Crossroads and Signposts: The ADA Amendments Act of 2008

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Although the apparent purpose of the 2008 amendments to the Americans with Disabilities Act (ADA) is solely to broaden the ADA's protected class, the manner in which the amendments achieve this purpose erodes the statute's explicit textual support for understanding persons with disabilities as a politically subordinated minority. The amendments also strengthen the statutory link between the biological severity of a person's disability and that person's right to sue for ADA accommodations. Accordingly, for some courts, the amendments will reinforce the perception that the ADA differs from traditional civil rights law.

Federal courts' understanding of the ADA's relationship to traditional civil rights law will shape courts' resolution of unresolved questions about the ADA's scope. Because the ADA, as amended, will now enable more plaintiffs to proceed past the preliminary question of membership in the ADA's protected class, federal courts will soon be forced to confront broad questions about the ADA's application. Resolution of these questions will largely turn on courts' understanding of the conceptual relationship between the ADA and traditional civil rights statutes, an underlying question that the recent amendments will unintentionally shape.

INTRODUCTION

Amendments designed to make minor changes to an existing statute may have unintended consequences on courts' assumptions about the existing statute's theoretical foundation. Particularly when the statute's conceptual rationale is strongly contested, amendments tailored to address narrow interpretive issues may influence judicial

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understanding of the original statutory provisions that the amendments leave untouched. This shift in courts' conceptual understanding of the statute wrought by subsequent amendments can then subtly influence judicial assumptions about the purpose and scope of the statutory provisions that predated the amendments.

The ADA Amendments Act of 2008 (ADAAA) may be such a series of amendments. Effective January 1, 2009, these amendments reverse a handful of Supreme Court decisions that constricted the scope of the Americans with Disabilities Act's (ADA) protected class. Focused solely on allowing more individuals to bring ADA claims, the amendments do not attempt to resolve the hotly contested debate about the ADA's theoretical foundation. For example, the amendments do not address disability scholars' claims that courts should understand the ADA as a civil rights statute designed to remove socially constructed obstacles that persons with disabilities experience. The amendments similarly do not address the claim, embraced by many courts, that the ADA institutes a welfare benefits regime that extends preferential treatment to persons with disabilities in order to compensate for endogenous biological limitations. Congress is no doubt cognizant of the debate about the conceptual relationship between the ADA and other antidiscrimination legislation, because this debate extends beyond law review literature to inform judicial opinions as well as popular commentary about disability policy. Nonetheless, the amendments, which focus solely on reversing the Supreme Court's constriction of the ADA's protected class, refer only obliquely to the important debate about the degree to which courts should understand the ADA as conferring welfare benefits and the degree to which courts should understand the ADA as protecting civil rights.

Despite the ADAAA's lack of attention to the ADA's theoretical foundation, the amendments will nonetheless bring renewed attention and significance to this debate. By enabling more plaintiffs to overcome the initial hurdle of establishing membership in the ADA's protected class, the amendments will require courts to address many important interpretive questions raised by the original statutory text, such as the scope of the amorphous term "reasonable accommodation."[1] Although courts encountered these interpretive questions prior to the ADAAA, they have not yet fully resolved these issues due to the scarcity of ADA cases that proceeded past the initial question of the plaintiff's standing to sue.[2] Now that the ADAAA will enable more plaintiffs to

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1. *See* Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 864–65 (2004) ("The question of what makes a requested accommodation reasonable (and therefore obligatory unless it imposes an undue hardship on an employer) remains unsettled and hotly contested."); John E. Matejkovic & Margaret E. Matejkovic, *What Is Reasonable Accommodation Under the ADA?: Not an Easy Answer; Rather a Plethora of Questions*, 28 MISS. C. L. REV. 67, 67 (2009) ("[F]or every answer provided in response to a question of reasonable accommodations, a plethora of other questions is presented. Further, in light of the recent signing of the ADA Amendments Act . . . the questions and issues . . . are of even greater significance . . . .").

2. *See* Alex B. Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 645 (2004) (noting that, prior to the ADAAA's enactment, "[a] lower threshold for the existence of a disability [such as that enacted by the ADAAA] would mean that more cases would hinge on whether the accommodation that would enable the disabled employee to perform the essential functions of the job was 'reasonable' (an inherently ambiguous term), whether the provision of the accommodation

proceed past the preliminary question of membership in the ADA's protected class, courts will be tackling broad questions relating to the ADA's application, the resolution of which will largely turn on courts' understanding of the conceptual relationship between the ADA and traditional civil rights statutes.

This Article argues that the ADA Amendments Act of 2008 will shape courts' understanding of the conceptual relationship between the ADA and other antidiscrimination statutes and thereby influence the courts' future interpretation and application of the ADA. It argues that courts may regard the manner in which the amendments broaden the ADA's protected class as confirming a welfare benefits conception of the ADA. The amendments erode the extent to which the ADA provides explicit textual support for understanding the ADA's protected class as a politically subordinated minority. The amendments also strengthen the connection between the severity of endogenous limitations and the right to ADA accommodations. Accordingly, the amendments may unwittingly underwrite the assumption that the ADA is not a traditional civil rights statute but is instead a welfare benefits statute that confers special benefits to compensate for endogenous biological limitations.

This argument proceeds as follows. Part I describes the broad outlines of the debate about the ADA's conceptual foundation and illustrates that the perceived disjunction between the ADA and other civil rights statutes has led courts to constrict the ADA's protected class and to narrowly construe the types of conduct that constitute disability discrimination. Focusing on the recent amendments to the ADA, Part II contends that the amendments do not challenge the assumption that appears to animate the Supreme Court's impulse to read the ADA's provisions more narrowly than the Civil Rights Act's parallel provisions: the perception that the ADA extends preferential treatment to persons with disabilities in order to compensate for biological deficiencies. Instead, for some courts, the amendments may reinforce the perception that the ADA significantly differs from traditional civil rights law. Looking to the future, Part III explores four important interpretive questions raised by the ADA's original text that federal courts have not fully resolved due to the emphasis in pre-amendments litigation on defining the boundaries of the ADA's protected class. This Article concludes by arguing that the resolution of these and other questions will largely turn on courts' understanding of the conceptual relationship between the ADA and traditional civil rights statutes. The ADA Amendments Act of 2008 will shape the future course of this debate.

I. THE PERCEIVED CONCEPTUAL DIVIDE

The conceptual debate about the ADA's theoretical foundation revolves around the extent to which courts should understand the ADA as removing socially imposed barriers to persons with disabilities as opposed to compensating for endogenous biological limitations. In other words, the debate involves the question of whether courts should view the ADA through the lens of civil rights or through the lens of welfare reform.[3] Although the ADA is patterned on Title VII of the Civil Rights Act of

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imposed an 'undue hardship' (an ambiguous term as defined by Congress), or whether the employer could justify the use of a facially-neutral policy or practice on the grounds of job-relatedness and business necessity (a potentially highly demanding standard for an employer to meet)" (footnote omitted)).

3. The legislative history of the ADA lends support to both frameworks. Most saliently, initial proponents of the ADA consistently characterized the statute as a civil rights act for

1964 and was enacted amidst fanfare characterizing the statute as "a civil rights act for people with disabilities,"[4] courts and commentators debate the extent to which courts should understand the ADA as parallel to traditional civil rights legislation.[5]

Downplaying the civil rights rhetoric that surrounded the passage of the ADA, many courts appear to regard the ADA's employment provisions as a welfare benefits system designed to compensate for inherent biological limitations.[6] They assume that unlike

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persons with disabilities. *See generally* H.R. REP. NO. 101-558 (1990) (Conf. Rep.); H.R. REP. NO. 101-596 (1990) (Conf. Rep.). However, also present within these discussions about the justifications for enacting the ADA was a call to remove people with disabilities from the rolls of public benefits programs. *See id.*; Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 955 (2003) (noting that "the more green-eyeshaded welfare reform argument formed a major part of the public justification for the statute"). The ADA's passage by wide margins in 1990 as well as the ADAAA's passage by even larger margins in 2008 obscures the mixed justifications for the ADA's enactment. *See* 154 CONG. REC. S9626 (2008) (daily ed. Sept. 26, 2008) (statement of Sen. Reid); 154 CONG. REC. S8342 (daily ed. Sept. 11, 2008) (indicating that the ADAAA passed the Senate by unanimous consent); 154 CONG. REC. H6081 (daily ed. June 25, 2008) (indicating that the ADAAA passed the House 402–17); 136 CONG. REC. 11,466–67 (1990) (indicating that the ADA passed the House 403–20); 135 CONG. REC. 19,903 (1989) (indicating that the ADA passed the Senate 76–8).

