimination regardless of the real or perceived severity of one's physical or mental condition.[56]

Second, the ADAAA eliminated any inquiry into the motivation behind an employer's impairment-based decision. Under the ADAAA, the "regarded as" prong applies to any adverse employment decision because of an individual's impairment—*regardless* of whether the decision was the result of "myths, fears, or stereotypes about disability."[57] In other words, Congress clarified that the "regarded as" prong contains no stigma requirement. The ADA's "regarded as" prong now protects against impairment-based discrimination whether the impairment produces widespread social exclusion or merely results in a single employer's idiosyncratic response.

Given this dramatic expansion of "regarded as" coverage—and the fact that the "regarded as" definition remains formally housed within the ADA's three-pronged disability definition—traditional universalists quite reasonably may assert victory by describing the ADAAA as having codified the continuum approach to disability. Yet at the same time that Congress expanded statutory coverage, it also divided the continuum into functionally distinct categories with different legal rights. It did so by severing the ADA's

---

[54] *See* Statement of the Managers, *supra* note 50, at 18,520 ("The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong."); 154 CONG. REC. 18,527 (2008) (statement of Sen. Orrin Hatch) (describing the ADAAA's removal of a functional-limitations requirement from "regarded as" claims); EEOC Regulations, 76 Fed. Reg. at 17,014 (amending 29 C.F.R. app. § 1630.2(l) to state that "an individual is not subject to any functional test" in "regarded as" claims).

[55] ADAAA § 4(a) (defining a "transitory impairment" as having "an actual or expected duration of 6 months or less").

[56] *See* Long, *supra* note 43, at 224 (describing the ADAAA's return to impairment-based antidiscrimination protection). Of course, statutory protection remains limited to individuals who are qualified for the job and who are not subject to any statutory defenses. EEOC Regulations, 76 Fed. Reg. at 16,984 (amending 29 C.F.R. § 1630.2(l)).

[57] EEOC Regulations, 76 Fed. Reg. at 17,015 (amending 29 C.F.R. app. § 1630.2(l)); *see also* Travis, *supra* note 47, at 550–52 (arguing that the "regarded as" prong should apply even when employers' misperceptions do not result from myths, fears, or stereotypes about disability).

reasonable accommodation mandate from "regarded as" claims.[58] Under the ADAAA, only individuals who meet the functional-limitations test required to qualify as having either an "actual" disability or a "record of" a disability are entitled to reasonable accommodations to perform the essential functions of a job.[59] This portion of the ADAAA resolved a split among federal courts[60] by rejecting prior opinions that had applied the ADA's accommodation mandate to "regarded as" claims.[61]

Through these changes, the ADAAA resolved the tension between the minority group approach and the traditional universal approach to disability coverage in both a subtle and ingenious way.[62] The ADAAA endorses nearly universal protection

---

[58] ADAAA § 6(a)(1); *see also* Statement of the Managers, *supra* note 50, at 18,519 (explaining that the ADAAA does not require accommodations "when an individual qualifies for coverage . . . solely by being 'regarded as' having a disability"); EEOC Regulations, 76 Fed. Reg. at 16,986, 17,002 (adding 29 C.F.R. §§ 1630.2(o)(4), 1630.9(e) and amending 29 C.F.R. app. § 1630.2(o) to clarify that employers need not accommodate individuals who qualify for coverage solely under the "regarded as" prong).

[59] ADAAA § 6(a)(1).

[60] *See* Lawrence D. Rosenthal, *Reasonable Accommodations for Individuals Regarded as Having Disabilities Under the Americans with Disabilities Act? Why "No" Should Not Be the Answer*, 36 SETON HALL L. REV. 895, 896–97 (2006) (noting the federal court split); Travis, *supra* note 34, at 921–33 (analyzing the federal court split).

[61] *See, e.g.*, Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) (applying accommodation mandate to "regarded as" claim); Matczak v. Frankford Candy & Chocolate Co., 950 F. Supp. 693, 697 (E.D. Pa. 1997) (same), *rev'd in part on other grounds*, 136 F.3d 933 (3d Cir. 1997); Pinkerton v. City of Tampa, 981 F. Supp. 1455, 1457 (M.D. Fla. 1997) (same); Muller v. Hotsy Corp., 917 F. Supp. 1389, 1412–13 (N.D. Iowa 1996) (same); Spath v. Berry Plastics Corp., 900 F. Supp. 893, 903–04 (N.D. Ohio 1995) (same); Stradley v. Lafourche Comm., Inc., 869 F. Supp. 442, 444–45 (E.D. La. 1994) (same). The ADAAA endorses the view of courts that had held "regarded as" plaintiffs ineligible for workplace accommodations. *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003) (holding that employer has no duty to accommodate under the "regarded as" prong); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999) (same).

While commentators have described application of the accommodation mandate to "regarded as" claims as "pro-employee," (e.g., Rosenthal, *supra* note 60, at 906), that approach likely had the opposite effect on ADA coverage. Granting "regarded as" plaintiffs the right to accommodation likely contributed to the judicial desire to cabin the reach of the "regarded as" prong and to apply a minority group lens to ensure that only the truly deserving could levy such demands upon their employers. *See* BAGENSTOS, *supra* note 4, at 47 (explaining that when a law is viewed as "provid[ing] special protections," it pushes judges to "guard the boundaries of [the protected] class to assure that those who are undeserving do not partake of those benefits").

[62] *See* Barry, *supra* note 4, at 278 (arguing that "the ADAAA brings coherence to a definition of disability in tension" by expanding "regarded as" coverage while restricting the

against simple discrimination under the "regarded as" prong.[63] The "regarded as" prong now protects individuals against impairment-based decision making regardless of the real or perceived severity or stigmatizing nature of the impairment.[64] In contrast, by retaining the requirement that an impairment substantially limits (or limited) a major life activity to obtain coverage under the "actual" (or "record of") disability prongs, the ADAAA endorses the minority group approach for those portions of the statute.[65] Although the ADAAA added several significant provisions to ensure that the boundaries of that protected minority group will extend much farther than federal courts previously had permitted,[66] Congress nevertheless retained an identifiable minority status as the basis for triggering entitlement to reasonable accommodations, which now attach solely to the "actual" and "record of" disability prongs.[67] Only those individuals whose impairments at some point have produced significant functional limitations or social exclusion are deemed eligible for workplace restructuring, while nearly all individuals with impairments are now protected under basic antidiscrimination law.

By incorporating nearly universal antidiscrimination coverage under the "regarded as" prong and severing that prong from the accommodation mandate, the ADAAA has functionally codified the social model's foundational distinction between impairment and disability. Under the social model, impairment describes one's physical or mental condition, while disability identifies the socially

---

accommodation mandate to the first two prongs).

[63] *Id.*

[64] A few ways remain in which "regarded as" coverage is both under- and over-inclusive of all impairment-based discrimination. On one hand, the ADAAA excludes coverage of impairments that are transitory and minor, and the ADAAA still requires employees to be qualified for the job and fall outside of various statutory defenses. *See supra* notes 55–56 and accompanying text. On the other hand, the ADAAA covers *perceived* impairments, even if an employee possesses no impairment at all. ADAAA, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008); *see also* EEOC Regulations, 76 Fed. Reg. 16,978, 17,000 (Mar. 25, 2011) (amending 29 C.F.R. § 1630.2(g)). As a result, references throughout this Article to impairments and to impairment-based discrimination under the ADAAA are intended to encompass both actual and perceived impairments.

[65] Barry, *supra* note 4, at 280.

[66] *See infra* notes 279–82 and accompanying text.

[67] ADAAA § 6(a).

imposed limitations or exclusion that flow from one's impairment.[68] Although the "regarded as" prong continues to be listed in the ADA as a third incarnation of disability,[69] the post-ADAAA "regarded as" prong is really about *impairment*. The "regarded as" prong now prohibits employers from engaging in impairment-based decision making: other than proving a causal link between the impairment and the employer's decision, no showing of functional limitations, stigma, or widespread social exclusion is required.[70] The "actual" and "record of" prongs, in contrast, continue to protect *disability* by requiring not just the existence of an impairment but proof that the impairment produces or has produced significant social effects. Thus, the ADAAA effectively has added impairment—as distinct from disability—to the list of statuses receiving federal antidiscrimination protection.

The ADAAA's legislative history reveals Congress's understanding of this crucial distinction between impairment and disability. The legislative history documents congressional intent for the "regarded as" prong to cover simply impairments—which require no functional-limitations assessment—and for the "actual" and "record of" prongs to protect the smaller category of disabilities, which require a finding of substantial limitation in a major life activity as a prerequisite for the right to accommodation. The ADAAA's legislative history explains, for example, that "courts will have to address whether an impairment constitutes a disability under the first and second, but *not* the third, prong of

---

[68] *See supra* notes 21–23 and accompanying text.

[69] 42 U.S.C. § 12102(1)(C) (Supp. III 2009).

[70] One could argue that a single employer's impairment-based decision is itself a sufficient socially imposed limitation to render the impairment a "disability" within the understanding of the social model. *See* Barry, *supra* note 4, at 281 (describing the "regarded as" prong as codifying the view that "[a]ny adverse treatment" based on one's impairment "disables"); Samaha, *supra* note 24, at 1261 (explaining that in an extreme version of the social model, disability includes "all the things that impose restrictions" upon individuals with impairments). But that view falls outside of mainstream social model theory and effectively would erase the line between impairment and disability that is so critical to the model's existence. *See* Samaha, *supra* note 24, at 1264–65 (critiquing extreme versions of the social model for failing to grapple with the "dimensions and severity of disadvantage" required to transform an impairment into a disability).

the definition of disability."[71] According to the legislative Statement of the Managers, an individual who faces an adverse employment action because of a real or perceived impairment will be covered under the ADAAA's "regarded as" prong, regardless of "*whether the impairment constitutes a disability*."[72] The legislative Statement explains that the decision to "retain[ ] the essential elements of the definition of disability including the key term 'substantially limits,' " reflects congressional reaffirmation "that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA."[73] In contrast, the legislative Statement explains that "the third prong of the disability definition *will apply to impairments, not only to disabilities*."[74]

The ADAAA's basic effect is thus quite profound. In our post-ADAAA world, impairment now stands alongside race, color, national origin, sex, religion, age, and disability as a legally protected status in federal antidiscrimination law.[75] Understanding the ADAAA as having elevated impairment to protected class status alongside disability—rather than as having merely expanded the definition of disability—has broad-reaching theoretical and strategic implications that remain unexplored. The remainder of this Article begins that endeavor by revealing how such an understanding could advance the disability rights movement by combining the most compelling elements of both traditional universalism's continuum model and of the minority group status approach.

III. LEARNING FROM THE CONTINUUM APPROACH: NEW UNIVERSALITY'S (NEARLY) UNIVERSAL REACH

The ADAAA's new universality incorporates one of the core elements of traditional universalism: expansive statutory

---

[71] Statement of the Managers, *supra* note 50, at 18,520 (emphasis added).

[72] *Id.* at 18,519 (emphasis added).

[73] *Id.* at 18,517.

[74] *Id.* at 18,519 (emphasis added).

[75] *See* Barry, *supra* note 4, at 219–20 (explaining that "the universal approach neatly aligns impairments . . . with race, sex, religion and other prohibited characteristics for purposes of civil rights protection").

coverage. As explained above, the ADAAA's "regarded as" prong now provides basic antidiscrimination protection for almost all physical and mental impairments. Although Part IV below suggests the potential benefits of characterizing this major development as having expanded coverage to protect individuals *without disabilities*—rather than as having expanded coverage further along a *disability continuum*—the ADAAA's expanded statutory coverage certainly represents a major success for traditional universalists.

This Part explores the realistic limits to true universal coverage, regardless of how that coverage is characterized. In identifying the limits to universality, commentators have focused primarily on the ADAAA's two explicit statutory exclusions.[76] First, the ADAAA excludes impairments that are "transitory and minor" from protection under the "regarded as" prong.[77] Second, by severing the reasonable accommodation mandate from the "regarded as" prong, the ADAAA excludes coverage for individuals with non-substantially limiting impairments who require an accommodation to perform the essential functions of a job.[78] Commentators have not expressed major concern about these two explicit limits to universal coverage. They tend to believe that the "transitory and minor" exclusion will only preclude coverage of common, short-term ailments, such as sprained ankles and colds, which historically have not triggered stigma and employment exclusion.[79] And they are hopeful that the law will cover most

---

[76] *See, e.g.*, *id.* at 278 (noting that the "two caveats" to universal coverage under the "regarded as" prong are the lack of an accommodation right and the exclusion of transitory and minor impairments); Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1022–28 (analyzing the explicit statutory exclusions to "regarded as" coverage).

[77] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified in 42 U.S.C. § 12102(3)(B) (Supp. II 2009)).

[78] *Id.* § 6(a) (codified as amended at 42 U.S.C. § 12201(h) (Supp. II 2009)); *see* Statement of the Managers, *supra* note 50, at 18,519 (describing the ADAAA's severing of accommodations from the "regarded as" prong as an "important limitation[ ]" on coverage).

[79] *See, e.g.*, Barry, *supra* note 4, at 266 (explaining that advocates were unconcerned about the ADAAA's "transitory and minor" exclusion because they "believed that individuals with these impairments were not likely to encounter barriers to access"). Other research challenges this assumption by documenting that many low-wage workers without paid sick leave often face job loss for absences related to their own or their family members'

individuals whose impairments require accommodations under the ADAAA's more broadly defined "actual" and "record of" disability prongs, to which the accommodation mandate still applies.[80] While only time will tell whether these optimistic predictions will be accurate, focusing only on the two explicit statutory exclusions fails to recognize the most significant implicit limitation to true universality: the concept of impairment itself.

While the ADAAA greatly expanded the scope of the "regarded as" prong, it did not eliminate the defining status of having a real or perceived impairment. To the contrary, the ADAAA effectively elevated impairment to protected class status. True universality arguably would provide antidiscrimination protection for any physical or mental characteristic upon which an employer makes an irrational employment decision.[81] Yet even the most prominent disability rights advocates with the strongest universalist agendas have not pressed for legal coverage to extend that far.[82] They have

---

short-term illnesses. *See generally* Joan C. Williams, *One Sick Child Away from Being Fired: When "Opting Out" Is Not an Option*, WORK LIFE LAW (2006), *available at* http://www.worklifelaw.org/pubs/onesickchild.pdf (describing the job vulnerability of low-wage workers with caregiving responsibilities). Nonetheless, the ADAAA's "transitory and minor" exclusion likely was a necessary compromise to gain support for the bill's otherwise broad expansion of the "regarded as" prong. *See* Feldblum et al., *supra* note 3, at 236–37 (noting that the exclusion "respond[ed] to concerns raised by the business community"); Statement of the Managers, *supra* note 50, at 18,519 (explaining that the exclusion "responds to concerns raised by employer organizations").

[80] *E.g.*, Barry, *supra* note 4, at 265 n.363; Feldblum et al., *supra* note 3, at 237–38; *see also* Statement of the Managers, *supra* note 50, at 18,519 (describing the ADAAA's severing of accommodations from the "regarded as" prong as "an acceptable compromise given our strong expectation that [individuals needing accommodation] would now be covered under the first prong"); 154 CONG. REC. 19,433–34 (2008) (statement of Rep. Jerrold Nadler) (expressing "confidence that individuals who need accommodations will receive them" under the expanded "actual" disability prong).

[81] *See* BAGENSTOS, *supra* note 4, at 53 ("A universalist version of the ADA would impose a requirement of rationality on employers whenever they refuse to hire someone because of any present, past, or perceived physical characteristic."); Martha T. McCluskey, *How the Biological/Social Divide Limits Disability and Equality*, 33 WASH. U. J.L. & POL'Y 109, 156 (2010) (questioning whether "protected disability status should be presumptively and naturally limited to those with real or perceived impairments," given that any "direct social identity as disabled . . . can be the object of illegitimate differentiation"); Samaha, *supra* note 24, at 1259 (suggesting that " '[t]rait' better fits the social model's broadest implications" than "impairment").

[82] *See, e.g.*, Barry, *supra* note 4, at 218 (advocating for universality while acknowledging that "the universal approach does not protect people treated adversely based on mere characteristics"); Crossley, *supra* note 19, at 712–13 (identifying the pros and cons of

instead conceptualized impairment as a subset of all physiological traits.[83] The size and shape of the impairment subset, however, has never been well-defined. But now that the ADAAA has successfully severed the judicial interpretational ties that had bound the "regarded as" prong to the minority group approach, the impairment concept likely will take center stage in policing the boundaries of statutory coverage.[84]

Because the ADAAA elevated impairment without providing any guidance on how to define the concept or prove its existence, judicial interpretations of the term will dictate how universal the ADAAA will really become. Section A therefore analyzes pre-ADAAA case law and administrative guidance, which reveal both an under-theorization and an over-medicalization of impairment. For judges who were hostile to "regarded as" claims before the ADAAA—or more generally, who were committed to viewing disability law through a minority group lens—these aspects of the legal definition of impairment may provide fodder for limiting the statute's intended reach. Section B explores the more fundamental critique of the legal approach to impairment that is raised by disability theorists' recent efforts to uncover the socially constructed nature not just of disability but of impairment itself. While acknowledging the theoretical shortcomings of the legal approach, this analysis ultimately takes both a realistic view of the law's limitations and a pragmatic view of the role that disability advocates might play in policing judicial interpretations of impairment.

---

eliminating the impairment requirement and "open[ing] up the protection of disability discrimination law to anyone subjected to adversely discriminatory treatment on the basis of any physical characteristic"); Feldblum, *supra* note 20, at 160–62 (advocating for universality while accepting that the one "unifying aspect" of disability "is that the individual either has to have, or has to be perceived as having, an *impairment*—that is, some aberration in her physical or mental system" (emphasis in original)); Perju, *supra* note 18, at 287 (explaining that "[d]efining disability without reference to medical impairments would bring courts closer to a discrimination-centered approach to disability," but concluding "that an impairment-free definition is highly unlikely").

[83] Samaha, *supra* note 24, at 1266.

[84] *See* Allison Ara, Comment, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 SANTA CLARA L. REV. 255, 275 (2010) (noting that in post-ADAAA "regarded as" cases, "courts will need to police the distinction between an 'impairment' and any other sort of condition").

A. IMPAIRMENT AS RETRENCHMENT RISK: A CRITIQUE OF EARLY CASE LAW

Despite its significance in establishing the boundaries of statutory coverage, the term "impairment" is defined in neither the original ADA nor the ADAAA.[85] The ADAAA's legislative history indicates that the regulatory definitions of impairment issued by the Equal Employment Opportunity Commission (EEOC) under the original ADA should continue to apply when courts interpret the new "regarded as" prong,[86] which means that pre-ADAAA cases interpreting the term should continue to have precedential value. Before the ADAAA was enacted, however, courts paid little attention to the definition of impairment,[87] in part because it became so easy to dismiss ADA claims for failing to meet the other stringent requirements for being "disabled" under the judicially narrowed definitions that became the impetus for enacting the ADAAA.[88] The small set of pre-ADAAA cases that did address the impairment requirement likely will shift from being relatively peripheral to becoming critically important in defining "regarded as" coverage in post-ADAAA litigation. Unfortunately, those cases could assist judges who may seek to re-tether the "regarded as" prong to the minority group approach and to restrict the ADAAA's intended reach.[89]

---

[85] EEOC Regulations, 76 Fed. Reg. 16,978, 17,006 (Mar. 25, 2011) (amending 29 C.F.R. app. § 1630.2(h)).

[86] *See* Statement of the Managers, *supra* note 50, at 18,518 ("The bill does not provide a definition for the terms 'physical impairment' or 'mental impairment.' The managers expect that the current regulatory definition of these terms . . . will not change."); *accord* Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 235 (2010) ("The ADAAA does not change the definition of an impairment.").

[87] *See* Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 228 (2008) (noting that the impairment requirement had "rarely been used to exclude plaintiffs" in pre-ADAAA cases); Bagenstos, *supra* note 45, at 407 (noting that defining "the boundaries of the 'impairment' concept" raises a "theoretical question that requires much further study"); Korn, *supra* note 86, at 231 (noting that in many pre-ADAAA cases the existence of an impairment was "not litigated").

[88] *See* Areheart, *supra* note 87, at 211 (noting that pre-ADAAA cases "often fail[ed] at the summary judgment stage since a claimant [was] often unable to prove herself disabled").

[89] *See* BAGENSTOS, *supra* note 4, at 51–52 (suggesting that pre-ADAAA case law "gives judges tools to read 'impairment' parsimoniously"); Crossley, *supra* note 19, at 668–69 (arguing that although the regulatory definition of impairment, "on its face, is extremely

As a starting point, the EEOC's original ADA regulations appeared to reflect the social model's understanding of impairment as biological fact rather than as social construct. Those original regulations defined a physical or mental impairment to include:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[90]

Although the EEOC has acknowledged Congress's explicit expectation that this definition " 'will not change' " under the ADAAA,[91] the EEOC nevertheless made several minor amendments to this original definition. While the EEOC has always viewed the list of body systems in subpart one as non-exhaustive, the EEOC inserted the words "such as" to make that view more explicit, while at the same time adding the immune and circulatory systems to the enumerated list to be more consistent with other parts of the statute.[92] The EEOC also substituted "intellectual disability" for the antiquated term "mental retardation" in subpart two.[93] Otherwise, the original regulatory definition of impairment remains unchanged, including the EEOC's original supplementary guidance that attempts to delineate the category's boundaries. That guidance explains that

---

broad," pre-ADAAA case law remains wedded to a narrow medical model).

[90] 29 C.F.R. § 1630.2(h) (2001) (pre-ADAAA version). The EEOC adopted this original definition from the regulations implementing the Rehabilitation Act. EEOC Regulations, 76 Fed. Reg. 16,978, 17,007 (Mar. 25, 2001); *see also* Crossley, *supra* note 19, at 697 (explaining the origin of the ADA's impairment definition).

[91] EEOC Regulations, 76 Fed. Reg. at 17,006–07 (quoting Statement of the Managers, *supra* note 50).

[92] *Id*. at 16,980, 17,000, 17,006–07 (amending 29 C.F.R. § 1630.2(h)–(i) and 29 C.F.R. app. § 1630.2(h)–(i)).

[93] *Id*. at 17,000 (amending 29 C.F.R. § 1630.2(h)(2)).

the impairment definition should exclude any physical characteristics that fall within the "normal" range, as well as "common" personality traits, unless they result from a physiological or psychological "disorder."[94] The guidelines also exclude conditions that are "[e]nvironmental, cultural, or economic" in origin, rather than biologically based.[95]

The seemingly broad sweep of the regulatory definition reasonably convinced ADAAA advocates that there was little risk of impairment becoming a future source for judicial retrenchment.[96] Yet a closer inspection of the details of the regulatory definition, along with the pre-ADAAA cases that have applied it, suggests some reason for concern. Imbedded in the definition of impairment are both an implicit requirement of biological etiology and an explicit requirement of abnormality or aberration. While early social modelists criticized the medical model of disability for stigmatizing individuals "by defining them as something less than normal,"[97] the social modelists' own failure to confront the medical imprimatur of abnormality at the core of the regulatory definition of impairment opens the door for the very same critique.[98]

In the absence of either a theoretical account or a social understanding of impairment,[99] judges responded in two general

---

[94] *Id*. at 17,007 (amending 29 C.F.R. app. § 1630.2(h)) (stating that "physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone" and "personality traits such as poor judgment or a quick temper" typically will not constitute impairments, nor will "conditions, such as pregnancy, that are not the result of a physiological disorder").

[95] *Id*. (amending 29 C.F.R. app. § 1630.2(h)) (noting that "poverty, lack of education, or a prison record are not impairments").

[96] Bagentos, *supra* note 45, at 407; *see also* Nicole Buonocore Porter, Essay, *Relieving (Most of) the Tension: A Review Essay of Samuel R. Bagenstos,* Law and the Contradictions of the Disability Rights Movement, 20 CORNELL J.L. & PUB. POL'Y 761, 776 (2011) (expressing a "positive outlook" that courts will not "turn to interpreting 'impairment' strictly to limit coverage"). *But see* Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 209, 213 (2012) (raising a concern that courts might "put more pressure on the evidence required to demonstrate an 'impairment' " as a "new way[ ] to narrow the ADA's protections").

[97] BAGENSTOS, *supra* note 4, at 18.

[98] *See* Samaha, *supra* note 24, at 1259 (noting that impairment has the "connotation of inferiority," which is inconsistent with "the social model's broadest implications").

[99] *See* Perju, *supra* note 18, at 341 ("[S]ocial movements were bereft of arguments to invoke in the public sphere—and notably, in courts of law—regarding the interpretation of

ways when interpreting the term in pre-ADAAA cases. In response to the definition's biological etiology component, judges resorted to a medical model and relied heavily on formal diagnoses.[100] In response to the definition's abnormality component, judges resorted to a minority group approach to statutory coverage and ratcheted up the impairment hurdle in a variety of ways.[101] These predictable responses created a case law legacy that may allow future judges to invoke the impairment concept to undermine the intended universal reach of the ADAAA's new "regarded as" prong.

Judges' tendency not only to rely upon but to actually require a formal medical diagnosis to validate the existence of a contested impairment in pre-ADAAA cases reveals how deeply ingrained the medical model remains within the law.[102] Even for plaintiffs who are able to bear the costs of pursuing medical validation, some will face the additional problem of having a physical or mental experience that medical professionals do not yet accept as "real"—even if highly stigmatizing and functionally limiting—as was historically the case for individuals with chronic fatigue syndrome, multiple chemical sensitivity, and Gulf War Syndrome.[103] More generally, diagnostic judgments of even well-established impairments are simply "far less precise and far more uncertain and unreliable than most lawmakers might recognize."[104] This is particularly the case for impairments that are not easily validated with objective measurements, such as disorders that depend upon

---

impairment in the definition of disability from the perspective of the social model.").

[100] *See* Areheart, *supra* note 21, at 362 (observing that impairment is "little more than diagnosis"); Crossley, *supra* note 19, at 689–90 (demonstrating that a "common thread" in the regulations and case law "defining 'disability' is the need for medical validation of the existence of an impairment").

[101] *See infra* notes 123–50 and accompanying text (collecting cases and exploring their ramifications).

[102] *See* Crossley, *supra* note 19, at 689 (documenting how a medical model "appears in a broad gamut of cases when courts look to physicians to validate the existence of a plaintiff's impairment"); Perju, *supra* note 18, at 283 (arguing that "[w]ithout sufficient help in the uncharted waters of the discrimination-centered social model, judges (re)turned to a familiar approach—the medicalized conception of impairments").

[103] *See* Crossley, *supra* note 19, at 690, 694 & n.326, 695 ("Persons struggling with the disabling effects of a novel condition before the condition is validated by medical science may not be able to establish that they have an impairment.").

[104] *Id*. at 691.

an individual's self-reports of pain[105] or upon an individual's narrative description or self-characterization of his or her experience, as is required when diagnosing depression.[106]

In addition, judicial reliance on medical validation to prove the existence of an impairment ends up establishing the limits of medical causal knowledge as the outer limit of the ADA's "regarded as" prong. In some cases, even state-of-the-art diagnostic tools are unable to identify a particular biological cause of an individual's physical or mental condition. When facing such circumstances in pre-ADAAA cases, judges typically have held that the lack of a validated impairment precludes ADA coverage, even in the face of an undisputed causal connection between the plaintiff's physical or mental condition and an adverse employment action.

This has been illustrated most commonly in cases involving weight-based[107] and height-based employment discrimination.[108] In such cases, many courts have refused to characterize a plaintiff's obesity or short stature as an impairment unless the plaintiff can produce medical evidence of a specific physiological cause, such as a malfunctioning thyroid or a growth hormone deficiency.[109] Not only does this force individuals to submit to

---

[105] *Id*.

[106] Areheart, *supra* note 21, at 371–72.

[107] *See* Crossley, *supra* note 19, at 678–79, 682–85 (revealing the medical model's influence in weight-related cases requiring proof of an identifiable physical disorder to obtain ADA coverage); Korn, *supra* note 86, at 231–33 (explaining that most courts have required that a plaintiff's obesity "result from a physiological disorder that can be identified" to obtain ADA coverage); Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 55 (1997) (explaining that in pre-ADAAA cases obesity "not caused by a known and identifiable underlying physiological condition . . . is not an impairment").

[108] Isaac B. Rosenberg, *Height Discrimination in Employment*, 2009 UTAH L. REV. 907, 929–31 (2009) (analyzing cases refusing to find that plaintiffs who are "just plain short" have an impairment without proof of a medical cause).