4. 135 CONG. REC. 8518 (1989) (statement of Sen. Lieberman). The senators who introduced the ADA in 1989 expressly invoked the memory of the Civil Rights Act, describing persons with disabilities as a "minority" that has experienced discrimination and segregation analogous to that experienced by African Americans. 135 CONG. REC. 8505–14 (1989) (statements of Sens. Harkin and Kennedy). Senator Kennedy championed the ADA as designed to "end this American apartheid." 135 CONG. REC. 8514 (1989) (statement of Sen. Kennedy).

5. *See, e.g.*, Sherwin Rosen, *Disability Accommodation and the Labor Market*, *in* DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 18, 21 (Carolyn L. Weaver ed., 1991) ("[T]he ADA is not an antidiscrimination law[,]" for it mandates "firms to treat unequal people equally, thus discriminating in favor of the disabled."); Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 75 (2008) (describing many scholars' characterization of reasonable accommodations as indulgent departures from the norm that amount to "redistribution of attention and resources to people with disabilities to overcome their impairments"); Anita Silvers, Michael E. Waterstone & Michael Ashley Stein, *Disability and Employment Discrimination at the Rehnquist Court*, 75 MISS. L.J. 945, 947 (2006) ("Almost all scholars agree that as a civil rights statute, the ADA is viewed by courts differently than its predecessor, the Civil Rights Act of 1964 (Title VII).").

6. *See infra* Part II. This Article uses the term "welfare benefits" to describe a charity-driven approach to disability policy. This approach notably differs from the approach suggested by several disability scholars who argue that the current limitations of antidiscrimination theory require a partial return to welfare-focused disability policy. These scholars draw on Rawlsian and antisubordination theories to argue that the current status quo—which requires persons with disabilities to internalize all or most of the costs of disability—is unjust. *See, e.g.*, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 83 (2004); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889 (2000). Mark Weber argues for shifting "some of the costs of disability to the population as a whole" in order "to achieve a more functional social and economic equality for people with disabilities." Weber, *supra*, at 956. Relying in part on Rawlsian theory, Weber suggests that:

the socially imposed disadvantages women experience relative to men, social factors do not significantly contribute to the segregation and limited opportunities experienced by persons with disabilities. Instead, they reason, these disadvantages flow directly from the individual's biological traits.[7] Relatedly, many courts characterize the ADA's accommodations provision—which requires employers to remove barriers impeding the workplace participation of persons with disabilities—as providing people with disabilities "preferential treatment," which would distinguish the ADA from Title VII's model of formal equality.[8] Ignoring the extent to which public and private actors have constructed physical and social environments in a manner that unnecessarily excludes persons with disabilities, many courts appear to regard reasonable accommodations as compensation for endogenous limitations.[9] Over the past decade, the Supreme Court has appeared to take this view, describing ADA accommodations as requiring employers to treat persons with disabilities "preferentially"[10] in order to "mak[e] allowance[s] for the disabled."[11]

By contrast, many disability scholars argue that the ADA should be regarded as parallel to Title VII of the Civil Rights Act of 1964 by noting that persons with disabilities routinely experience disadvantages resulting from socially constructed obstacles wholly separate from their endogenous biological traits.[12] They note, for

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> If an individual did not know what natural endowments she might have in life, she would choose . . . a distribution of the good things in life that would take into account the likelihood that she would have a severe disability. If a society were to attempt to become a just society under this description of social justice, it might well engage in significant redistribution to persons with severe disabilities, not only supplementing their incomes but also setting aside jobs and reorienting social services, recreational activities, the physical environment, and intangibles that confer self-respect to provide as much benefit for persons with disabilities as for anyone else.

Id. at 916–17 (footnotes omitted). Similarly, Bagenstos argues that:

> The antidiscrimination approach exemplified by the ADA has not come close to achieving full employment and community integration for people with disabilities, and there is no reason to expect that it ever will. Although the ADA remains exceptionally important, social welfare interventions will also be necessary to achieve those goals.

Bagenstos, *supra*, at 83.

7. *See* MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 27 (2003) (noting that many persons view disability as "a personal, medical problem, requiring but an individualized medical solution; that people who have disabilities face no 'group' problem caused by society or that social policy should be used to ameliorate").

8. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002); *see also, e.g.*, Bell v. Tower Mgmt. Serv., L.P., No. 07-CV-5305(FLW), 2008 WL 2783343 (D.N.J. July 15, 2008) ("reasonable accommodations for persons with disabilities involve preferential treatment").

9. *See, e.g.*, *id*.

10. *Id.*

11. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

12. *E.g.*, Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 921 (2006) ("Congress's impetus for passing Title VII (and then amending it in 1991) was strikingly similar to that underlying enactment of the ADA's employment provisions. In both cases, Congress recognized the need to eliminate barriers that historically had excluded groups from the workplace."); *see also* Samuel R. Bagenstos,

example, that wheelchair users experience disadvantages in securing employment due to historical decisions to construct buildings with stairs and narrow doorways, design decisions that reflect both formal and informal assumptions that persons with certain physical traits would not participate in public life.[13] The ongoing construction of (and reluctance to eliminate) these unnecessary barriers, while rarely couched in terms of overt animus, functions to frustrate workplace participation by persons with disabilities. Disability scholars suggest that by remedying this history of exclusion, ADA accommodations are analogous to the affirmative steps that Title VII requires to incorporate women into the workplace, such as the installation of women's restrooms in work facilities formerly occupied only by men.[14]

Subordination, Stigma, and "Disability," 86 VA. L. REV. 397, 418–45 (2000) (describing the socially constructed nature of the term "disability").

13. For example, Samuel Bagenstos writes,

> Consider, for example, a person with paralysis that prevents her from walking. If workplace entrances are accessible only by stairs, or they are too narrow to accommodate a wheelchair, then she cannot work. . . . [I]n [this] example[], the social relations model posits, it is not her physical impairment that has disabled her: What has disabled her is the set of social choices that has created a built environment that confines wheelchair users to their homes. The point can readily be extended to other physical structures . . . [such as] elevators with buttons that are too high for wheelchair users to press . . . .

Bagenstos, *supra* note 12, at 429 (footnote omitted).

14. *See, e.g.*, Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 594–96 nn.54–59, 618–19 (2004); *see also* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 716–17 (1978) (holding that an employer's actuarially reasonable pension system, under which female employers made higher contributions because of greater average longevity, violated Title VII); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1270, 1271 (W.D. Wash. 2001) ("Title VII . . . require[s] employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same.") (holding that an employer's exclusion of birth control pills from its health insurance plan, which provided generally comprehensive prescription coverage, violated Title VII); Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(b)(5) (2009) ("Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms . . . ."). Mary Crossly explains:

> We fail to recognize how much of the existing workplace scheme is built around the *needs* of the non-disabled, and we assume that this existing scheme is maximally productive just the way it is and that, consequently, any accommodation altering the dominant scheme will increase workplace cost and decrease productivity. Disability theorists (and other skeptics) challenge this assumption, asserting that while existing workplace practices and structures may suit the convenience of and advantage the non-disabled majority, they are not in any sense "natural" and may impose real costs. From this perspective, disabled people who request the reasonable accommodations guaranteed by the ADA are simply demanding the same thing that non-disabled employees receive as a matter of course—the tools reasonably necessary to allow them to perform their job. Providing those tools without a second thought to non-disabled employees, but refusing the requests of employees with disabilities, is indeed discriminatory.

Crossley, *supra* note 1, at 893 (emphasis in original) (footnotes omitted).