[109] *See, e.g.*, Ivey v. Dist. of Columbia, 949 A.2d 607, 613 (D.C. Cir. 2008) (affirming dismissal of weight-based ADA claim because plaintiff did not prove that a physiological condition caused her morbid obesity); EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 441–43 (6th Cir. 2006) (affirming dismissal of weight-based ADA claim because plaintiff did not link his morbid obesity to a physiological disorder); Mehr v. Starwood Hotels & Resorts Worldwide, Inc., 72 F. App'x 276, 286–87 (6th Cir. 2003) (affirming dismissal of height-based ADA claim because plaintiff did not prove that his short stature resulted from a physiological disorder); Francis v. City of Meriden, 129 F.3d 281, 287 (2d Cir. 1997) (affirming dismissal of weight-based ADA claim because plaintiff did not prove that his

medical care and bear the cost of providing expert testimony,[110] it also means that the law will not protect many individuals from explicit discrimination because doctors simply do not know the cause of most people's weight or height.[111]

In *Middleton v. CSX Transportation, Inc.*, for example, the plaintiff alleged that a railroad transportation company refused to hire him as a freight conductor because he was morbidly obese.[112] The district court granted the employer summary judgment on the plaintiff's ADA claim based on his failure to prove an actual or perceived impairment.[113] Because the plaintiff "could not recall being informed of a precipitating physiological basis for his weight" and his treating physician expressed "no medical opinion as to any physiological basis for [the plaintiff's] obesity," the court held that the plaintiff failed to demonstrate that he had an impairment to establish protected class status.[114] The Sixth Circuit used similar reasoning in *Mehr v. Starwood Hotels & Resorts Worldwide, Inc.* when affirming dismissal of the plaintiff's claim that her employer discriminated against her in job assignments and promotions because she was under five-feet tall.[115] The lack of evidence of an identifiable physiological basis for the plaintiff's short stature rendered "futile" her ADA claim.[116]

In some cases, judges have shifted even further by equating the biological etiology component not just with proof of a physiological

---

employer regarded him "as suffering from a physiological weight-related disorder"); Coleman v. Ga. Power Co., 81 F. Supp. 2d 1365, 1369–70 (N.D. Ga. 2000) (dismissing weight-based ADA claim because plaintiff did not prove that his obesity was "related to a physiological disorder"); Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1089–90 (S.D. Iowa 1997) (dismissing weight-based ADA claim because plaintiff did not prove that his employer regarded his weight "as connected to a physiological disorder or condition").

[110] Crossley, *supra* note 19, at 686.

[111] *See id.* at 687 (noting the difficulty of proving impairment in weight-related ADA cases because of "the high level of medical uncertainty regarding the causes of obesity"); Korn, *supra* note 86, at 231–33 (explaining that most people cannot link their obesity to a physiological disorder); Rosenberg, *supra* note 108, at 929 (noting the difficulty of proving impairment in height-related ADA cases because "most short people suffer from no biological malfunction").

[112] No. 3:06cv417/MCR/EMT, 2008 WL 846121, at *2 (N.D. Fla. Mar. 28, 2008).

[113] *Id.* at *3.

[114] *Id.*

[115] 72 F. App'x 276, 286–87 (6th Cir. 2003).

[116] *Id.* at 287.

cause but with proof of a physiological *disorder*. In pre-ADAAA cases involving pregnancy discrimination, for example, judges routinely have held that pregnancy is not an impairment because it is not the result of a physiological disorder but rather a normal bodily process.[117] Although the regulatory definition of a physical impairment (unlike the definition of a mental impairment) purports to cover "[a]ny physiological disorder *or condition*,"[118] courts have read the latter term out of the definition altogether.[119] While some judges have been willing to characterize medical complications arising from pregnancy as impairments (such as pregnancy-induced hypertension),[120] that distinction inevitably renders medical professionals the final arbiters of the line between pregnancies that are "normal" versus "abnormal."[121]

Overall, these cases illustrate the explicit medicalization of impairment that has resulted from the regulatory definition's implicit requirement of biological etiology—along with the lack of any alternative theoretical, social, or political account of impairment to guide courts in a different direction. As noted above, the regulatory definition of impairment also contains a notion of abnormality or aberration,[122] which presents a related

---

[117] *See, e.g.*, Gudenkauf v. Stauffer Commc'ns, Inc., 922 F. Supp. 465, 473 (D. Kan. 1996) (holding that pregnancy is not an impairment because it is "the natural consequence of a properly functioning reproductive system"); *see also* Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. app. § 1630.2(h) (2011) (stating that pregnancy is not an impairment because it is "not the result of a physiological disorder"); Crossley, *supra* note 19, at 671 nn.240–41 (summarizing cases).

[118] 29 C.F.R. § 1630.2(h) (emphasis added).

[119] *See, e.g.*, *Gudenkauf*, 922 F. Supp. at 473 (holding that pregnancy is not an impairment because it "is a physiological condition, but it is not a disorder"); *see also* Crossley, *supra* note 19, at 670–71 (arguing that when courts hold "that pregnancy is not an impairment," they "ignor[e] the disjunctive between 'disorder' and 'condition' ").

[120] *See, e.g.*, Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D. Conn. 1997) (holding that pregnancy is not an impairment but that "complications caused by pregnancy" may be an impairment); Cerrato v. Durham, 941 F. Supp. 388, 392 (S.D.N.Y. 1996) (stating that although "a normal, uncomplicated pregnancy itself " is not an impairment, "a complication or condition arising out of the pregnancy" may be); *see also* Definition of the Term "Disability," EEOC COMPLIANCE MANUAL § 902.2(c)(3) (CCH) ¶ 6882, at 5,307 (2000) (explaining that pregnancy-induced hypertension is an impairment although pregnancy itself is not); Crossley, *supra* note 19, at 671–74 (analyzing ADA cases involving pregnancy complications).

[121] Crossley, *supra* note 19, at 677.

[122] Feldblum, *supra* note 20, at 162; *see also* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15–16 (1st Cir. 1997) (stating that "[i]mpairment is to be measured in relation to

but distinct retrenchment risk: allowing the re-emergence of a minority group approach to disability law. In pre-ADAAA cases involving contested impairments, courts have translated the abnormality component in a variety of ways to restrict the boundaries of protected class status.

Cases involving physical or mental conditions that judges have deemed to be mere traits, characteristics, or attributes (which is itself a contestable determination) most clearly illustrate this point. In such cases, judges have required the plaintiff to prove that the particular expression of the trait or attribute in the plaintiff's body or mind is highly unusual or uncommon in order to be deemed an impairment.[123] In *Andrews v. Ohio*, for example, the Sixth Circuit affirmed dismissal of ADA claims by police officers who had been disciplined for failing to meet their employer's weight and fitness standards.[124] The court characterized the plaintiffs' claims as involving mere "physical characteristics" and held that such characteristics failed to qualify as either actual or perceived impairments because there was no evidence that they were "beyond a normal range."[125] Judges frequently have used this reasoning as an additional basis for rejecting claims involving often blatant weight discrimination.[126] Despite the fact that obesity is highly stigmatized[127]—and even if a particular plaintiff

---

normalcy").

[123] *See, e.g.*, Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (dismissing a Rehabilitation Act claim alleging discrimination based on plaintiff's "poor judgment, irresponsible behavior and poor impulse control," because such "personality traits could be described as commonplace; they in no way rise to the level of an impairment"); Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) ("The very concept of an impairment implies a characteristic that is not commonplace . . . ."); Jasany v. U.S. Postal Serv., 755 F.2d 1244, 1249 (6th Cir. 1985) ("Characteristics such as average height or strength . . . are not *impairments*." (emphasis in original)); Crossley, *supra* note 19, at 702–03 & nn.356–57 (summarizing cases in which courts found common behavioral or physical attributes not to be impairments).

[124] 104 F.3d 803, 805, 808 (6th Cir. 1997).

[125] *Id.* at 810 (emphasis omitted). The court also rested its conclusion on the plaintiffs' failure to allege "that they suffer from a physiological disorder," *id.*, which demonstrates the combined effect of an abnormality and biological etiology requirement.

[126] *See* Crossley, *supra* note 19, at 684–85 (collecting cases). Courts have used similar reasoning to reject height-based ADA claims. *See* Rosenberg, *supra* note 108, at 931–38 (discussing judicial and regulatory uses of the "normal range" in height-based claims).

[127] *E.g.*, Crossley, *supra* note 19, at 688; Korn, *supra* note 86, at 220–23; Korn, *supra* note 107, at 54; Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act*

can demonstrate a clear causal link between his or her obesity and a specific adverse employment action—many courts have refused to find an impairment because obesity is itself too widespread.[128]

This implicit use of a minority group lens for policing the boundaries of impairment may also have implications for future cases involving various forms of age-related deterioration.[129] Because certain conditions become the norm rather than the exception for individuals who reach a certain age, the outcome of an uncommonality requirement will depend upon whether judges adopt an "age-relative" comparison group.[130] Most people experience some level of hearing loss by the time they reach their mid-eighties, for example, which means that even hearing loss may not be deemed an impairment if judges assess commonality in an age-relative manner.[131] Some of the pre-ADAAA pregnancy cases illustrate how easy it is for judges to manipulate the selection of a comparison group to restrict the definition of impairment. In those cases, judges refused to characterize even undesirable medical complications from pregnancy as impairments without proof that such complications were unusual and beyond the normal range *relative to other pregnant women*.[132]

---

and the Americans with Disabilities Act, 31 CAL. W. L. REV. 41, 64–72 (1994) (analyzing social science data regarding the stigmatization of obesity).

[128] *See* Crossley, *supra* note 19, at 684 ("The courts seem to fear that permitting suits that allege discrimination based on simple . . . characteristics such as excess weight will fling wide open the floodgates of specious ADA claims.").

[129] *Id*. at 703.

[130] *Id*. at 704.

[131] *Id*. (citing Edward W. Campion, *The Oldest Old*, 330 NEW ENG. J. MED. 1819, 1819 (1994)). *But see* Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. app. § 1630.2(h) (2011) (stating that "medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments").

[132] *See, e.g.*, Martinez v. Labelmaster, No. 96 C 4189, 1998 WL 786391, at *8 (N.D. Ill. Nov. 6, 1998) (holding that plaintiff's inability to lift twenty-five pounds or more was not an impairment because that condition "accompanies all pregnancies"); Jessie v. Carter Health Care Ctr., Inc., 926 F. Supp. 613, 616 (E.D. Ky. 1996) (holding that pregnancy "and the usual accompanying limitations" are not impairments absent "unusual circumstances"); Gudenkauf v. Stauffer Commc'ns, Inc., 922 F. Supp. 465, 474 (D. Kan. 1996) (finding no impairment because plaintiff's "morning sickness, stress, nausea, back pain, swelling and headaches" were not "unusual" or "outside the normal range" for pregnant women); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995) (holding that "pregnancy and related medical conditions do not, absent unusual circumstances, constitute a 'physical impairment' ").

For contested impairments that judges cannot easily characterize as mere traits or attributes, judges have found alternative ways to apply the abnormality requirement to restrict the protected class. In particular, judges frequently have conflated the simple identification of a physiological disorder with the need to demonstrate a present experience of significant physiological effects.[133] In other words, judges have blurred the concept of a physical or mental condition into an assessment of the condition's resulting limitations or a search for diminished capacity.[134] Although the regulatory definition of a physical impairment requires merely a showing that one's condition "affect[s]" a body system,[135] courts often have required a heightened showing of harm to one's body before making an impairment finding. As a result, these past cases may allow future judges to re-insert a functional-limitations test into the new "regarded as" prong through the back door left open by the abnormality requirement in the impairment definition. More generally, these cases illustrate the risk of impairment morphing back into disability altogether.[136]

Judges' tendency to improperly conflate the mere identification of an impairment with an assessment of an impairment's effects often showed up in pre-ADAAA opinions as unnecessary dicta attached to an otherwise proper assessment of *disability*, rather than an assessment of impairment itself. Specifically, judges often inadvertently raised the impairment threshold through the use of imprecise language while analyzing the distinct issue of whether a plaintiff's impairment substantially limits a major life activity—either to find an actual disability or to find a perceived disability under pre-ADAAA case law. In *Rodriguez v. Loctite Puerto Rico, Inc.*, for example, a district court took judicial notice that the plaintiff's lupus "is a physiological disorder affecting certain body

---

[133] *See* Crossley, *supra* note 19, at 697 (identifying courts' tendency to conflate the legal definition of "impairment" with a lay understanding of the verb "to impair").

[134] *See id.* at 700–01 (analyzing cases in which courts have treated "impairment" not as "the bodily condition of the plaintiff, but the disadvantage or deficit in ability that is associated with a bodily condition").

[135] 29 C.F.R. § 1630.2(h)(1).

[136] *See* Crossley, *supra* note 19, at 702 (arguing that collapsing "disability" into the impairment concept "reflects precisely the medical model of disability that disability theorists reject").

systems," thereby qualifying as an impairment.[137] Under pre-ADAAA rules governing "regarded as" claims, however, the plaintiff also was required to prove that his employer regarded his lupus as substantially limiting a major life activity (a requirement that the ADAAA has since removed).[138] In assessing the substantial-limitations issue, the court incorrectly stated that "[a]n illness cannot in and of itself be considered an impairment," but instead requires actually limiting "symptoms and/or ramifications."[139] In *Forrisi v. Bowen*, the Fourth Circuit used similarly problematic language when assessing whether the plaintiff's acrophobia substantially limited any major life activities.[140] "[T]he very concept of an impairment," stated the court, "implies a characteristic . . . that poses for the particular individual a more general disadvantage."[141] Both courts' statements were unnecessary because both courts had already properly characterized the plaintiffs' conditions as impairments. Nevertheless, such statements lay the groundwork for the re-emergence of a functional-limitations test in future "regarded as" claims as part of the impairment analysis, despite the ADAAA's explicit rejection of a substantial-limitations requirement for claims brought under the "regarded as" prong.

Older cases involving HIV-related discrimination further illustrate this risk. Those cases originally held that asymptomatic HIV infection is not an impairment. In *Runnebaum v. Nationsbank of Maryland*, for example, the Fourth Circuit reached that conclusion based on a finding that asymptomatic HIV infection has not yet produced "diminishing effects" on an individual's body.[142] The United States Supreme Court later held in *Bragdon v. Abbott* that asymptomatic HIV infection does indeed constitute an impairment,[143] which will govern future HIV-related

---

[137] 967 F. Supp. 653, 657–58 (D.P.R. 1997).

[138] *See supra* notes 53–54 and accompanying text.

[139] *Rodriguez*, 967 F. Supp. at 659.

[140] 794 F.2d 931, 934 (4th Cir. 1986).

[141] *Id.*; *see also* Jasany v. U.S. Postal Serv., 755 F.2d 1244, 1250 n.6 (6th Cir. 1985) (suggesting that plaintiff's strabismus may be "so minor that it does not rise to the level of a physical impairment," rather than considering the condition's gravity only when applying the substantial-limitations test).

[142] 123 F.3d 156, 168 (4th Cir. 1997) (en banc).

[143] 524 U.S. 624, 632–37 (1998).

cases. However, the Supreme Court reached its conclusion not by applying different reasoning, but rather based on different factual findings about the effects of HIV.[144] Specifically, the Supreme Court cited medical evidence that HIV immediately damages an individual's blood cells and has "a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection."[145] The Supreme Court did not question the propriety of erecting a "diminishing effects" test as an impairment hurdle but simply held that such a hurdle happens to be cleared by asymptomatic HIV. In doing so, the Supreme Court implicitly permitted a "nonlegal definition" to displace the formal legal definition of impairment.[146] Rather than requiring a simple showing of any effect on the body, the Court endorsed the lay understanding of impairment as "having become worse, or weaker, or less valuable."[147]

Thus, even though pre-*Bradgon* cases no longer hold precedential value with respect to HIV, courts may still invoke the reasoning in those cases as a way to "ratchet up the harm required for an impairment finding" when assessing other contested impairments in the future.[148] Dicta in the *Runnebaum* case may further assist courts in that endeavor. In *Runnebaum*, the court stated that the impairment label should not apply to *any* condition during an initial asymptomatic stage, even if that stage lasts "for an extended period of time."[149] The Supreme Court may have provided more general support for the conflation of an impairment with its effects in a portion of *Sutton v. United Air Lines, Inc.* that is unlikely to be affected by the ADAAA. In *Sutton*, the Supreme Court stated that employers are free to make employment decisions based on preferences regarding "medical conditions *that*

---

[144] *See* BAGENSTOS, *supra* note 4, at 52 (analyzing the reasoning in *Bragdon*); Crossley, *supra* note 19, at 698 (noting *Bradgon*'s continued emphasis on the condition's diminishing effects).

[145] 524 U.S. at 637.

[146] Crossley, *supra* note 19, at 697.

[147] *Id.*

[148] BAGENSTOS, *supra* note 4, at 52 (arguing that judges committed to a minority group approach may use the definition of impairment to "reintroduce much of the limiting jurisprudence" that the ADAAA intends to overturn).

[149] 123 F.3d 156, 168 (4th Cir. 1997).

do not rise to the level of an impairment."[150] That statement suggests that the impairment determination incorporates some threshold level of gravity or seriousness, rather than merely requiring the identification of a physiological condition.

Overall, the pre-ADAAA regulations and case law thus leave room in a variety of ways for judges to use impairment as a retrenchment tool. To the extent that judges equate impairment with only significant, unusual, and medically recognized biological abnormalities, they may use the term to circumscribe the intended reach of the ADAAA's new "regarded as" prong. Yet beyond these specific legal critiques about the missteps that judges may take when interpreting the term impairment lies a more general argument that the legal approach to impairment represents a wrong turn altogether. This more fundamental critique stems from recent work by disability theorists who are beginning to demonstrate that impairment is as much a social construct as disability itself.

B. IMPAIRMENT AS SOCIAL CONSTRUCT: A CRITIQUE FROM EVOLVING DISABILITY THEORY

Activists and scholars have been largely unconcerned about the retrenchment risk posed by "impairment," in part because of their belief that an impairment is an objectively identifiable physiological fact.[151] Based on that assumption, the concept of impairment should be less manipulable than the various social components of disability (e.g., "substantial limitation" and "major life activities"), which had provided ready sources for judges to restrict the ADA's reach in a pre-ADAAA world. That assumption is understandable given that the social model is built upon the distinction between a simple bodily description—i.e., "impairment"—and a complex social construct—i.e., "disability."[152]

---

[150] *See* 527 U.S. 471, 490 (1999) (emphasis added).

[151] *See supra* note 96 and accompanying text; *see also* Tremain, *Government of Disability*, *supra* note 19, at 617 (explaining that " 'impairment' is generally taken to refer to an objective, transhistorical and transcultural entity of which modern bio-medicine has acquired knowledge and understanding and which it can accurately represent").

[152] *See supra* notes 21–23 and accompanying text (describing the impairment/disability dichotomy).

Yet there is growing reason to question this underlying belief. Social modelists have always under-theorized impairment relative to disability,[153] and disability theorists are now recognizing that impairments are more socially constructed than previously acknowledged.[154]

Defining impairment requires identifying the particular subset of all physical and mental traits that will be deemed abnormal. Traits become impairments only through social identification of difference from some established norm or ideal of human functioning and ability.[155] Recent disability theorists have demonstrated that this social identification of difference is neither fixed nor universal but is both historically and culturally

---

[153] *See* Areheart, *supra* note 21, at 360 n.66 ("While social modelists have focused on the meaning of disablement, impairment has been sorely neglected."); Bill Hughes, *Disability and the Body*, *in* DISABILITY STUDIES TODAY 58, 60 (Colin Barnes et al. eds., 2002) (noting that "the social model pushed the study of impairment to the fringes of disability studies"); Perju, *supra* note 18, at 282 (observing that "impairments have remained largely under-theorized within the social model"); Carol Thomas & Mairian Corker, *A Journey Around the Social Model*, *in* DISABILITY/POSTMODERNITY, *supra* note 19, at 18, 20 (arguing that "impairment should be much more centrally addressed in disability studies"); Tremain, *Government of Disability*, *supra* note 19, at 620–21 (suggesting that the social model "forced a strict separation between the categories of impairment and disability," and "the former category has remained untheorized").

[154] *See* SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 138 (1998) (noting the need "to grapple more directly with 'impairment' and recognize that it is as nuanced and complex a construct as 'disability' "); Areheart, *supra* note 21, at 349, 360–77 (arguing that impairment "is indeed a social concept"); Dan Goodley & Mark Rapley, *Changing the Subject: Postmodernity and People with 'Learning Difficulties*,*' in* DISABILITY/POSTMODERNITY, *supra* note 19, at 127, 138 (arguing that early disability studies "ignore[d] the socially contested nature of impairment"); Carol Thomas, *Disability Theory: Key Ideas, Issues and Thinkers, in* DISABILITY STUDIES TODAY, *supra* note 153, at 38, 51 (describing the social constructionist critique that "*both* impairment and disability are discursively constructed social categories" (emphasis in original)); Thomas & Corker, *supra* note 153, at 22 (criticizing early social modelists for abstracting impairment from social context); *see also* Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It* or *An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 407 (2011) (defining disability studies as "the examination of disability as a social, cultural, and political phenomenon").

[155] *See* McCluskey, *supra* note 81, at 134 (arguing that impairment "has meaning only in relation to functioning in a particular social, economic, and political context"); Tremain, *Government of Disability*, *supra* note 19, at 632 (explaining that impairments materialize only in relationship to "norms and ideals about . . . human function and structure, competency, intelligence, and ability").

specific.[156] Normalcy itself is contestable, socially relative, and changes over time.[157]

As an obvious basis for questioning the purportedly "clear line" that exists between "the socially constructed 'disability' and the preexistent and somatic 'impairment,' " disability theorists point to the "plethora of syndromes and conditions that have sprouted in the hearts and minds of physicians and patients."[158] "[F]idgety children," for example, were not viewed as impaired until the advent of the attention deficit disorder label.[159] Loss of height and hip fractures among the elderly used to be seen as "normal byproducts of aging," but have now become the diagnosable, preventable, and treatable disease of osteoporosis.[160] Conversely, the medical establishment has resisted recognizing some conditions, such as chronic fatigue syndrome, multiple chemical sensitivity, and Gulf War Syndrome, as real "impairments," despite evidence that these conditions produce significant functional effects.[161]

This translation of a trait or condition into an "impairment" can be affected by medical fads, technological innovation, financial interests, and other social phenomena.[162] Scholars have

---

[156] *See* Thomas & Corker, *supra* note 153, at 19 (arguing that impairment is not "universal, fixed, unchanging, [or] transhistorical"); Tremain, *Government of Disability*, *supra* note 19, at 617 (arguing that impairment is socially ascribed and historically and culturally specific); Tremain, *Impairment*, *supra* note 19, at 34 (arguing that impairment is "historically contingent").

[157] *See* LINTON, *supra* note 154, at 22 (arguing that normalcy is constructed and historically specific); Crossley, *supra* note 19, at 656 (explaining that "the very concept of a 'normal human being' is socially constructed and therefore socially and culturally relative"); Lennard J. Davis, *Constructing Normalcy, in* THE DISABILITY STUDIES READER, *supra* note 19, at 3, 3 (advocating for a greater focus on the constructed nature of normalcy); Jackie Leach Scully, *A Postmodern Disorder: Moral Encounters with Molecular Models of Disability, in* DISABILITY/POSTMODERNITY, *supra* note 19, at 48, 48, 53 (explaining that "cultural standards" and "[b]iomedical science" continually "reconstitut[e] normality").

[158] Lennard J. Davis, *The End of Identity Politics: On Disability as an Unstable Category, in* THE DISABILITY STUDIES READER, *supra* note 19, at 301, 309; *see also* Scully, *supra* note 157, at 48 (arguing that "[m]edicine is in the business of reconstituting normality and health," which are concepts that evolve "over relatively short time-spans").

[159] Davis, *supra* note 158, at 309.

[160] Areheart, *supra* note 21, at 370; *see also id.* at 368 (describing "transient" impairments—conditions that have always existed but have not always been considered impairments—to illustrate the historically and culturally relative nature of impairment).

[161] *See* Crossley, *supra* note 19, at 694–95 (noting that medical science "may at times be slow in accepting evidence of a new condition").

[162] *See* Areheart, *supra* note 21, at 364 (arguing that political, social, and economic

demonstrated, for example, how pharmaceutical companies that depend upon formal diagnoses for the prescription and purchase of their products have influenced the expansion of diagnostic categories in the Diagnostic and Statistical Manual of Mental Disorders (the DSM).[163] The expansion of diagnosable learning disabilities similarly has been fueled by economic interests, including the desire to expand access to federal funding.[164] Even when the existence of a diagnostic label has gained general acceptance, the process of applying that label to a particular individual may itself involve cultural influences and financial incentives.[165] Particularly when a diagnostic process relies upon subjective interpretation and interactional or self-assessment, as in the process of diagnosing clinical depression, social norms inevitably play a role.[166]

Impairment is thus an unstable category.[167] That instability, in turn, creates space for various stakeholders to step in and assert definitional control. The battles waged over whether to include such things as homosexuality, post-traumatic stress disorder, and gender identity disorder as diagnostic categories in the DSM[168] provide glimpses of what can be at stake within this contested ground. These examples also highlight that defining abnormal can never be truly "value-neutral" or "'merely descriptive.'"[169] Defining impairment inevitably carries prescriptive power.[170]

---

interests shape the creation and application of diagnostic labels); Davis, *supra* note 158, at 309 (suggesting that impairments may be "a creation of a medical—technological—pharmaceutical complex").

[163] *See* Areheart, *supra* note 21, at 366 (discussing a study linking pharmaceutical money to the creation of DSM categories).

[164] *See id*. at 370 (identifying economic interests that have fueled proliferation of learning disability diagnoses).

[165] *See id*. at 362–69 (arguing that bodies are described as impaired through diagnostic labels that reflect cultural and social judgments, political negotiations, and financial incentives).

[166] *See id*. at 372 (describing how a "cultural condition" may be "transformed into a medically identifiable pathology").

[167] Davis, *supra* note 158, at 309.

[168] Areheart, *supra* note 21, at 365.

[169] Tremain, *Government of Disability*, *supra* note 19, at 621; Tremain, *Impairment*, *supra* note 19, at 34; *see also* LINTON, *supra* note 154, at 22 (describing the term "abnormal" as "value laden").

[170] Crossley, *supra* note 19, at 656; *see also* LINTON, *supra* note 154, at 24 (noting that the terms "normal" and "abnormal" not only "affect individuals' most private deliberations

More generally, the existence of this contested ground has vested significant residual authority in the hands of medical professionals, whose diagnoses have taken on a preeminent role in defining impairment.[171] As one disability theorist has explained, "although the impairment-disability distinction demedicalizes disability, it renders the impaired body the exclusive jurisdiction of medical interpretation."[172] To the extent that " 'normality' and 'abnormality' are not delivered in an unmediated form by biology," but instead are affected by cultural, organizational, and economic interests and norms, the definition of impairment becomes a reflection of biomedical power.[173] Yet the medicalization of impairment masks this power by naturalizing and reifying impairment as a biological essence,[174] which is precisely what the social model of disability had intended to undermine by replacing the medical model.[175] If the same contested power structures that were the targets of the social model end up retaining the power to define the identity of the model's subjects—individuals with impairments—the social model inadvertently may extend those

---

about their worth and acceptability," but also "determine social position and societal response to behavior"); Tremain, *Impairment*, *supra* note 19, at 34 (expressing doubt that there is ever "a description which [is] not also a *prescription* for the formulation of that to which it is claimed innocently to refer" (emphasis in original)).

[171] Areheart, *supra* note 21, at 362; *see also* Davis, *supra* note 158, at 309 (arguing that impairment "relies heavily on a medical model for [a] diagnosis").

[172] Tremain, *Impairment*, *supra* note 19, at 33; *see also* McCluskey, *supra* note 81, at 134 (arguing that the impairment concept "seems primarily useful as a strategy for removing contested judgments about disability from political, social, and legal scrutiny").

[173] Scully, *supra* note 157, at 48; *see also* Tremain, *Impairment*, *supra* note 19, at 34 (arguing that impairment is not an "entity which biomedicine accurately represents," but "an historically contingent effect of modern power").

[174] Areheart, *supra* note 21, at 354; *see also* Tremain, *Impairment*, *supra* note 19, at 42 (arguing that allowing biomedical science to define impairment "naturalize[s] [impairments] as an interior identity or essence" and "camouflage[s] the historically contingent power relations that materialized them as natural" (emphasis omitted)).