The lens through which courts view the ADA has weighty implications for future disability policy as well as for the on-the-ground reality of the employment opportunities available to persons with disabilities. For example, if courts regard the ADA as conferring charitable welfare benefits to persons with disabilities, courts may narrowly construe the ADA's substantive provisions to conform to a benefits framework that compensates for endogenous biological limitations. They may treat the ADA's employment provisions as a welfare benefits statute for which the paramount legal question is policing the line between those who are entitled to benefits and those who are not. By contrast, if courts regard the ADA as remedying past and current discrimination, they may be more inclined to shift the focus of ADA litigation away from the severity of the individual plaintiff's endogenous limitations to the workplace policies and practices that tend to unnecessarily exclude persons with disabilities.[15]

II. IMPACT ON COURTS' UNDERSTANDING OF THE ADA

Existing ADA case law demonstrates that the assumption that the ADA fundamentally differs from Title VII influences not only courts' conclusions about the scope of the ADA's protected class, but also courts' conclusions about the content of the ADA's nondiscrimination mandate. Although most ADA cases can be characterized as embodying traditional text-driven interpretative analysis of either the ADA itself or the constitutional provisions that gave Congress the authority to enact the ADA, the rhetoric of many judicial opinions reveals that even when courts engage in ostensibly textualist analysis, they inevitably presuppose a particular vision of the ADA's theoretical framework. Many cases suggest that courts tend to view the ADA through the framework of welfare benefits rather than the framework of civil rights.[16] To illustrate this phenomenon, this section traces two lines of cases in which the Supreme Court's assumption that the ADA conceptually differs from Title VII has led the Court to reach conclusions about the scope of the ADA's nondiscrimination mandate that significantly differ from the Court's conclusions about the scope of Title VII's nondiscrimination mandate.

A. Congress's Power to Remediate Social Subordination

First, the Supreme Court's understanding of the ADA as fundamentally different from Title VII animated the Court's conclusion that, unlike Title VII, which permits

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15. *See* Ron Amundson, *Disability, Handicap, and the Environment*, 23 J. SOC. PHIL. 105, 113 (1992) ("Someone whose disadvantage comes from a natural disaster may be an object of pity, and perhaps of charity. . . . Someone whose disadvantage occurs as a result of social decision has a more obvious claim for social remediation."); 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, 561 (1997) (observing, prior to the ADAAA, that "[t]he restrictive interpretations of statutory protection under the ADA . . . have engendered a situation in which many cases are decided solely by looking at the characteristics of the plaintiff").

16. *See* Crossley, *supra* note 1, at 874 ("[P]erceived distinctions between the ADA and Title VII may prompt judges to interpret the ADA's ambiguities consistently with a welfare reform vision of the statute, rather than consistently with a civil rights vision.").

state employees to sue their employers for sex discrimination, state employees may not sue their employers for disability-based employment discrimination under the ADA. In *Fitzpatrick v. Bitzer*, the Court concluded that the Fourteenth Amendment should be read to give Congress authority to authorize private litigation against the states for employment discrimination on the basis of sex.[17] The Court accordingly held that Title VII's prohibition of gender discrimination in state government employment was a valid exercise of Congress's Fourteenth Amendment power to remediate the subordination of historically disadvantaged groups.[18] In reaching this conclusion, the Court reasoned that the disadvantages women experience in employment—both in private business and in government jobs—result predominantly from historical social and political subordination rather than from inherent biological weakness vis-à-vis their male counterparts.[19]

By contrast, the Court's conclusion in *Board of Trustees of the University of Alabama v. Garrett* that Congress had exceeded its Fourteenth Amendment power by authorizing plaintiffs to sue state governments for disability-related employment discrimination reflected the Court's belief that the employment difficulties experienced by persons with disabilities have no significant social cause. In stark contrast to its acknowledgment of state-sponsored gender discrimination in *Fitzpatrick*, the Court downplayed the long history of state-sponsored exclusion and segregation of persons with disabilities.[20] The Court dismissed as insignificant the ADA's statutory findings that described persons with disabilities as a "discrete and insular minority" and which

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17. Fitzpatrick v. Bitzer, 427 U.S. 445, 453, 456 (1976).

18. *See id*. at 456.

19. *Cf.* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729–30 (2003) ("Congress responded to [the] history of [state gender] discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a), and we sustained this abrogation in *Fitzpatrick.*").

20. *See Garrett*, 531 U.S. at 369 & n.6. This history includes state policies denying education and citizenship to persons with disabilities, segregating them from the mainstream population, and forcibly sterilizing them in order to prevent the birth of more persons with disabilities. *See, e.g.*, CHI., ILL., MUN. CODE § 36-34 (1966) (repealed 1974) ("No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view."); Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a state compulsory sterilization law from constitutional attack, concluding that "[i]t is better for all the world [for] society [to] prevent those who are manifestly unfit from continuing their kind"); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 461–63 (1985) (Marshall, J., dissenting in part) (describing legislation arising from the early twentieth-century eugenics movement as embodying a "virulence and bigotry" against persons with developmental disabilities that "rivaled, and indeed paralleled, the worst excesses of Jim Crow"); S. REP. NO. 101-116 (1989) (quoting 117 CONG. REC. 45,974 (1971) (citing a case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates")); Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1297 & n.13 (1980) (noting that twenty-seven states enacted compulsory sterilization targeted at people with disabilities between 1907 and 1931 and that such laws remained on the books into the 1980s in at least four states).

found that "society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[21] The Court also downplayed evidence, which the congressional committees responsible for the ADA had amassed, that indicated that "[e]very government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased cost and decreased productivity."[22]

The Court drew instead on its previous conclusion in *City of Cleburne v. Cleburne Living Center* that, unlike gender, which "frequently bears no relation to ability to perform or contribute to society,"[23] persons with disabilities "as a group are indeed different from others not sharing their misfortune."[24] The Court characterized the ADA's directive to reasonably accommodate persons with disabilities as upsetting employers' "entirely rational [desire] . . . to conserve scarce financial resources by hiring employees who are able to use existing facilities."[25] Ignoring the extent to which the ADA's accommodations provision can be understood as requiring employers to provide disability-related accommodations comparable to the standard accommodations employers routinely provide to other employees, the Court characterized the ADA as requiring "special accommodations"[26] that "mak[e] allowance[s] for the disabled."[27] The Court did not acknowledge the extent to which ADA accommodations appear to confer preferential treatment on persons with disabilities only "because we see people with disabilities as somehow different from the 'normal,' non-disabled majority and because most workplaces have not been constructed or managed with the needs of a broad range of individuals in mind."[28]

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21. 42 U.S.C. § 12101(a)(2), (7) (2006). The *Garrett* Court reasoned that *Buck v. Bell*, which upheld compulsory sterilization laws, was written "70 years ago," and "there is no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted." *Garrett*, 531 U.S. at 369 n.6; *see also Buck*, 274 U.S. at 207 (concluding that "[i]t is better for all the world [for] society [to] prevent those who are manifestly unfit from continuing their kind").

22. H.R. REP. NO. 101-485, pt. 2, at 71 (1990); *see also Civil Rights Restoration Act of 1987: Hearing on S. 557 Before the S. Comm. on Labor and Human Resources*, 100th Cong. 80 (1987) (describing a study of twenty-three public jurisdictions showing that none was willing to hire blind applicants; that many jurisdictions excluded applicants with a history of cancer; and that one jurisdiction had a written standard prohibiting the hiring of an amputee for any job unless he or she used a prosthesis, even when the job tasks did not necessitate a prosthesis); S. REP. NO. 101-116, at 7–8 (1989) (describing a disfigured woman who was denied a job at a state university because "college trustees [thought] 'normal students shouldn't see her'").

23. 473 U.S. at 441 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)).

24. *Id.* at 448; *see Garrett*, 531 U.S. at 366–68.

25. *Garrett*, 531 U.S. at 372.

26. *Id*. at 367.

27. *Id.* at 368.

28. Crossley, *supra* note 1, at 891.

B. Exclusionary Paternalism as Discrimination

The assumption that the ADA's employment discrimination provisions significantly differ from Title VII's parallel provisions similarly fueled the Court's decision in *Chevron U.S.A., Inc. v. Echazabal*. In *Echazabal*, the Court upheld the Equal Employment Opportunity Commission's (EEOC) determination that the ADA provides no remedy for unilateral employer decisions that exclude persons with disabilities from the workplace based on paternalistic concern for their health and safety.[29] In a similar case, *UAW v. Johnson Controls, Inc*., the Supreme Court held that Title VII prohibits employers from excluding "women as capable of doing their jobs as their male counterparts" from the workplace based on the risk that workplace chemicals or other hazards would endanger their health or the health of their unborn children.[30] Framing the case as involving a clash between worker autonomy and the paternalism that had historically fueled policies excluding women from the workplace, the Court concluded that Title VII's civil rights mandate makes it the "individual woman's decision to weigh and accept the risks of employment"[31] and permits employers to consider "only the woman's ability to get her job done."[32] In reaching this conclusion, the Court distinguished an earlier case, *Dothard v. Rawlinson*, in which the Court had concluded that Title VII permitted a state's refusal to hire women as prison guards in a men's prison because a female guard's vulnerability to sexual assault might threaten other guards' safety if violence broke out.[33] The Court explained that Title VII permitted the prison's gender-based policy "only because more was at stake than the individual woman's decision to weigh and accept the risks of employment."[34] By contrast, the Court explained that, in situations in which the danger to a woman's health or safety will pose no threat to other employees, "the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."[35]

In sharp contrast to *Johnson Controls*, the Supreme Court in *Echazabal* unanimously upheld the EEOC's determination that the ADA permits employers to exclude qualified employees with disabilities based on the employer's determination that the job poses a risk to the employee's health or safety.[36] The plaintiff, Mario

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29. 536 U.S. 73, 85–86 (2002).

30. 499 U.S. 187, 204 (1991).

31. *Id.* at 202 (quoting Dothard v. Rawlinson, 433 U.S. 321, 335 (1977)).

32. *Id.* at 205–06.

33. *Id.* at 202; *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977).

34. UAW v. Johnson Controls, Inc., 499 U.S. 187, 202 (1991) (quoting *Dothard*, 433 U.S. at 335).

35. Dothard, 433 U.S. at 335. The Court also dismissed the employer's concerns about tort liability for injuries to the women's reproductive health and future children. *Johnson Controls*, 499 U.S. at 210 ("The tort-liability argument reduces to two equally unpersuasive propositions. First, Johnson Controls attempts to solve the problem of reproductive health hazards by resorting to an exclusionary policy. Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace. Second, the specter of an award of damages reflects a fear that hiring fertile women will cost more. The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender.").

36. 536 U.S. 73, 85–86 (2002).

Echazabal, had worked for a contractor in an oil refinery for twenty years but lost his job when the refinery owner concluded that the refinery chemicals were too dangerous for someone with his disability.[37] The case turned on the Court's interpretation of the ADA's business-necessity defense, which, much like the Court's interpretation of Title VII in *Johnson Controls*, provides that the qualification standards for a particular job "may include a requirement that an individual shall not pose a direct threat to the *health or safety of other individuals* in the workplace."[38] The ADA further provides that "[t]he term 'direct threat' means a significant risk to the *health or safety of others* that cannot be eliminated by reasonable accommodation."[39] While the Court could have reasoned that the ADA's express permission for excluding employees based on risks to others suggests that the ADA does not give employers permission to exclude employees based on their own vulnerability to workplace hazards, the *Echazabal* Court instead emphasized that the ADA provides that permissible employment criteria "*may include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals."[40] Focusing on the words "may include," the Court determined that the EEOC could expand the scope of permissible justifications for excluding qualified individuals with disabilities beyond "direct threat to the health or safety of other individuals," to include threats to the employee's own health or safety.[41]

The *Echazabal* Court relegated its discussion of *Johnson Controls* to a footnote in which it dismissed the parallel case as "beside the point."[42] Downplaying the autonomy rationale that animated *Johnson Controls*, the Court characterized *Johnson Controls* as reflecting "judgments based on the broad category of gender" in contrast to the "individualized risk assessment[]"[43] that Echazabal's employer used to exclude him from the workplace. This rationale, of course, disregarded the Court's conclusion in *Johnson Controls* that policies excluding fertile women from chemically hazardous workplaces violate Title VII not because of these policies' potential overbreadth but because these policies deny female employees the opportunity to assess the risk and rewards of employment for themselves.[44] Had the workplace policy in *Johnson*

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37. *Id*. at 76. Echazabal had worked in the refinery for more than twenty years with no discernible harm to his health or to his productivity. *See* Brief of the Am. Pub. Health Ass'n, the Am. Ass'n for the Study of Liver Disease, the Hepatitis C Action and Advocacy Coal., the Hepatitis C Ass'n, the Hepatitis C Outreach Project, and Lambda Legal Def. and Educ. Fund, as Amici Curiae Supporting Respondent at 11, Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002) (No. 00-1406), *available at* http://www.bazelon.org/publichealthbrief.html.

38. 42 U.S.C. § 12113(b) (2006) (emphasis added).

39. *Id.* § 12111(3) (emphasis added).

40. *Id.* § 12113(b) (emphasis added); *see also Echazabal*, 536 U.S. at 79.

41. *Echazabal*, 536 U.S. at 79–80.

42. *Id.* at 86 n.5.

43. *Id*.

44. While, in hindsight, *Johnson Controls*' policy excluding all fertile women of childbearing age appears overinclusive because not all such women will choose to bear children, the *Johnson Controls* Court itself did not list overbreadth as a reason the policy violated Title VII. UAW v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991). Furthermore, as Samuel Bagenstos has noted, the Court's distinction between the exclusion of a class in *Johnson Controls* and the exclusion of an individual in *Echazabal* does not withstand scrutiny because all judgments based on the probability of a risk require class-based thinking—"a conclusion (intuitively or statistically derived), based on experience with other individuals with the same

Controls excluded only the women who faced the greatest health risk (those who planned to become pregnant), the *Johnson Controls* Court would likely still have held that the policy violated Title VII because, as the *Johnson Controls* Court explained, Title VII "made clear that the decision . . . to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself."[45]

As in *Garrett*, the *Echazabal* Court's conclusion is at odds with the ADA's text, which appears to provide civil rights protection to persons with disabilities comparable to the civil rights protection Title VII extends to women. The ADA's statutory findings, which set out the justifications for the ADA's enactment, state that "overprotective rules and policies"[46] excluding persons with disabilities from the workplace are one of the "forms of discrimination" that "continue to be a serious and pervasive social problem."[47] Similarly, statements in the ADA's legislative history repeatedly suggest that "like women, disabled people have identified 'paternalism' as a major obstacle to economic and social advancement."[48] The House Committee Report reasons that because "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities,"[49] it is "critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant."[50] Most directly, co-sponsor Senator Edward Kennedy explained that

> It is important . . . that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. . . . That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.[51]

In short, the *Echazabal* Court did not acknowledge the reality that Congress understood: that like the historical subordination of women, the subordination of persons with disabilities routinely takes the form of seemingly well-intentioned paternalism which denies the affected person's right to self-determination.[52]

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diagnosis in similar environments." Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 941 (2004).

45. *Johnson Controls*, 499 U.S. at 206.

46. 42 U.S.C. § 12101(a) (5) (2006).

47. *Id.* § 12101(a)(2).

48. *Americans with Disabilities Act: Hearing Before the H. Comm. on Small Business*, 101st Cong. 126 (1990) (testimony of Arlene Mayerson); *see also* Weber, *supra* note 6, at 920 ("Simi Linton has noted the tendency to ascribe similar characteristics of dependency, emotionality, passivity, and immaturity to both women and persons with disabilities, a phenomenon that she terms the 'feminization of disability.'" (quoting SIMI LINTON, CLAIMING DISABILITY 100 (1998))).

49. H.R. REP. NO. 101-485, pt. 2, at 74 (1990).

50. *Id.* at 72; *see also* Stein & Waterstone, *supra* note 12, at 899 (surveying disability studies literature and concluding that "the vast majority of these commentators believe that differential treatment is grounded in pity and paternalism").

51. 136 CONG. REC. 17,377 (1990) (statement of Sen. Kennedy); *see also* H.R. REP. NO. 101-485, pt. 2, at 74 (1990) ("[E]mployment decisions must not be based on paternalistic views about what is best for a person with a disability.").