[175] *See* Goodley & Rapley, *supra* note 154, at 134 (arguing that the social model's "biological vision of impairment" leaves power "in the hands of the very institution that such a theory purports to challenge" (emphasis omitted)); Hughes, *supra* note 153, at 67 (explaining that "the social model, conceived as the intractable opponent of . . . the medical model . . ., came to share with it a common conception of the body" that was "indistinguishable from the one promoted by biomedicine"); Tremain, *Impairment*, *supra* note 19, at 33 (noting that although the social model was "[d]eveloped to counter individual (or medical) models of disability," it granted biomedical science control over defining individuals with impairments).

original power relations.[176] Thus, impairment is not just a social construct but a political one as well.

Yet political considerations were exactly what motivated social modelists to under-theorize impairment in the first place.[177] Disability rights activists developed the social model of disability with the primary objective of creating a "shared political consciousness,"[178] which was a prerequisite for empowering individuals with disabilities to seek policy reform as an identifiable group. Activists understood that disrupting the connection between disability and illness and focusing on the common experience of social discrimination were essential to achieving that goal.[179] Focusing too much on the impairment component of the impairment/disability dichotomy risked legitimizing the medical model's abdication of control to medical professionals and perpetuating assumptions about normality, abnormality, and the source of functional limitations[180]—i.e., it risked reinforcing the notion "that disability is really about physical limitation after all."[181] Thus, the social model's failure to provide a theoretical account of impairment was not an oversight but a thoughtful and deliberate strategy.[182] Early social modelists wisely believed that deeply confronting the nature and contours of impairment risked limiting the model's effectiveness as a tool for political reform.[183]

---

[176] Tremain, *Government of Disability*, *supra* note 19, at 631; *see also* Stefan, *supra* note 7, at 1343 (observing that the ADA's practice of "permitting experts and the judiciary to determine whether an individual fits into a protected class . . . would be unthinkable in the case of race, gender, age, religion, or sexual orientation").

[177] *See* Perju, *supra* note 18, at 282–83, 335 (describing social modelists' political motives).

[178] *Id*. at 283.

[179] *Id*. at 338–39 (chronicling how the separation of disability from illness helped forge a common identity in the disability movement).

[180] *Id*. at 335; *see also* Crossley, *supra* note 19, at 700, 702 (suggesting that disability scholars accepted the "medicalization of impairment" to avoid "the conflation of the concepts of impairment and disability," which could reinforce the medical model's notion "that bodily inferiority naturally causes the disadvantages of disability"); Thomas, *supra* note 154, at 50 (describing how early social modelists viewed "a focus on impairment as posing a danger" to the movement by reinforcing the " 'impairment causes disability' positions in the medical model").

[181] OLIVER, *supra* note 22, at 39 (internal quotation marks omitted).

[182] *See* Perju, *supra* note 18, at 335 (describing social modelists' "argumentative strategy").

[183] *Id*.

As a result, the impairment/disability dichotomy is, paradoxically, not only the social model's most "transformative insight," but also "its central shortcoming."[184] The impairment/disability distinction unified a movement through the model's core revelation that the cause of disability is society's reaction to an impairment rather than the impairment itself.[185] Yet that success was achieved by consciously "gloss[ing] over medical impairments altogether."[186]

Now that disability theorists have moved forward and begun to "do social theory with impairment,"[187] the legal approach to impairment becomes subject to a more fundamental critique than merely identifying misguided judicial tendencies to interpret the term too narrowly. Taken to the extreme, the recognition of the socially constructed nature of impairment risks collapsing the distinction between impairment and disability altogether, which risks undermining the social model itself.[188] According to one disability theorist, "impairment has been disability all along."[189] Yet at the same time that disability theorists are trying to "bring impairment and disability together as co-existing social and political facets of disablement,"[190] the ADAAA has reinforced the impairment/disability dichotomy by establishing it as the line between antidiscrimination protection and the right to accommodation. To render the concepts distinct, the ADAAA has maintained a functional-limitations test for disability, while

---

[184] *Id*. at 284; *see* Shakespeare, *supra* note 19, at 268 (observing that the impairment/disability dichotomy "paradoxically gives the social model both its strengths and its weaknesses").

[185] Perju, *supra* note 18, at 284.

[186] *Id*.

[187] Goodley & Rapley, *supra* note 154, at 138 (internal quotation marks omitted).

[188] Samaha, *supra* note 24, at 1266–67; *see also* McCluskey, *supra* note 81, at 155 ("[I]ndividual biological and social identity and functioning are thoroughly entangled and inseparable."); Tremain, *Impairment*, *supra* note 19, at 42 ("[T]he strict division between the categories of impairment and disability which the social model is claimed to institute is in fact a chimera.").

[189] Tremain, *Government of Disability*, *supra* note 19, at 632.

[190] Goodley & Rapley, *supra* note 154, at 138 (emphasis omitted); *see also* OLIVER, *supra* note 22, at 42 (observing the need to "develop a social model of impairment to stand alongside a social model of disability"); Thomas, *supra* note 154, at 52 (noting that impairment "requires further theoretical and political attention"); Thomas & Corker, *supra* note 153, at 24 ("[I]mpairment should be theorized as a biosocial phenomenon.").

endorsing the judicial and administrative reliance on a medical construction of impairment.[191] Modern disability theory implicitly raises the question of whether the impairment concept can successfully play the role envisioned by the ADAAA, while also incorporating a social and political understanding of the term.[192]

Framing the question in this way highlights the very different contexts in which the impairment concept is expected to do work. While disability theorists want to focus attention on how and by whom impairment is defined in order to maintain a shared identity for individuals with disabilities without also ceding power to paternalistic others, the concept of impairment plays a much more concrete role in disability discrimination litigation.[193] In functional terms, defining impairment defines the protected class of individuals who may invoke antidiscrimination protection under the ADAAA's "regarded as" prong. The practical and political demands that necessarily attach to such a legal definition—particularly one that polices the boundaries of legal protection—likely makes it impossible for the legal construction of impairment to fully reflect the insights of modern disability theory, at least under the existing ADAAA. In significant part, this is because it is difficult to take the social constructionist critique of impairment seriously without moving inexorably to the position that the ADA should protect *all* physical and mental characteristics upon which an employer renders a market-irrational decision. Yet even disability rights activists with the strongest universalist agendas have recognized the infeasibility of such a position.[194] In addition, activists recognize the continued importance of the social model for framing policy debates and are likely to resist collapsing the

---

[191] *See supra* notes 58–70 and accompanying text.

[192] A similar history exists in sex discrimination law, in which gender was theorized as a social construct imposed upon biological sex to advance an antidiscrimination agenda. Shakespeare, *supra* note 19, at 271. Later feminists then challenged the sex/gender dichotomy by revealing the socially constructed nature of sex, just as disability theorists are now challenging impairment "as an unsocialized and universal concept." *Id.*; *see also* Areheart, *supra* note 21, at 356–60 (analogizing the impairment/disability dichotomy to the historic development and critique of the sex/gender binary).

[193] *Cf.* Perju, *supra* note 18, at 343 (explaining that judges' concerns differ "from the formation of shared identity of persons with disabilities").

[194] *See supra* notes 82–83 and accompanying text.

model's component parts and undermining its viability as a tool for ongoing reform.[195]

Certainly, it is important to acknowledge the risks that modern disability theory reveals about vesting legal definitional control of impairment in the hands of medical professionals. Because normality is a socially, culturally, and historically relative construct—and because abnormality inevitably carries prescriptive force—the medicalization of impairment within the law does have the potential to naturalize the concept as an inherently inferior identity.[196] Requiring a plaintiff to obtain medical validation of an impairment requires the plaintiff to enter an unequal power relationship and seek a formal label of aberration from professionals whose interests may not be aligned with advancing the plaintiff's social well-being.[197]

In addition, by divorcing impairment from notions of social exclusion and oppression,[198] the legal definition necessarily becomes both over- and under-inclusive of the set of stigmatized physical and mental characteristics. The ADA's new "regarded as" prong will cover an individual with a *non*-stigmatized condition that medical professionals recognize as an impairment if the individual encounters an idiosyncratic employer with a singularly irrational response to that condition.[199] At the same time, individuals with highly stigmatized physical or mental characteristics *not* deemed medical impairments will fall outside the ADA's protection, even if such characteristics exclude the

---

[195] One scholar has taken the forward-looking step of urging abandonment of the biological/social divide, arguing that the "central division between social and biological causes of disability has developed into a bind that impedes meaningful analysis and reform of injustice." McCluskey, *supra* note 81, at 110, 113. While Professor McCluskey's compelling argument should inform the future direction of disability rights, this Article focuses more immediately on what recent disability theory might reveal about the risks and opportunities presented by the existing ADAAA.

[196] *See supra* note 19 and accompanying text.

[197] *See* Crossley, *supra* note 19, at 690 (observing that "the power to define who is disabled has historically been used to advance the interest of groups providing services to disabled people rather than to advance the interests or well-being of disabled people themselves").

[198] *See id*. at 689 n.302 (arguing that the medicalization of impairment ignores "the social experience of oppression").

[199] *See* Barry, *supra* note 4, at 220 (noting that while the universal approach covers all impairments, "not all impairments . . . subject people to systematic prejudice, stereotypes, and neglect").

individuals from a wide range of jobs. Professor Deborah L. Rhode's book, *The Beauty Bias*, documents that such "disabling stereotypes" exist for many physical characteristics that are associated with unattractiveness, including obesity.[200] But even the most generous application of the ADAAA will not address such harms in the absence of a social and political understanding of what it means to be impaired.

On the other hand, recognizing that the concept of impairment is more socially constructed and therefore more malleable than previously acknowledged is not to say that the entire category is illusory or that all alleged impairments will present a contestable legal issue. While some social constructionists have attempted to describe the biological body as solely discursive in nature, the regulatory definition of impairment does usefully define a consistently and objectively identifiable core set of conditions that judges cannot read out of protected class status.[201] Blindness, deafness, and spinal cord injuries producing paralysis, for example, certainly will meet the impairment definition, even if narrowly applied. Nonetheless, the insights of recent disability theorists, along with our pre-ADAAA case law legacy, suggest that the medical approach to impairment does leave greater contested ground with more significant stakes than previously realized.

Addressing the social experience of discrimination that is at the heart of the social model of disability will therefore require continued vigilance of the judicial approach to impairment under the ADAAA. Although advocates of the traditional universal approach to disability believe judges will interpret impairment broadly enough to advance the movement's core goals,[202] that assumption should not be taken for granted. Advocates should resist attempts to narrowly interpret the term by conflating the existence of an impairment with a demonstration of diminishing effects, by manipulating comparison groups when assessing abnormality, or by ratcheting up the demand for proving a specific

---

[200] DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 23–44, 63 (2010).

[201] *See* Areheart, *supra* note 21, at 374–76 (critiquing radical social constructionism for implying that "disabilities are not real").

[202] *See supra* notes 37–38 and accompanying text (explaining advocates' understanding of the "regarded as" prong).

biological etiology of one's condition or disorder. More generally, advocates should make concerted efforts to educate judges about the ADAAA's intended expansion of "regarded as" coverage to nearly all impairment-based discrimination.

Regardless of the inevitable boundary skirmishes that will play out in future cases, the ADAAA's nearly universal expansion of antidiscrimination protection is an undeniable success for traditional universalists who have long recognized the importance of broad statutory coverage in advancing disability civil rights. Because this expansion remains housed within the third prong of the ADA's disability definition, traditional universalists reasonably could assert victory not only in results, but also in means, by describing the ADAAA as having codified the concept of a disability continuum. This Article, however, resists that compelling urge. Instead, the Part IV suggests the potential benefits of highlighting the ADAAA's elevation of impairment alongside disability, and of characterizing the ADAAA as having expanded coverage to protect both individuals with *and without* disabilities. Part IV argues that the disability rights movement may have more to gain by articulating this new form of universality, which acknowledges the ways in which the ADAAA also has embraced core features of the minority group status approach.

IV. LEARNING FROM THE MINORITY GROUP APPROACH: NEW UNIVERSALITY'S EMBRACE OF DIFFERENCE

At the same time that the ADAAA expanded impairment-based antidiscrimination protection, it also clarified that the right to workplace accommodation exists only for the subset of individuals whose impairments meet a functional-limitations test.[203] Although the ADAAA also expands this subset of accommodation-eligible individuals,[204] it nevertheless continues to rely upon a minority status to trigger the accommodation right. In doing so, the ADAAA acknowledges that there is something unique about the experiences of individuals whose impairments substantially

---

[203] *See supra* notes 58–70 and accompanying text.

[204] *See infra* notes 279–81 and accompanying text.

limit one or more major life activities. By restricting the accommodation mandate to members of that identifiable minority group, the ADAAA acknowledges, in particular, these individuals' shared experience of confronting workplaces constructed to systematically exclude them.

The desire of traditional universalists to focus solely on the ADAAA's expanded antidiscrimination protection and to characterize the statute as having codified a disability continuum ignores the dividing line that the ADAAA has drawn between individuals with different types of impairments, and it thereby misses the way in which the ADAAA has also incorporated elements of the minority group approach. Although not without its own risks, acknowledging the ADAAA's respect for difference ultimately may have more to offer the disability rights movement, not only by illuminating common ground with those who value recognition of a unique disability identity but also in advancing the goals of traditional universalists themselves.

One major goal that traditional universalists have hoped to achieve by characterizing disability as a continuum is to broaden public commitment to disability rights and reduce the socio-legal backlash that has plagued the ADA. Before the ADAAA's enactment, disability scholars had become increasingly concerned about the judicial and social backlash that was undermining the ADA's legitimacy as a core piece of civil rights legislation.[205] Although the backlash was multifaceted, its public rhetoric and displays commonly relied upon an " 'us versus them' mentality" that viewed the ADA as benefiting a privileged few at the expense of everyone else.[206] Given that most people believed *both* in the existence of a line between the disabled and the nondisabled *and*

---

[205] *See* Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 7–12 (2000) (describing the ADA backlash in the judiciary and mainstream media); Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 492–98 (2000) (discussing the socio-legal effects of the ADA backlash); Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335, 348–55 (2000) (analyzing "the business backlash against the ADA"); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 315–19 (2009) (discussing the role of the media, popular culture, and the judiciary in fueling the ADA backlash).