52. *See* Silvers et al., *supra* note 5, at 959 ("Like women, people with disabilities have a

Historically, formal and informal policies paternalistically excluded persons with many types of disabilities from the workplace—confining them to hospitals or other institutions. While these restrictions may have been necessary for a small number of individuals, such restrictions unnecessarily stunted the development and denied the autonomy of large populations of people who could participate in public life if the socially imposed barriers to their participation were removed.[53]

As in *Garrett*, the Supreme Court's conception of the ADA as fundamentally different from Title VII led the Court to read the ADA's nondiscrimination mandate more narrowly than Title VII's parallel mandate.[54] The Court downplayed strong indications in both the ADA's text and legislative history that Congress understood paternalistic decisions excluding qualified persons with disabilities from the workplace as discrimination.[55] The Court accordingly failed to acknowledge the extent to which paternalistic policies obscure the reality that many supposed dangers to persons with disabilities are not inevitable but instead could be removed.

II. THE NEW AMENDMENTS AND THE PERCEIVED CONCEPTUAL DIVIDE

A. The ADA Amendments Act of 2008: A Brief Overview

The ADA Amendments Act of 2008 does not provide the Supreme Court an avenue to revisit its holdings in either *Garrett* or *Echazabal* and does not directly address the perceived conceptual divide between the ADA and Title VII. Instead, the ADAAA focuses predominantly on reversing judicial constrictions of the ADA's protected class. Prior to the ADAAA, an ADA plaintiff had to prove not only that she experienced employment discrimination on the basis of disability but also that she met a stringent standard for qualifying as an "individual with a disability" within the meaning of the statute.[56] Textually, the ADA required plaintiffs to show that they had "a physical or mental impairment that substantially limits one or more of [their] major life activities," "a record of such an impairment," or that they were "regarded as having such an impairment."[57] The Supreme Court interpreted this standard stringently, reasoning that the "substantially limit[ed]" qualifier on the ADA's protected class should "be interpreted strictly to create a demanding standard."[58] The Court held that the phrase "substantially limits one or more . . . major life activities"[59] meant that the impairment

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history of being subjected to overprotective laws and workplace policies based on notions of biological incapability.").

53. *See* Weber, *supra* note 6, at 900 ("Keeping persons with disabilities hidden might be a means to protect them. The separation, however, more often protected those without disabilities from having to deal with the existence of anyone with a disability." (footnote omitted)).

54. *See* Silvers et al., *supra* note 5, at 949 (arguing that the Supreme Court's "failure to reject paternalistic notions of 'protecting' people with disabilities (in this case, from themselves) is inconsistent with its race and sex antidiscrimination jurisprudence").

55. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)–(5), 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101).

56. 42 U.S.C. § 12112(a) (2006) (amended 2008).

57. *Id.* § 12102(2).

58. Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101).

59. *Id.* at 193 (quoting 42 U.S.C. § 12102(2) (1994)).

must "prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily lives."[60] The Court also held that the determination of "substantial[] limit[ation]" must be made after taking into account mitigating measures, such as medication, that the individual uses to ameliorate her condition.[61] In light of these interpretations of the ADA's disability definition, commentators suggested that the Supreme Court was treating the ADA's employment provisions as a welfare-benefits statute for which the paramount legal question is policing the line between those who are entitled to the ADA's benefits and those who are not.[62]

Following the Supreme Court's restrictive interpretations of the ADA's protected class, many federal courts of appeals held that many persons with seemingly significant disabilities were not sufficiently limited to fall within the ADA's protected class. For example, the Tenth Circuit, citing the Supreme Court's determination that "the term 'substantial' must 'be interpreted strictly,'" concluded that no reasonable jury could find that a plaintiff with cerebral palsy was an "individual with a disability" despite her proven difficulties with speaking, eating, swallowing, preparing food, dressing herself, and other manual tasks.[63] Similarly, the Eleventh Circuit concluded that no reasonable jury could regard a twenty-nine-year-old man with mental retardation as an "individual with a disability" even though the man was diagnosed with mental retardation as a child, had received a certificate in special education rather than a traditional high school diploma, and continued to live at home with the support of his mother and social security benefits.[64]

Relatedly, the Supreme Court's determination that courts should judge "substantial limitation" by reference to the limitations a person experiences while using medication led lower courts to hold that the ADA excluded many plaintiffs who use medication to

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60. *Id*. at 198. Prior to the ADAAA, the ADA provided no definition of "major life activities," but EEOC regulations provided that this term should be read to include activities "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(h)(2)(i) (2009).

61. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482–83 (1999), *superseded in part by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101). The Court had reasoned that "[b]ecause the phrase 'substantially limits' appears in the Act in the present indicative verb form, . . . the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited" in order to fall within the ADA's protected class. *Id.* at 482.

62. *See, e.g.*, Crossley, *supra* note 1, at 945 ("If courts understand accommodation as a potentially costly 'special' or 'extra' benefit, then their willingness to dole out that benefit only to those who truly need it—the so-called 'truly disabled'—is unsurprising."); *cf*. Burgdorf, *supra* note 15, at 528 ("The benefit laws aim to give something to one group of people that is not made available to others. This necessitates a definite, circumscribed standard for determining who can get the services or benefits—an eligibility class. A nondiscrimination law, on the other hand, aims to provide a remedy for a much less confined class—anyone who has been subjected to discrimination.").

63. Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 766–67 (10th Cir. 2006) (citing *Williams*, 534 U.S. at 197).

64. Littleton v. Wal-Mart Stores, Inc., 231 Fed. App'x 874, 875, 878 (11th Cir. 2007) (concluding that the plaintiff had "no evidence which would create a genuine issue of material fact regarding whether he was substantially limited").

manage serious seizure disorders or mental illnesses.[65] While the "regarded as" prong of the ADA's disability definition might have ameliorated this situation by permitting plaintiffs who could not meet the stringent standard for demonstrating actual substantial limitation to point to their employer's negative attitudes toward their diagnoses, the Supreme Court functionally foreclosed this possibility by concluding that the ADA's "regarded as" provision required a plaintiff to prove not only that his employer discriminated against him on the basis of disability but also that his employer perceived him to be "substantially limit[ed]" in a "major life activit[y]" as the Supreme Court had defined those terms.[66] As a result of these restrictive interpretations of the ADA's protected class, a 2007 study suggested that federal courts had effectively limited the ADA's protected class to a category of persons that would have extreme difficulty demonstrating that they are qualified to work, even with the provision of ADA accommodations.[67]

In an effort to bolster the ADA's relevance in the employment context, the ADAAA rejects the Supreme Court's restrictive interpretations of the ADA's protected class. Explaining that the Supreme Court's interpretations of the ADA "created an inappropriately high level of limitation necessary to obtain coverage under the ADA,"[68] the ADAAA provides that the term "substantially limits" "shall be construed in favor of broad coverage."[69] The ADAAA also expressly rejects the Supreme Court's

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65. *See, e.g.*, Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002) (affirming the district court's holding that the plaintiff's diabetes did not rise to the level of a disability under the ADA, reasoning that "neither the district court nor we can consider what would or could occur if [the plaintiff] failed to treat his diabetes or how his diabetes might develop in the future. Rather, *Sutton* requires that we examine [the plaintiff's] present condition with reference to the mitigating measures taken, i.e., insulin injections and diet, and the actual consequences which followed"); Mosher v. Tex. Dep't. of Criminal Justice, No. 01-40386, 2001 WL 1692423, at *1 (5th Cir. Nov. 20, 2001) (affirming the district court's holding that the plaintiff's bipolar disorder did not rise to the level of a disability under the ADA "[b]ecause [the plaintiff's] bipolar disorder [was] corrected by medication" and thus "his mental impairment [did] not substantially limit his major life activities" under *Sutton*); Downie v. Revco Discount Drug Ctrs., Inc., 448 F. Supp. 2d 724, 730–31 (W.D. Va. 2006) (holding, based on *Sutton*, that the condition of a pharmacy technician who took medication to control his epilepsy "did not rise to the level of a disability under the ADA").

66. *Sutton*, 527 U.S. at 493 (holding that the plaintiffs' allegations that their employer regarded them as precluded from the job they desired on the basis of a physical limitation "does not support the claim that [the employer] regards [the plaintiffs] as having a *substantially limiting* impairment [because] '[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.'" (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1998) (emphasis in original) (citation omitted))).

67. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 7 (2007) (using Social Security Administration and Census Bureau data to conclude that "the approach chosen by the Court only results in about 13.5 million Americans receiving statutory coverage, with those individuals typically being so disabled that they are not qualified to work even with reasonable accommodations").

68. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (to be codified at 42 U.S.C. § 12101).

69. *Id.* § 4(a). The ADAAA also expressly notes that Congress expects the EEOC to revise its definition of the term "substantially limits." *Id.* § 2(b)(6) ("The purposes of this Act are . . . to express Congress' expectation that the Equal Employment Opportunity Commission will

conclusion that substantial limitation should be judged by reference to the functional difficulties a person experiences while using medication and other medical technology.[70] With the minor exception of persons who wear corrective lenses to address relatively common levels of vision impairment, the ADAAA provides that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures," thus instructing courts to judge substantial limitation by reference to an individual's unmedicated state.[71] The ADAAA also broadens the ADA's protected class by expanding the definition of "major life activity" beyond functional capacities such as "caring for oneself, performing manual tasks, [and] walking" to include "the operation of a major bodily function," which "include[s] but [is] not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[72] These changes to the meaning of the phrase "substantially limits one or more . . . major life activities" will enable a much larger number of persons to use the ADA to sue for reasonable accommodations.[73]

Even more significant than this redefinition of the phrase "substantially limits one or more . . . major life activities" is the ADAAA's elimination of the "substantially limits" requirement altogether for cases not involving a request for a reasonable accommodation.[74] While the original ADA required all plaintiffs to demonstrate a substantial limitation of a major life activity, the ADAAA provides that when a plaintiff is not requesting a reasonable accommodation, she must prove only that she experienced discrimination due to a physical or mental impairment (whether actual or perceived) that is not "transitory and minor."[75] The ADAAA achieves this result via amendments to the ADA's "regarded as" provision, which was originally designed to

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revise that portion of its current regulations that defines the term 'substantially limits' as 'significantly restricted' to be consistent with this Act, including the amendments made by this Act.").

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

71. *Id.* § 4(a).

72. *Id*. The ADAAA also adds to the nonexclusive list of functional activities "standing, lifting, bending, . . . reading, concentrating, thinking, communicating, and working." *Id.*

73. The ADAAA further loosens the Supreme Court's restrictive reading of "substantial[] limit[ation]" by providing that the determination of whether a condition "substantially limits a major life activity" hinges on whether the condition "would substantially limit a major life activity when active." *Id.* While the EEOC's position had been that "[c]hronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms," courts had often concluded that persons with such conditions fell outside the ADA's protected class. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 902: DEFINITION OF THE TERM DISABILITY (2000). *Compare id.*, *with* Berry v. T-Mobile USA, Inc., 490 F.3d 1211, 1218 (10th Cir. 2007).

74. 42 U.S.C. § 12102(2) (2006) (amended 2008); *see also* ADA Amendments Act § 4(a).

75. ADA Amendments Act § 4(a). *Compare id.*, *with* § 12201(2). The ADAAA further provides that "[a] transitory impairment is an impairment with an actual or expected duration of 6 months or less." ADA Amendments Act § 4(a).

permit plaintiffs to establish membership in the ADA's protected class based on their employer's perception—whether accurate or not—that they had a disability. Plaintiffs attempting to use the "regarded as" provision had little success prior to the ADAAA because of the Supreme Court's conclusion that the "regarded as" language required plaintiffs to prove that their employer believed they were substantially limited in a major life activity.[76] The ADAAA amends the "regarded as" provision to provide that plaintiffs must now simply demonstrate that they have an "actual or perceived physical or mental impairment."[77] Whether "the impairment limits or is perceived to limit a major life activity" is no longer relevant to whether a plaintiff alleging discrimination (other than the denial of a reasonable accommodation) qualifies for membership in the ADA's protected class.[78] In light of this change, many ADAAA supporters anticipate that all ADA litigation not involving a request for a reasonable accommodation will now proceed under the "regarded as" prong. Representatives Steny Hoyer and James Sensenbrenner, principal sponsors of the ADAAA, explain that "[a]ny individual who has been discriminated against because of an impairment—short of being [denied] a reasonable accommodation or modification—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment."[79]

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76. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 493 (1999) (holding that the plaintiffs' allegations that their employer regarded them as precluded from the job they desired on the basis of a physical limitation "does not support the claim that [the employer] regards [the plaintiffs] as having a *substantially limiting* impairment [because t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working" (citation omitted)), *superseded in part by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (to be codified at 42 U.S.C. § 12101).

77. ADA Amendments Act § 4(a)(3)(A).

78. *Id*. The odd placement of this change within the "regarded as" prong is a consequence of a compromise between disability groups and the business community. The bill drafted by the National Council on Disability would have eliminated the substantial limitation requirement for all ADA plaintiffs, regardless of whether they were suing for an employer's failure to provide a reasonable accommodation or for a different form of disability discrimination. But the business community was not willing to agree to amendments that would significantly increase the number of individuals who could sue for reasonable accommodations. *See* Memorandum from the ADA Disability Negotiating Team to Interested Stakeholders 2 (June 2, 2008) *available at* http://www.dredf.org/programs/Response%20Memo%20to%20DREDF%20060208.pdf (explaining that this modification to the original bill "is unavoidable if we want to pass a bill with the support of the business community" (emphasis omitted)). The compromise also resolved a question that had split the federal courts of appeals: whether a person merely "regarded as" having a disability could sue for a reasonable accommodation. Some courts, reading the text literally and following precedent under the Rehabilitation Act, had concluded that the ADA permitted persons who did not have a substantially limiting physical or mental impairment to sue for a reasonable accommodation if they could demonstrate that their employer believed they had a substantially limiting impairment within the meaning of the ADA. *See, e.g.*, Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc). The ADAAA's amendments to the "regarded as" prong reverse these decisions and make clear that only persons with actual substantially limiting impairments may sue for reasonable accommodations. ADA Amendments Act § 4(a); *see also* 154 CONG. REC. S8342, S8344 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin) (noting removal of "regarded as" portion).

79. 154 CONG. REC. H6058, H6068 (daily ed. June 25, 2008) (joint statement of Reps.

To highlight the ADA's expanded scope, the ADAAA also realigns the wording of the ADA's core provision to better parallel the wording of Title VII, which prohibits employers from taking adverse employment actions against an individual "because of such individual's race, color, religion, sex, or national origin."[80] The cumbersome wording of the ADA's original text emphasized that the ADA's protection from disability-based discrimination applied only to persons who qualified for membership in the ADA's protected class. It provided that, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . . ."[81] According to a congressional committee report, the new text, which provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability,"[82] communicates that:

> the emphasis in questions of disability discrimination [should be] on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is even a "person with a disability" with any protections under the Act at all.[83]

The proponents of the ADAAA "hope this will be an important signal to both lawyers and courts to spend less time and energy on the minutia of an individual's impairment, and more time and energy on the merits of the case."[84]

B. Unintentionally Reshaping the Debate

To a significant degree, the ADAAA may be read as aligning the ADA with Title VII. By broadening the ADA's protected class, the ADAAA rejects the Supreme Court's impulse to limit the ADA's protections to persons with the most severe biological limitations. It suggests that, in the future, courts should focus their attention on whether employer conduct constitutes disability discrimination rather than on policing the boundaries of the ADA's protected class. In this respect, the amendments counter the Supreme Court's assumption that the ADA is a welfare benefits statute for which the overriding legal question is determining benefits eligibility. However, the

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Hoyer and Sensenbrenner); *see also id.* (further explaining that "we expect [the actual disability prong will] be used only by people who are affirmatively seeking reasonable accommodations or modifications."). Whether Representatives Hoyer and Sensenbrenner's prediction is correct may hinge on courts' application of the traditional burden-shifting framework that applies in employment discrimination cases. If courts interpret the "regarded as" prong to require plaintiffs to prove, as part of their prima facie case, that they experienced disability-based discrimination, some plaintiffs may instead choose to establish membership in the protected class by demonstrating an actual "substantial limitation." *Cf.* Pulcino v. Fed. Express Corp., 9 P.3d 787 (Wash. 2000); McClarty v. Totem Elec., 81 P.3d 901 (Wash. Ct. App. 2003), *reversed by* McClarty v. Totem Elec., 137 P.3d 844 (Wash. 2006).

80. 42 U.S.C. § 2000e-2(a)(1) (2006).

81. *Id.* § 12112(a) (2006) (amended 2008).