[206] Travis, *supra* note 205, at 315–17.

that the ADA provided legal protection only for members of the former group, it was unsurprising that this mentality fueled public resentment against the ADA and its beneficiaries. The narrow judicial interpretations of ADA coverage (itself a form of backlash) became mutually reinforcing of the public's perceptions.[207]

Under the late Professor Derrick Bell's interest-convergence theory,[208] such results were predictable.[209] As Bell has described in the context of racial equality, the interests of a subordinated minority are likely to be advanced only when they converge with the interests of the dominant majority.[210] This is not to say that the majority's self-interest should determine disability policy, nor is it to deny that equality and self-sufficiency for individuals with disabilities should itself be enough to justify the ADA.[211] Acknowledging the role that interest convergence can play in advancing disability rights merely suggests the practical benefits that may accrue by identifying the ADA's relevance to individuals who self-identify as nondisabled.[212]

Traditional universalists have always believed that interest convergence could be achieved by correcting the first component of the public's misunderstanding of disability that has fueled the "us versus them" response: the belief in a distinct line between the disabled and the nondisabled. At least with respect to simple

---

[207] *Id*. at 317–20.

[208] *See* Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 22 (2004) (arguing that "the interest of blacks in achieving racial equality is accommodated only when that interest converges with the interests of whites in policy-making positions"); Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*] (explaining that *Brown* required policy makers to recognize "the economic and political advances" from desegregation).

[209] *See generally* Travis, *supra* note 205 (applying the interest-convergence concept to disability civil rights).

[210] Bell, *Interest-Convergence Dilemma*, *supra* note 208, at 523–25.

[211] Travis, *supra* note 205, at 312; *see also* Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 401 (2001) (observing "that nondisabled persons may discover the convenience of . . . architectural changes" to accommodate disabled individuals, but arguing that such changes "should not be justified as worthwhile because nondisabled people can enjoy them").

[212] Travis, *supra* note 205, at 312; *see also* Asch, *supra* note 211, at 402 ("Disability policy and politics must speak to the economic and emotional needs of the nondisabled majority . . . .").

antidiscrimination protection (as opposed to accommodation), traditional universalists have arguably succeeded as a matter of formal law, as the ADAAA's "regarded as" prong now prohibits nearly all forms of impairment-based discrimination.[213] Yet despite the fact that the ADAAA's brilliantly negotiated codification of nearly universal impairment-based coverage far better reflects the continuum reality, it is doubtful that the mere existence of the new "regarded as" prong will increase public acceptance of the ADA. Although the new "regarded as" prong expands the ADA's protected class to include nearly all individuals with non-substantially limiting impairments, this formal legal expansion is unlikely to translate automatically into an expanded class of self-identified ADA stakeholders. As a threshold matter, the ADAAA's enactment failed to generate much media attention, which means that most people are likely unaware of the newly expanded "regarded as" prong. But even if awareness increases, the ADAAA's path may not necessarily lead to widespread embrace of the universal notion of disability as falling along a continuum for all individuals.

Embrace of traditional universality has always run up against the general public's notion that individuals with disabilities are seriously impaired in a way that renders them qualitatively distinguishable from nondisabled individuals.[214] Early on, the social model itself became connected in operational terms with a particular subset of impairments—ones that are "physical, immutable, tangible[,] and severe."[215] That reified disability identity has proven quite intractable. To some extent, this is fueled by fear. "For persons gifted with strong, able bodies," explains Professor Mary Crossley, "persons with disabilities may symbolize things dreaded: the vulnerability to aging, infirmity, and death and the inability to control one's body."[216] The late Professor Harlan Hahn described this fear of someday being

---

[213] *See supra* notes 48–64 and accompanying text (detailing the ADAAA's expanded antidiscrimination coverage).

[214] Burgdorf, *supra* note 7, at 519.

[215] Phil Lee, *Shooting for the Moon: Politics and Disability at the Beginning of the Twenty-First Century, in* DISABILITY STUDIES TODAY, *supra* note 153, at 139, 151 (internal quotation marks omitted).

[216] Crossley, *supra* note 19, at 666.

stricken with a substantially limiting physical or mental condition as a form of "existential anxiety" that stereotypic notions of disability often trigger in those who enjoy the privileges that society bestows upon individuals with able bodies and minds.[217]

The desire to deny one's own vulnerability thus contributes to a desire to view individuals with disabilities not just as "other" but as others with whom many do not wish to identify.[218] This is exacerbated because the lay concept of disability generally refers either to "limitation and incapacity" or to "oppression and exclusion"—neither of which provide easy ground for adopting a disabled identity or celebrating disability as a source of pride or community.[219] As Professor Simi Linton has observed so astutely, because "the prefix *dis* connotes separation, taking apart, [or] sundering in two," the term *disability* itself "creates a barrier, cleaving in two ability and its absence."[220] Thus, the mere fact that the ADAAA's expanded impairment-based protection remains formally, but uncomfortably, housed within the statutory definition of disability will make it difficult for many individuals with non-substantially limiting impairments to naturally view the ADA as personally applicable.

In addition to these general barriers to effectively disseminating a belief in a disability continuum, social scientists have documented a specific cognitive phenomenon, referred to as the "optimistic bias," which makes the task of traditional universalists even tougher. The optimistic bias refers to people's

---

[217] *See* Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, *in* PERSPECTIVES ON DISABILITY 37, 39–40 (2d ed. 1993) (defining "existential anxiety" as "the perceived threat that a disability could interfere with functional capacities deemed necessary to the pursuit of a satisfactory life").

[218] Crossley, *supra* note 19, at 666.

[219] *See* Shakespeare, *supra* note 19, at 272 (explaining the challenges to celebrating disability as we "celebrate Blackness, or Gay Pride, or being a woman"); *accord* Lee, *supra* note 215, at 151 (explaining how the social model's association with severe physical impairments "deter[s] many people from adopting a disabled identity and participating in a disability community" (citation omitted)); *cf.* Emens, *supra* note 96, at 232 (urging greater consideration of "the possibility of disability as something that people (disabled or nondisabled) could be drawn to—for community, culture, or concepts").

[220] LINTON, *supra* note 154, at 30–31 (arguing that the construction of *"dis/ability"* is inconsistent with a continuum approach, and that *"*[*d*]*is* is the semantic reincarnation of the split between disabled and nondisabled people in society").

tendency to underestimate their own risks of negative events,[221] particularly when considering their future health.[222] People typically believe, for example, that they are less likely than their peers to experience heart attacks, heart disease, strokes, cancer, diabetes, arthritis, high blood pressure, alcoholism, drug addiction, car accidents, and other serious health conditions and threats.[223]

---

[221] *See* Carla C. Chandler et al., *It Can't Happen to Me . . . Or Can It? Conditional Base Rates Affect Subjective Probability Judgments*, 5 J. EXPERIMENTAL PSYCHOL.: APPLIED 361, 374 (1999) (summarizing research finding that most people assess their own risk for negative events as less than their peers' risk); Meg Gerrard et al., *The Effect of Risk Communication on Risk Perceptions: The Significance of Individual Differences*, J. NAT'L CANCER INST. MONOGRAPHS, JAN. 1999, at 94, 95 (describing people's tendency to "think that they are less vulnerable to future negative events than are similar others"); Alexander J. Rothman et al., *Absolute and Relative Biases in Estimations of Personal Risk*, 26 J. APPLIED SOC. PSYCHOL. 1213, 1213 (1996) ("[P]eople are unrealistically optimistic about their chances of avoiding many negative life events."); Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 HEALTH PSYCHOL. 132, 132 (1995) ("People show a consistent tendency to claim that they are less likely than their peers to suffer harm."); Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 735, 742–45 (2009) (citing evidence that "most people are irrationally optimistic about their futures").

[222] *See* Nancy E. Avis et al., *Accuracy of Perceptions of Heart Attack Risk: What Influences Perceptions and Can They Be Changed?*, 79 AM. J. PUB. HEALTH 1608, 1608 (1989) (compiling research showing "that people tend to underestimate their own risk of developing certain conditions or diseases"); David Dunning et al., *Flawed Self-Assessment: Implications for Health, Education, and the Workplace*, 5 PSYCHOL. SCI. IN THE PUB. INT. 69, 79 (2004) (summarizing evidence of people's tendency "to be unrealistically optimistic about their health"); Nathan M. Radcliffe & William M.P. Klein, *Dispositional, Unrealistic, and Comparative Optimism: Differential Relations with the Knowledge and Processing of Risk Information and Beliefs about Personal Risk*, 28 PERSONALITY & PSYCHOL. BULL. 836, 837 (2002) (summarizing research showing that most people rate their own health risks as below average); Alexander J. Rothman & Marc T. Kiviniemi, *Treating People With Information: An Analysis and Review of Approaches to Communicating Health Risk Information*, J. NAT'L CANCER INST. MONOGRAPHS, Jan. 1999, at 44, 45 (explaining the "tendency to systematically underestimate important health risks").

[223] *See* Williams, *supra* note 221, at 744 (summarizing "comparative optimism" research). Many studies have documented the optimistic bias for specific health risks. *See, e.g.*, Avis et al., *supra* note 222, at 1609 (heart attack); Matthew W. Kreuter & Victor J. Strecher, *Changing Inaccurate Perceptions of Health Risk: Results From a Randomized Trial*, 14 HEALTH PSYCHOL. 56, 56, 59, 62 (1995) (heart disease, cancer, alcoholism, auto accidents, heart attack, and stroke); Thomas A. Morton & Julie M. Duck, *Communication and Health Beliefs: Mass and Interpersonal Influences on Perceptions of Risk to Self and Others*, 28 COMM'N RESEARCH 602, 617–18 (2001) (skin cancer); Rothman et al., *supra* note 221, at 1220–21 (suicide, chronic liver disease, colon cancer, alcohol abuse, panic attacks, obesity, pregnancy, chlamydia, and human papilloma virus); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 810–11

Not only are most individuals optimistic about their health risks relative to others, but many are also overly optimistic relative to their own personal risk factors.[224] The optimistic bias exists across all ages, sexes, education levels, and occupational lines,[225] although it is particularly strong when assessing high-risk conditions[226] and when relatively high-risk individuals are making the assessment.[227]

The optimistic bias is difficult to correct and has been remarkably resilient in the face of debiasing strategies.[228] Social scientists have been unable to reliably reduce the optimistic bias by providing individuals with base-rate information about health risks or even by providing customized personal risk data.[229]

(1980) [hereinafter Weinstein, *Unrealistic Optimism*] (drinking problems, heart attack, and cancer); Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample*, 10 J. BEHAV. MED. 481, 486 tbl.1 (1987) [hereinafter Weinstein, *Health Problems*] (drug addiction, alcoholism, asthma, deafness, lung and skin cancers, diabetes, stroke, heart attack, auto injury, arthritis, and high blood pressure).

[224] *See, e.g.*, Avis et al., *supra* note 222, at 1610 (finding in a large-scale study that 42% of respondents overestimated their heart attack risk relative to their objective individual risk level); Radcliffe & Klein, *supra* note 222, at 840 (finding in a large-scale study that 56% of participants were overly optimistic about their heart attack risk relative to their objective personal risk factors); Rothman et al., *supra* note 221, at 1225 (finding in a large-scale study that "most individuals . . . were optimistic in both relative and absolute senses" regarding many health risks).

Studies identifying the optimistic bias in individuals relative to their personal risk factors add significantly to the more common demonstrations of comparative optimism in which individuals merely rate their own risk as less than that of their peers. Although comparative optimism studies establish bias "at the group level," they cannot identify the *particular* individuals who are *unrealistically* optimistic. Radcliffe & Klein, *supra* note 222, at 837; *see also* Weinstein, *Health Problems*, *supra* note 223, at 489 (explaining that group-level bias exists when a group's "mean comparative risk judgment" is below average, but that any particular individual's belief "that his or her susceptibility to a particular hazard is less than average" is not necessarily "an example of unrealistic optimism").

[225] *See* Radcliffe & Klein, *supra* note 222, at 841 (finding no correlation between these personal factors and optimism levels); Weinstein, *Health Problems*, *supra* note 223, at 489, 496 (same); Williams, *supra* note 221, at 754 (same).

[226] Rothman et al., *supra* note 221, at 1221.

[227] Radcliffe & Klein, *supra* note 222, at 837; *cf.* Gerrard et al., *supra* note 221, at 96 (finding that individuals with high self-esteem have particularly resilient optimistic biases).

[228] Morton & Duck, *supra* note 223, at 604; *see also* Weinstein & Klein, *supra* note 221, at 132–39 (analyzing four studies using different risk-factor information and concluding that no debiasing interventions consistently reduce the optimistic bias); Williams, *supra* note 221, at 748–53 (summarizing the results of various debiasing strategies).

[229] Williams, *supra* note 221, at 749; *see also* Avis et al., *supra* note 222, at 1610–11

People have developed a wide array of cognitive strategies to preserve their optimistic biases in the face of contrary evidence.[230] We minimize, discount, distort, or ignore negative personal risk information.[231] We pay selective attention to relevant risk factors, often by over-emphasizing our own preventive health behaviors relative to our own risky activities.[232] And we regularly assess ourselves as "better than average" on risk-reducing characteristics and conduct.[233] Social scientists have had some success in correcting the optimistic bias by providing subjects a combination of individualized risk assessments and other information, such as accurate data about the precautionary conduct of others,[234] or by making either the causes or consequences of a health risk highly salient.[235] But those types of interventions are particularly infeasible on a wide-scale basis outside of a laboratory setting.

(finding in a large-scale study that individual heart attack risk data did not reduce the optimistic bias for "the majority of respondents"); Chandler et al., *supra* note 221, at 365–68 (finding in a large-scale study that even when individuals receive base-rate risk statistics, most still estimate their own risk below the base-rate); Gerrard et al., *supra* note 221, at 94 ("There is limited evidence that providing risk information is an effective way to change risk perceptions . . . ."); Kreuter & Strecher, *supra* note 223, at 61 (finding mixed results in a large-scale study on whether individualized risk feedback improves assessments of personal risks); Rothman & Kiviniemi, *supra* note 222, at 45–46 (finding that probability data about health risks does not dramatically improve personal risk assessments).

[230] Gerrard et al., *supra* note 221, at 96; *see also* Rothman & Kiviniemi, *supra* note 222, at 44 ("[P]eople are not passive, unbiased processors of information about their health status." (citation omitted)); Weinstein, *Health Problems*, *supra* note 223, at 498 (summarizing research finding that people are "ingenious in finding reasons for believing that their own risk is less than the risk faced by their peers").

[231] Gerrard et al., *supra* note 221, at 96; Rothman & Kiviniemi, *supra* note 222, at 44.

[232] Rothman & Kiviniemi, *supra* note 222, at 48.

[233] Chandler et al., *supra* note 221, at 366, 374; *see also* Morton & Duck, *supra* note 223, at 604 (finding that people consistently assess others' health risks as higher than their own); Rothman et al., *supra* note 221, at 1221, 1225, 1231 (finding in a large-scale study that comparative optimism is largely explained by overestimating others' health risks).

[234] *See, e.g.*, Chandler et al., *supra* note 221, at 375 (concluding that the optimistic bias may be improved through "a combination of individualized feedback about a person's characteristics and the conditional probability that the event will occur given these characteristics"); Kreuter & Strecher, *supra* note 223, at 57 (finding some reduction of optimistic biases by providing individualized risk data and "information about the precautionary actions of others").

[235] *See* Rothman & Kiviniemi, *supra* note 222, at 47 (discussing various risk-salience studies).

Our highly resilient "illusion of invulnerability"[236] combined with the general existential anxiety triggered by stereotypic notions of disability create a strong force pushing most individuals not only to resist taking on the disability label, but to deny that the label will ever apply to them. As a result, most individuals will refuse to see themselves as ever existing along a disability continuum where their conditions are not qualitatively distinct from impairments that result in significant social limitations.

Although this desire to erect a false boundary between the disabled and the nondisabled contributes to the stigmatization of disability, evidence suggests that individuals may personally benefit from their erroneous beliefs.[237] Unrealistic optimism correlates with higher levels of happiness and perceived control, which are associated with more effective stress management and coping abilities.[238] Unrealistic optimism can lower anxiety when individuals have little ability to control their risk for a negative health outcome,[239] and it may help sustain precautionary behaviors when risks can be reduced.[240] More generally, studies have found that individuals who rate high in "dispositional optimism" enjoy better physical health, have lower blood pressure, and exercise more than their peers, cope more effectively with and recover faster from illness, and typically are more satisfied with their lives.[241]

To the extent that the optimistic bias produces such individual benefits, it is likely to be that much more resistant to change. If

---

[236] Gerrard et al., *supra* note 221, at 95.

[237] *See* Williams, *supra* note 221, at 762 (collecting research showing that "[u]nrealistic optimism creates benefits, in addition to its costs").

[238] *Id*. at 762–63.

[239] Weinstein & Klein, *supra* note 221, at 132.

[240] *Id*. *But see* Radcliffe & Klein, *supra* note 222, at 836 ("[O]ptimism may prevent individuals from taking proactive measures to affect the outcomes about which they are optimistic."); Weinstein & Klein, *supra* note 221, at 132 (noting that a tendency to "downplay one's own risk may interfere with appropriate self-protective action").

[241] Radcliffe & Klein, *supra* note 222, at 838, 843–44. Most research has not focused specifically on individuals who have been identified as unrealistically optimistic about their health relative to personal risk factors, but rather has focused more generally on individuals who rate high in "dispositional optimism"—i.e., individuals with a strong positive outlook, which may not be erroneous based on their personal health risks. *Id*. at 837. Nonetheless, the pervasiveness of the optimistic bias suggests that not all individuals with high dispositional optimism are accurately assessing their individual health risks.

individuals benefit from being overly optimistic about their health, correcting their biases will produce personal hedonic costs and potentially less positive health results.[242] That is not to say that such costs outweigh the gains that may be produced through widespread embrace of traditional universality, which would include normalizing and destigmatizing disability. Acknowledging the costs that would be felt by individuals who currently self-identify as nondisabled if they corrected their optimistic biases and more accurately perceived themselves along a disability continuum simply highlights the difficulty of the traditional universalist endeavor.

Ironically, even though most individuals with non-substantially limiting impairments are unlikely to self-identify as disabled, they may be quite likely to identify as the victim of a legal wrong if their non-substantially limiting impairments result in adverse employment actions.[243] Individuals with high blood pressure, for example, may resist seeing themselves along a continuum with individuals who are hearing-, sight-, or mobility-impaired, but they may easily view themselves as having been legally wronged if an employer refuses to hire them because of their high blood

---

[242] *See* Williams, *supra* note 221, at 736 ("[C]orrecting over-optimism can impose collateral costs.").

[243] Employees tend to be overly optimistic about legal protections in the workplace, often believing that permissible grounds for adverse employment actions are unlawful. *See* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 454–65 (1999) (describing survey results assessing workers' understanding of at-will employment). Most employees erroneously believe, for example, that the law prohibits employers from firing an at-will employee to hire someone to work for lower pay or simply because the employer personally dislikes the employee. *Id.* at 456 tbl.1. If most employees incorrectly believe that employers may not fire them because of personal animus, they probably also believe *correctly* (under the ADAAA) that the law prohibits employers from firing them for non-substantially limiting impairments. In the context of disability, researchers have found that individuals who identify as "a disabled person" and who do not "distinguish disability from self " are less likely to view employment exclusion as "unfair treatment" that implicates legal rights. DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 46 (2003) (internal quotations omitted). In contrast, an individual who identifies as "a person with many attributes and capabilities, of which the disability is but one," is more likely to view employment exclusion as "unfair" and rights-activating. *Id.* This finding suggests that individuals with non-substantially limiting impairments—who are particularly likely to distinguish their impairments from their self-identities—are likely to view impairment-based employment decision making as unlawful.

pressure. Under the ADAAA's new "regarded as" prong, that view would now be accurate; yet few individuals in such circumstances likely would be able to identify the ADA as the source of their legal protection. If so, then traditional universalists not only will have failed in their core objective of erasing the line between the disabled and the nondisabled, but they also will have missed an enormous opportunity for expanding the group of self-perceived stakeholders in the ADA.

Thus, the impetus for reconceptualizing universality stems not from any fundamental disagreement with the insights or goals of disability rights advocates who articulated the traditional universal notion of a disability continuum. Nor does it stem from any fundamental disagreement with activists who have characterized the post-ADAAA's "regarded as" prong as having codified to a very large degree this original conception of universality.[244] It is difficult to disagree with the aspirational notion that achieving widespread understanding of disability as a continuum would indeed advance the disability rights movement by erasing the line between the disabled and the nondisabled, which has contributed so significantly to the ADA backlash and the continued stigma that attaches to the social experience of disability.

The impetus for reconceptualizing universality is instead quite pragmatic. Intellectual and theoretical commitment to traditional universality should not preclude consideration of whether a less ideal strategy might realistically achieve more. Realistically, there are many reasons to predict that the public is unlikely to soon embrace the notion of a disability continuum, even in a post-ADAAA world. Despite the sustained efforts of traditional universalists, even legal scholars continue to describe disability as distinguishable from the universally possessed traits of race and sex.[245] To the extent that this pessimistic outlook is accurate, it

---

[244] *See, e.g.*, Barry, *supra* note 4, at 283 (arguing that the ADAAA's "regarded as" prong "provid[es] nearly universal nondiscrimination protection" and "represents . . . an acknowledgment that there is no 'us' and 'them' "); Feldblum, *supra* note 20, at 158 (noting that impairment-based antidiscrimination protection would "dissolve the line between 'disabled' and 'the rest of us' ").

[245] *See, e.g.*, BAGENSTOS, *supra* note 4, at 34 (stating that "disability discrimination law is different" from other civil rights laws, which "have no protected classes"); Areheart, *supra*

raises the question of whether an alternative strategy might more effectively develop interest convergence and broader personal commitment to the ADA.

Specifically, disability rights advocates should consider the potential benefits of characterizing the post-ADAAA's "regarded as" prong as having codified antidiscrimination protection for individuals *without* disabilities. Rather than continuing only to pursue the ideal strategy of helping individuals understand that the ADA may protect them if they are ever "regarded as disabled," advocates should consider expanding the group of ADA stakeholders by helping individuals understand that "impairment" is now a protected status—*alongside disability*—and that virtually all of us are impaired in some way.[246]

Explicitly characterizing the new "regarded as" prong as legal protection for individuals *without* disabilities is not without risks that may be too great for many members of the disability rights movement to seriously consider. All of the major criticisms of the minority group approach to disability[247] may be levied by traditional universalists against this alternative approach as well. An approach that characterizes the ADA as covering individuals with *and without* disabilities may undermine the core objective of traditional universality, which is to erase the line between "them" and "us" that has been etched so deeply in public thought. Critics may fear that such an approach may reinforce the salience of the disability label rather than diminishing it.

In the face of these significant threats to the traditional universalist endeavor, what does a new universality have to offer? Most significantly, it may offer a more realistic way to demonstrate the ADA's personal relevance to the large group of individuals with non-substantially limiting impairments. This

---

note 87, at 210 (distinguishing the ADA from other civil rights statutes because "the ADA protects only a particular set of people—specifically those with disabilities").

[246] Expanding the group of self-perceived ADA stakeholders in this way is unlikely to open a litigation floodgate. *See* Feldblum, *supra* note 20, at 160 (arguing that a broad interpretation of the "regarded as" prong will not inundate courts because "[i]t is rare that an individual in today's society is denied employment . . . because of a small, minor impairment"). Rhode has found that state and local laws that go beyond the ADA to cover all forms of appearance-based discrimination have not produced "the flood of frivolous litigation and business backlash that critics . . . predicted." RHODE, *supra* note 200, at 126.

[247] *See supra* notes 7–8 and accompanying text.

opportunity exists to the extent that *two* erroneous beliefs fuel the ADA backlash: that a bright line exists between the disabled and the nondisabled *and* that the ADA only protects individuals on the former side of the line. For good reason, traditional universalists have focused primarily on trying to correct the former misperception. But the ADAAA now offers an alternative educational campaign for advancing interest convergence, quelling backlash, and expanding the group of self-perceived ADA stakeholders: trying to correct the latter misperception instead. Specifically, the ADAAA presents the opportunity for advocates to consider whether correcting the erroneous belief that the ADA only covers individuals on the disabled side of the line should now take priority over trying to correct the erroneous belief in the existence of a line in the first place.

While interest convergence likely would be strongest by replacing the disabled/nondisabled line with a more accurate disability continuum,[248] interest convergence might also be achieved by getting individuals who view themselves as nondisabled to understand that they have more in common than previously recognized with individuals whom they perceive as being on the other side of the line. Although perhaps not ideal, it may be more realistic to focus less on convincing individuals to abandon their belief in the illusory disabled/nondisabled line and instead to focus more on convincing individuals that we are all at risk for experiencing irrational and unfair employment decision making and that the ADA now protects us all.

This alternative approach to universality differs from the minority group approach in that it highlights the inclusive legal protection of those in the majority rather than trying to defend their exclusion. Nevertheless, conceptualizing the ADAAA as protecting individuals with *and without* disabilities shares with the minority group approach a respect for the unique, lived experiences of individuals who confront a society designed to

---

[248] *See* Susan Wendell, *Toward a Feminist Theory of Disability*, *in* THE DISABILITY STUDIES READER, *supra* note 19, at 336, 341 ("If the able-bodied saw the disabled as potentially themselves or as their future selves, they would be more inclined to feel that society should be organized to provide the resources that would make disabled people fully integrated and contributing members.").

systematically exclude them.[249] As Professor Carol Gill has explained, a continuum notion of disability "trivializes the experience of us who must face the cold facts of marginalization while it ignores the value of our different experience."[250] Linton has agreed: "I am not willing or interested in erasing the line between disabled and nondisabled people," she explains, "as long as disabled people are devalued and discriminated against, and as long as naming the category serves to call attention to that treatment."[251]

Some individuals who self-identify as disabled also have objected to the traditional notion of universality because a continuum fails to recognize the important role that claiming a disability identity may play for individual self-empowerment, community development, and political collective action.[252] Simply put, "identity matters to people who are stigmatized and stereotyped because they belong to a socially disfavored group."[253] The fact that impairments fall along a spectrum likely has made disability identity even more significant given that "self-identification as a person with a disability is often a long, complex,

---

[249] *See* Bagenstos, *supra* note 45, at 479–80 (explaining that the universal approach has been criticized for ignoring the systematic marginalization of those with substantially limiting impairments); Carol J. Gill, *Questioning Continuum, in* THE RAGGED EDGE: THE DISABILITY EXPERIENCE FROM THE PAGES OF THE FIRST FIFTEEN YEARS OF *THE DISABILITY RAG* 42, 42, 47 (Barrett Shaw ed., 1994) (arguing that only individuals with substantially limiting impairments "know the relentless feeling of dealing directly and inescapably with both the difference and the public invalidation it inspires").

[250] Gill, *supra* note 249, at 42.

[251] Simi Linton, *Reassigning Meaning*, *in* THE DISABILITY STUDIES READER, *supra* note 19, at 225; *see also* LINTON, *supra* note 154, at 150 ("The continuum approach . . . doesn't wash when you observe the specific treatment of disabled people in society."); Bagenstos, *supra* note 45, at 481 ("[C]alling society's attention to the ways in which its practices and institutions uniquely disadvantage an identifiable *group* of people with disabilities may be the only way to force a careful examination of the subordinating effects of those practices." (emphasis in original)).

[252] *See* LINTON, *supra* note 154, at 5 (noting that "a strong disability alliance has led to civil rights victories and the foundation of a clearly identified disabled community"); Davis, *supra* note 158, at 301–02 (explaining how a disability identity helps "creat[e] a collectivity"); Gill, *supra* note 249, at 49 (arguing that individuals with disabilities gain political and psychological power "from celebrating who we are as a distinct people"); Marta Russell, *Malcolm Teaches Us, Too*, *in* THE RAGGED EDGE, *supra* note 249, at 11, 12 (noting the importance of "identify[ing] as disabled people" and arguing that "others should be called 'nondisabled,' " which "gives them less power").

[253] Stefan, *supra* note 7, at 1341.

and difficult process."[254] Thus, a potential benefit of a new universality that describes the ADAAA as protecting individuals with *and without* disabilities—in contrast to the continuum approach of traditional universality—is that it would neither require individuals who self-identify as nondisabled to embrace a disability label, nor would it require individuals who self-identify as disabled to dilute or devalue their experiences. Yet unlike the minority group approach to disability, which attempts to defend legal protection solely for members of the minority group, a new approach to universality would focus instead on the inclusive antidiscrimination protection that the ADAAA now provides for members of the majority group as well.

Certainly, such an approach would appear at odds with the core insight of traditional universalists that embracing a disability continuum has the potential to dissolve the artificial line between "us" and "them." Yet group differentiation does not necessarily divide and oppress,[255] nor does erasing category lines necessarily unite and destigmatize as traditional universalists have always hoped and predicted.[256] A continuum notion of disability will mark a path out of marginalization for individuals with disabilities only to the extent that it engenders acceptance of difference.[257] Conversely, recognizing individuals with disabilities as an identifiable group will produce marginalization only to the extent that devaluation accompanies such recognition. In some circumstances, recognizing difference can provide " 'a starting point for relatedness.' "[258]

---

[254] *Id.* at 1342.

[255] *See* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 47 (1990) ("Though some groups have come to be formed out of oppression, . . . group differentiation is not in itself oppressive."); *see also* Gill, *supra* note 249, at 49 (arguing that a minority group approach does not further "encourage divisiveness" in a society that already marginalizes those with certain impairments).

[256] *See* Gill, *supra* note 249, at 43–44 (explaining how the tendency to homogenize fails to respect disability's "differentness").

[257] *See id.* (arguing that a continuum approach is not "the path out of . . . marginalization" because it does not engender respect for difference).

[258] *See* LINTON, *supra* note 154, at 120–21 (quoting EVELYN FOX KELLER, REFLECTIONS ON GENDER AND SCIENCE 163 (1985)). Linton argues that "[m]arking the border" between the disabled and nondisabled "is a strategic endeavor not to separate the two groups further but to illuminate the lines that currently divide them." *Id.* at 124.

As Gill has described, an "ideal world" would both acknowledge and respect difference.[259] While the traditional universalist embrace of a disability continuum may be one path to that ideal result, it may not be the only one. Any method that helps us "conceptualize disabled and nondisabled people as integral, complementary parts of a whole universe" could move us forward.[260] Thus, viewing the ADA as providing antidiscrimination protection for both individuals with *and without* disabilities could unite rather than divide if such an approach helps deepen our understanding of "the relationship of one to the other, and of both to the social structures in which they function"—i.e., if it helps draw our attention to the "complementarity and interdependence of parts to wholes."[261]

Other provisions of the ADA already reflect this interdependence of individuals with and without disabilities in ways that are more explicit yet similarly in need of greater public awareness.[262] Even though the ADAAA has codified the traditional universalist concept of a disability continuum to a very large degree, the amendments continue to acknowledge that at any given time there will be individuals who do not meet any of the three statutory definitions of disability—"actual," "record of," or "regarded as"—and whom the ADAAA therefore describes as "individual[s] without a disability."[263] While it is tempting to

---

[259] Gill, *supra* note 249, at 44–45; *see also* Asch, *supra* note 211, at 394 (explaining the need to understand disability in a way "that appreciates similarities and differences among people with impairments").

[260] LINTON, *supra* note 154, at 129; *see also* Simon Thompson & Paul Hoggett, *Universalism, Selectivism and Particularism: Towards a Postmodern Social Policy*, 16 CRITICAL SOC. POL'Y 21, 21, 32 (1996) (arguing in the context of welfare reform that "sophisticated universalism" must account for difference).

[261] LINTON, *supra* note 154, at 121.

[262] *See* Travis, *supra* note 205, at 367 (analyzing how the ADA reflects that "the lives, needs, and interests of individuals with and without disabilities are inextricably intertwined as family members, friends, coworkers, and citizens").

[263] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a)(1), 122 Stat. 3553, 3557–58 (codified at 42 U.S.C. § 12201(g) (Supp. III 2009)) ("Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability."); *see also* Statement of the Managers, *supra* note 50, at 18,519 ("[A] person without a disability does not have the right under the Act to bring an action against an entity on the grounds that he or she was discriminated against . . . on the basis of not having a disability . . . .").

equate the ADA's three-pronged disability definition with the boundaries of statutory coverage, the ADA has always provided certain forms of legal protection to these nondisabled individuals.

Two major examples are the ADA's association and anti-retaliation provisions. The ADA's association provision prohibits employers from discriminating against an individual *without* a disability because of his or her relationship with someone who is disabled.[264] Recognizing the variety of ways in which the lives of individuals with and without disabilities are intertwined, courts and the EEOC have applied the ADA's association provision to a wide range of social and business relationships, including spouses, partners, family members, friends, coworkers, caregivers, and others.[265] The ADA's anti-retaliation provision prohibits employers from retaliating against individuals *without* disabilities for opposing conduct that violates the ADA, participating in an ADA investigation or proceeding, or aiding or encouraging individuals with disabilities in the exercise of their own statutory rights.[266] While the ADA's anti-retaliation provision often protects individuals without disabilities who report or protest perceived discrimination against a coworker,[267] it also protects them from third-party retaliation when a friend or family member asserts his or her own ADA rights, even if the nondisabled individual has not engaged in any protected activity.[268]

Before the ADAAA, individuals covered by the ADA's "regarded as" prong typically were referred to as individuals *with* disabilities. This made sense both as a formal statutory matter, given that the ADA listed the "regarded as" prong as the third

---

[264] 42 U.S.C. § 12112(b)(4) (2006).

[265] *See* Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.8 (2011) (stating that the association provision applies to "family, business, social or other relationship[s]"); *see also* Travis, *supra* note 205, at 368–71 (analyzing case law and agency guidance on the association provision).

[266] 42 U.S.C. § 12203(a)–(b) (2006).

[267] Travis, *supra* note 205, at 374; *see, e.g.*, Barker v. Int'l Paper Co., 993 F. Supp. 10, 15–16 (D. Me. 1998) (holding that a nondisabled employee stated an ADA retaliation claim alleging that he was fired for seeking an accommodation for his disabled wife).

[268] Travis, *supra* note 205, at 375; *see, e.g.*, Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 570–72 (3d Cir. 2002) (holding that firing a disabled employee's nondisabled son in retaliation for the disabled employee filing a claim against the employer could constitute unlawful third-party retaliation).

definition of disability, and as a practical matter, given the narrow judicial construction of "regarded as" coverage.[269] However, now that the ADAAA has expanded the "regarded as" prong to cover nearly all impairment-based discrimination, we may now describe the "regarded as" prong as a form of legal protection for individuals *without* disabilities—alongside the ADA's association and anti-retaliation provisions, rather than alongside the ADA's "actual" and "record of" disability prongs. Like the ADA's association and anti-retaliation provisions, claims under the new "regarded as" prong will not require the plaintiff to demonstrate any level of functional limitation,[270] nor will they entitle the plaintiff to workplace accommodations.[271]

This semantic realignment may also bring greater force to the analogy that scholars frequently make between the ADA's "regarded as" prong and Title VII's antidiscrimination protection for other protected statuses, such as race, sex, and ethnicity.[272] Under the new "regarded as" prong, as under Title VII, negative treatment based on a personal characteristic deemed irrelevant to employment decision making is sufficient to trigger legal protection[273] but is generally insufficient to trigger a right to accommodation.[274] Yet advocates of the social model of disability do not argue that people who are discriminated against because of their skin color "are by virtue of *that* fact disabled, nor do they argue that racism is a form of disability."[275] Individuals who

---

[269] *See supra* notes 43–48 and accompanying text.

[270] *See supra* note 54 and accompanying text.

[271] *See supra* note 58 and accompanying text.

[272] *See, e.g.*, Barry, *supra* note 4, at 218 (arguing that a universal approach would "protect everyone who experiences discrimination based on an impairment much like the Civil Rights Act of 1964 protects everyone who experiences discrimination based on race, religion, gender, or ethnicity"); Feldblum, *supra* note 20, at 101–02, 163–64 (noting that impairment-based antidiscrimination would be analogous to Title VII's treatment of race and sex).

[273] *See* Feldblum, *supra* note 20, at 101 ("[O]ur civil rights laws prohibit the use of a *characteristic* that the legislature has decided should ordinarily be irrelevant in decision-making." (emphasis in original)).

[274] Barry, *supra* note 4, at 278–79. Title VII includes a limited accommodation mandate for religion. 42 U.S.C. § 2000e(j) (2006). However, courts have interpreted that mandate very narrowly because accommodating religion raises Establishment Clause issues that are absent in the disability context. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 6–7 (1996).

[275] Tremain, *Impairment*, *supra* note 19, at 42.

experience race-based discrimination typically do not describe themselves as having a socially constructed disability, nor is that description likely to fit comfortably for most individuals with non-substantially limiting impairments who experience impairment-based discrimination. Thus, the analogy between the ADA's "regarded as" prong and Title VII appears more compelling when viewed from the opposite direction. Rather than viewing the ADA's "regarded as" prong as addressing a form of disability discrimination and understanding other forms of discrimination as similarly socially disabling, the analogy obtains greater force by viewing the ADA's "regarded as" prong as having placed impairment on par with race, sex, national origin, and other characteristics protected by other civil rights laws.[276]

A more explicit decoupling of impairment from disability may also reduce the risk of judicial retrenchment as described in Part III.A. Understanding the new "regarded as" prong as providing antidiscrimination protection for individuals *without* disabilities may help judges resist re-tethering the "regarded as" prong to a minority group model, which inevitably places judges in the role of boundary police.[277] Thus, rethinking the traditional notion of universality may not only provide an opportunity for advancing the goals of the disability rights movement, but also may help protect the formal gains that traditional universalists have fought so hard to obtain.

V. CONCLUSION

The ADA Amendments Act of 2008 has the potential to mark a profound step forward for disability civil rights. Thus far, however, most analysis of the ADAAA's potential impact has focused on the Act's restoration of the ADA's "actual" and "record of" disability prongs, which the amendments direct courts to

---

[276] *See* Barry, *supra* note 4, at 278 (arguing that the regarded as prong "harmonizes the concept of impairment with race, sex, and other protected characteristics" and brings "parity between the ADA and other civil rights laws").

[277] *See* BAGENSTOS, *supra* note 4, at 46 ("A protected-class understanding of disability rights law . . . encourages judges to see their job as vigorously policing the line between those who are in and those who are out of the protected class.").

interpret broadly.[278] Although plaintiffs seeking coverage under the "actual" or "record of" prongs will still need to demonstrate a current or past impairment that substantially limits or limited a major life activity, the ADAAA should greatly ease that burden by lowering the substantial-limitations hurdle,[279] expanding the definition of major life activities,[280] and no longer assessing a plaintiff's functioning with reference to mitigating measures.[281] If those changes have their desired effect, it should become easier for plaintiffs to obtain protected class status by demonstrating an "actual" or "record of" disability, thereby shifting judicial focus to what was always intended to be the ADA's central feature: reasonable accommodations.[282] But if that shift occurs, it does not necessarily mean that the "regarded as" prong will have a less important role to play. It does mean, however, that advocates

---

[278] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified at 42 U.S.C. § 12102(4)(A) (Supp. III 2009)).

[279] *Id.* §§ 2(a)(7)–(8), 2(b)(4)–(5) (codified at 42 U.S.C. § 12101 note (Supp. III 2009)) (rejecting the Supreme Court's high standard for showing that an impairment "substantially limits" a major life activity); *see also id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(B)) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the [ADAAA] . . . .").

[280] *Id.* § 4(a) (codified at 42 U.S.C. § 12102(2)) (revising the definition of "major life activities" to expand the enumerated activities and include major bodily functions); *see also id.* § 2(b)(4) (codified at 42 U.S.C. § 12101 note (Supp. III 2009)) (rejecting a Supreme Court case that had defined "major life activities" narrowly).

[281] *Id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(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 . . . ."); *see also id.* § 2(b)(2) (codified at 42 U.S.C. § 12101 note (Supp. III 2009)) (rejecting Supreme Court cases that had assessed an impairment's limiting impact "with reference to the ameliorative effects of mitigating measures"). The ADAAA also expanded the "actual" disability prong by clarifying that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." *Id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(D)).

[282] Professor Ruth Colker's recent empirical work may temper this optimism. *See generally* Ruth Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments: Cause for Concern*, 2010 UTAH L. REV. 1029 (analyzing the grounds for employers' victories in pre-ADAAA cases). Because Colker found that the disability definition did not play a significant role in favorable defendant outcomes in ADA cases filed from 2006 to 2008, she predicts that the ADAAA "will likely have little effect on overall judicial outcomes." *Id.* at 1031–32. Professor Ani Satz has also raised concerns that "the environments in which courts choose to evaluate an individual for disability" may be easily manipulated to undermine the ADAAA's expanded disability definition. Ani B. Satz, *Fragmented Lives: Disability Discrimination and the Role of "Environment-Framing,"* 68 WASH. & LEE L. REV. 187, 227 (2011).

should begin thinking critically about how the disability rights movement might most effectively leverage the ADAAA's new "regarded as" prong.

By necessity, pre-ADAAA analysis of the "regarded as" prong typically focused on strategies for using "regarded as" claims to protect individuals with disabilities whom the "actual" and "record of" prongs should have covered, but whom federal courts excluded from such coverage with their increasingly narrow interpretations. Because advocates turned to the "regarded as" prong as a potential back-up route for individuals with disabilities whom judges had carved out of the ADA's core protected class, much of the pre-ADAAA scholarship focused in particular on trying to apply the accommodation mandate to "regarded as" claims. Now that the ADAAA has restored the intended reach of the ADA's "actual" and "record of" prongs and clarified that "regarded as" coverage does not trigger entitlement to accommodations, advocates are free to think more broadly about the potential role that the "regarded as" prong may play in advancing a disability rights agenda.

Traditional universalists have always kept that broader focus in mind, and we should celebrate their success in shifting the "regarded as" prong much closer to the ideal of universal coverage. In our post-ADAAA world, the "regarded as" prong now protects individuals against nearly all forms of impairment-based discrimination, regardless of the real or perceived severity or stigmatizing nature of the impairment. In so doing, the ADAAA effectively has elevated impairment to our list of protected statuses under federal antidiscrimination law, alongside race, color, national origin, sex, religion, age, and disability. Nevertheless, realizing the full potential of this legal development will not occur automatically. Advocates will need to police these formal gains in federal courts by resisting any efforts to re-tether the new "regarded as" prong to a minority group model or to otherwise restrict its intended reach.

But in addition to remaining vigilant about the ADAAA's future within the federal courts, advocates also should think strategically about the larger opportunity that the ADAAA presents for broadening public commitment to the central ideals of the disability rights movement. The new "regarded as" prong provides

a tremendous opportunity to educate the public about our shared interest in the ADA's goal of eradicating impairment-based discrimination in the workplace. And while we may still be a long way from erasing the line between individuals with and without disabilities, the new "regarded as" prong may at least provide the opportunity for building bridges across the divide.