82. ADA Amendments Act § 5(a).

83. H.R. REP. NO. 110-730, pt. 1, at 16 (2008).

84. 154 CONG. REC. H6058, H6067 (daily ed. June 25, 2008) (joint statement of Reps. Hoyer and Sensenbrenner).

measures the ADAAA takes to enlarge the ADA's protected class do not entirely eliminate the perceived conceptual divide between Title VII and the ADA. They eliminate one result of that divide—the courts' constriction of the ADA's protected class—but they do not eliminate the broader uncertainty surrounding the question of whether courts should understand the ADA as aimed at remediating social factors that unnecessarily exclude persons with disabilities. In fact, as the following two sections suggest, the ADAAA's changes to the scope of the ADA's protected class may have the unintentional effect of weakening the claim that courts should understand the ADA as protecting a subordinated "minority" group comparable to Title VII's protected classes.

1. Removing Minority Language

First, the ADAAA risks strengthening the perceived conceptual divide between the ADA and Title VII by eroding the extent to which the ADA provides explicit textual support for understanding the ADA's protected class as a politically subordinated minority. As part of the effort to prevent courts from continuing to constrict the ADA's protected class, the ADAAA deletes a portion of the ADA's findings section that described persons with disabilities in the terms normally used to describe politically subordinated minority groups.[85] While the findings sections of most statutes generally carry little weight for purposes of interpreting a statute's substantive provisions, the contested nature of the ADA's purpose has led many courts and commentators to regard the ADA's findings "as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned."[86] Prior to the ADAAA, section 7 of the ADA's "Findings" statement provided that:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[87]

In place of this finding, the ADAAA provides a more modest depiction of persons with disabilities' subordinated status. It explains that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many

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85. ADA Amendments Act § 3(2).

86. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 613 (1999) (Kennedy, J., concurring). The Supreme Court's interpretations of the ADA have relied heavily on the ADA's findings section. Most notably, the Court used the Act's finding that an estimated 43 million Americans have disabilities to conclude that persons who have effectively mitigated their disability fall outside the ADA's protected class. Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999), *superseded in part by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101); *see also* Stein, *supra* note 14, at 668 (suggesting that the findings are particularly important since people with disabilities, unlike other minority groups, "were empowered by civil rights legislation prior to a general elevation of social consciousness about their circumstances and capabilities").

87. 42 U.S.C. § 12101(a)(7) (2006).

people with physical or mental disabilities have been precluded from doing so because of discrimination."[88] Although the House Judiciary Report on the ADAAA declares that this new finding "is consistent with" the prior section 7 finding,[89] courts might nonetheless conclude that the new statutory text weakens the connection between the ADA and the political subordination rationale for disability-related accommodations.[90]

As originally written, the section 7 finding indisputably signaled an understanding of disability as analogous to race and gender. It invoked the famous footnote of Justice Stone's *Carolene Products* opinion, which outlined the indicia of majoritarian subordination that justified judicial scrutiny by noting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[91] In drafting section 7, Congress expressly borrowed *Carolene Products*'s language as well as the Supreme Court's later rephrasing of the *Carolene Products* indicia of a politically subordinated group in *San Antonio Independent School District v. Rodriguez*.[92]

To the extent that section 7's language varied from the Supreme Court's articulation of the *Carolene Products* criteria for a politically subordinated minority, the variation reflected Congress's effort to reject the Supreme Court's conclusion in *City of Cleburne v. Cleburne Living Center*, just five years prior to the enactment of the ADA, that state action disadvantaging persons on the basis of disability does not merit

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88. ADA Amendments Act § 3(1).

89. H.R. REP. NO. 110-730, pt. 2, at 15 (2008).

90. To date, the Supreme Court has tended to dismiss arguments that the ADA's legislative history is a relevant tool for discerning the ADA's meaning. *See, e.g.*, *Sutton*, 527 U.S. at 482 ("Justice Stevens relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history." (citation omitted)).

91. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

92. 411 U.S. 1, 28 (1973) (describing the *Carolene Products* indicia of a politically subordinated minority as involving persons "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); *see also* Bagenstos, *supra* note 132, at 420 ("Although it is implausible to speak of people with disabilities as a 'discrete' or 'insular' group in a physical or geographic sense, the statute plainly uses those terms as constitutional code words to designate an identifiable group of people who experience a common set of obstacles to participation in public and private life." (footnote omitted)); James Leonard, *The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 10 (2005) ("To say that the ADA is a civil rights statute may seem a waste of breath. Civil rights terminology pervades the statute. The 'Findings and Purposes' section of the Act invokes Justice Stone's famous footnote in *United States v. Carolene Products Co*. . . ." (citation omitted)); Stein, *supra* note 14, at 661 ("The use of this specific language in the ADA—responding to what the Supreme Court, circa 1990, required for heightened constitutional scrutiny—demonstrates that Congress was consciously attempting to frame ADA remedies as part of an antisubordination agenda, a classic goal of civil rights law.").

heightened judicial scrutiny.[93] Section 7's finding that discrimination against persons with disabilities "result[s] from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society"[94] countered the *Cleburne* Court's conclusion that developmentally disabled persons' "reduced ability" justifies governmental regulations disadvantaging them.[95] Section 7's finding that persons with disabilities continue to be "relegated to a position of political powerlessness"[96] countered the *Cleburne* Court's conclusion that the existence of legislation providing welfare benefits to persons with developmental disabilities "negates any claim that the[y] are politically powerless."[97] In fact, section 7 so pointedly rejected the *Cleburne* Court's rationales for refusing to regard persons with disabilities as members of a politically subordinated minority that, in the years immediately following the ADA's enactment, several federal courts concluded that the ADA had effectively overruled *Cleburne* and required federal courts to give heightened scrutiny to government action disadvantaging persons on the basis of disability.[98] When the Supreme Court ultimately rejected this conclusion, it did so only after expressly considering and rejecting the factual accuracy of section 7's assertion that persons with disabilities are a subordinated minority.[99]

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93. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

94. 42 U.S.C. § 12101(a)(7) (2006).

95. *Cleburne*, 473 U.S. at 442.

96. § 12101(a)(7).

97. *Cleburne*, 473 U.S. at 445; *see also id.* at 443 (reasoning that mid-to-late twentieth-century legislation designed to provide welfare benefits to persons with developmental disabilities signaled the absence of "continuing antipathy or prejudice" toward such persons). Section 7's finding that "individuals with disabilities are a discrete and insular minority," § 12101(a)(7), not only echoed the *Carolene Products* footnote but also expressly countered the *Cleburne* Court's conclusion that persons with mental retardation constitute a "large and amorphous class," *Cleburne*, 473 U.S. at 445.

98. *See, e.g.*, Martin v. Voinovich, 840 F. Supp. 1175, 1210 (S.D. Ohio 1993) (holding that disability-based classifications are "subject at least to intermediate heightened scrutiny based on Congress's findings in § 12101 [of the ADA]"); Trautz v. Weisman, 819 F. Supp. 282, 293 (S.D.N.Y. 1993) (holding that "[t]o the extent that [prior cases] rely upon conclusions that people with disabilities are not a class historically discriminated against, we think them undercut by the ADA . . . ."); Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability under the Americans with Disabilities Act Should be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 113 (2000) ("The apparent purpose of the 'discrete and insular' characterization was not necessarily to further define the protected class, but rather to overrule the Supreme Court's ruling in *City of Cleburne v. Cleburne Living Center* . . . ."); Kyle C. Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation*, 6 WM. & MARY J. WOMEN & L. 323, 359 (2000) ("Congress's use of this language was significant—it may suggest that Congress intended that persons with disabilities be considered a suspect class."). The Supreme Court's federalism cases soon made clear, however, that Congress could not, by statute, overturn the Supreme Court's equal protection jurisprudence. *See* City of Boerne v. Flores, 521 U.S. 507, 516–20 (1997) (holding that Congress may not unilaterally raise the level of judicial review applied by the courts under the Fourteenth Amendment).

99. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 370–72 (2001). The Court concluded that Congress had not amassed sufficient evidence of "purposeful unequal treatment" to justify regarding persons with disabilities as politically powerless within the meaning of

The ADAAA's excision of section 7 from the ADA may lead courts to conclude that Congress now agrees with the Supreme Court's assessment in *Cleburne* and *Garrett* that the ADA's protected class does not fit the *Carolene Products* definition of a subordinated minority.[100] To counter this line of thought, advocates for a civil rights view of the ADA will need to emphasize the ADAAA proponents' stated rationale for deleting section 7. The relevant committee report explains that "[s]triking [section 7 was] necessary because [it had] been interpreted in a manner that is inconsistent with the intent to protect the broad range and class of individuals with disabilities."[101] This statement refers to Justice Ginsburg's opinion in *Sutton v. United Air Lines, Inc.* in which she concurred with the majority's conclusion that the ADA excluded persons who used ameliorative measures to remove the substantially limiting effects of their disability. Justice Ginsburg reasoned that:

> [I]n no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a "discrete and insular minority." . . . Congress' use of the phrase ["discrete and insular minority"] . . . is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class.[102]

To counter the view that the members of the ADA's protected class are not a politically subordinated minority, advocates should note that the difficulty of characterizing persons with disabilities as a "discrete and insular" group is not an insurmountable obstacle to acknowledging the social exclusion and socially imposed limitations they have experienced. Women, who enjoy civil rights protections under the Fourteenth Amendment and Title VII, similarly are not literally a "restrict[ed],"

Carolene Products. *Id*. The Court also rejected section 7's conclusion that persons with disabilities constitute a "discrete and insular minority," § 12101(a)(7), by emphasizing its previous observation in *Cleburne* that persons with disabilities are a "large and amorphous class," *Garrett*, 531 U.S. at 366 (quoting *Cleburne*, 473 U.S. at 445).

100. Although the House Committee on Education and Labor Report states that "the Committee does continue to believe that individuals with disabilities 'have been faced with the restrictions and limitations[,] . . . a history of purposeful unequal treatment, and . . . political powerlessness,'" H.R. REP. No. 110-730, pt. 1, at 8 (2008) (citation omitted), the Supreme Court's dismissive view of the ADA's legislative history reduces the weight this statement might otherwise carry, *see, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) ("Justice Stevens relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history." (citation omitted)), *superseded in part by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101). Courts may further read Congress's choice to cover a broader group of individuals as distancing the ADA from its civil rights rationale because many physical limitations not historically associated with segregation and animus—such as arthritis, carpal tunnel syndrome, and back problems—occur at much higher rates than "traditional" disabilities which historically resulted in segregation and animus.

101. H.R. REP. NO. 110-730, pt. 2, at 15 (2008); *see also id.*, pt. 1, at 8 ("The bill deletes the ADA's finding pertaining to a 'discrete and insular minority,' because of the manner in which it was used in *Sutton* to reason that Congress intended to 'restrict the ADA's coverage to a confined, and historically disadvantaged, class' and that 'in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a 'discrete and insular minority.'" (citations omitted)).

102. *Sutton*, 527 U.S. at 494–95 (Ginsburg, J., concurring).

"confined," or "insular" group—they comprise over half the population, are geographically dispersed, and can be found in virtually all socio-economic levels.[103] Although women as a group perhaps share more biological traits than do persons with disparate disabilities, the trait relevant to the *Carolene Products* analysis is the history of political and social subordination,[104] a "trait" shared by persons with myriad physical and mental characteristics labeled "disabilities" by persons without those characteristics.[105]

Advocates should further note that the ADAAA committee report's stated reason for deleting the "discrete and insular" phrase is to address the risk that courts might use the phrase to justify constricting the number of persons included in the ADA's protected class.[106] This rationale parallels the committee report's rationale for deleting the ADA finding that stated that "43 million Americans" have disabilities.[107] The Supreme Court had construed this finding as representing a ceiling, rather than a floor, on the number of persons able to bring ADA claims.[108] The amendments delete both findings in order to remove opportunities for courts to again constrict the ADA's protected class.[109] Thus, the amendments' narrow focus on clearly defining the ADA's protected class should not be understood to abandon the rationale for protecting that class—to remedy the social exclusion and socially imposed limitations that persons with disabilities frequently experience.[110]

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103. *See* United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) ("It is hard to consider women a 'discrete and insular' minorit[y] unable to employ the 'political processes ordinarily to be relied upon,' when they constitute a majority of the electorate.").

104. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

105. *See* Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814 (1966) ("Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar 'equality'; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished.").

106. H.R. REP. NO. 110-730, pt. 2, at 15.

107. *Id.* The House Judiciary Report provides as follows:

> [The ADAAA] modifies two findings in the ADA that have been used by the Supreme Court to support a narrow reading of "disability." Specifically, the bill strikes the ADA finding pertaining to "43 million Americans," and the ADA finding pertaining to "discrete and insular minority." The Supreme Court relied upon both of these findings in determining that the ADA's definition of disability should be interpreted strictly, rather than broadly as Congress had intended. Striking these findings is necessary because both have been interpreted in a manner that is inconsistent with the intent to protect the broad range and class of individuals with disabilities.

Id. (footnotes omitted).

108. *See id*.

109. *Id.*

110. Unfortunately, this argument may be difficult to make because Congress considered and rejected other textual options that would have at least partially preserved the language describing persons with disabilities as a subordinated minority. For example, it could have adopted the initial version of the bill, which would have excised the contested "discrete and insular minority" phrase but retained the rest of section 7's *Carolene Products* language. *See* ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 2 (2007). Alternatively, Congress could have adopted the National Council on Disability's proposed change to section 7, which would have amended section 7 to indicate that "some groups or categories" of the ADA's

2. Tying Accommodations to Medical Severity

The second way in which the ADAAA may broaden the conceptual divide between the ADA and Title VII is by strengthening the connection between the severity of endogenous limitations and the right to sue for ADA accommodations. Although the ADA has always restricted the right to sue for reasonable accommodations to persons "substantially limited" in a major life activity, the ADAAA appears to strengthen the connection between reasonable accommodations and the severity of endogenous limitations. For example, the ADAAA's addition of biological functions to the list of major life activities—which, if "substantially limited," permit an individual to sue for a reasonable accommodation—ties the ability to sue for an accommodation more closely to the medical severity of the individual's endogenous limitations.[111] Unlike the major life activities courts recognized prior to the ADAAA, many of which at least tangentially addressed the interaction between the individual and his social environment (e.g., the major life activities of working, caring for oneself, and interacting with others), many of the ADAAA's new major life activities, such as "normal cell growth," are fully internal to the individual's biology and operate separately from the individual's interactions with other persons.[112] Determining whether a person can sue for needed accommodations based on the degree of impairment to "normal cell growth" makes the right to sue for accommodations hinge squarely on the medical severity of the underlying biological condition, rather than on the interaction between the condition and the socially constructed environment. The ADAAA may accordingly reinforce, at least for some courts, the perception that ADA accommodations compensate for biological deficiencies.

Furthermore, by permitting a large number of individuals to sue for disability discrimination but only a limited subset of that group to sue for reasonable accommodations, the ADAAA may underwrite the perception that ADA accommodations compensate for endogenous biological limitations. As outlined above, the amendments provide that persons with impairments that do not meet the "substantially limiting" bar may bring the types of claims available under Title VII—such as claims that an employer fired them (or failed to promote them, hire them, or provide them equal pay) on the basis of disability—but they may not sue for a reasonable accommodation.[113] Only persons who can meet the higher threshold of demonstrating that their impairments substantially limit one or more major life

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protected class fit the *Carolene Products* criteria. *See* NAT'L COUNCIL ON DISABILITY, RIGHTING THE ADA 108 (2004), http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf.

111. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102(3)(2)(b)) (expanding the ADA's conception of "major life activities" to "includ[e] . . . functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").

112. *Id*.

113. *See id.* (modifying the definition of "disability" to include an individual who "establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity"). *See generally* 42 U.S.C. § 12112 (2006) (providing a general rule against discrimination and defining discrimination for the purpose of bringing claims under the ADA).

activities may use the ADA to challenge an employer's refusal to reasonably accommodate their disability.[114] Some courts may regard this reservation of accommodations to a limited subset of the ADA's protected class as incorporating into the ADA the dichotomy between "same treatment" and "different treatment" that many courts regard as conceptually dividing Title VII and the ADA.[115] They may regard the ADAAA as requiring employers to treat the majority of the ADA's protected class identically to their fellow employees while requiring employers to treat a small subset of the ADA's protected class (those who are substantially limited) preferentially. The alignment of this dichotomy with the severity of the person's impairment may reinforce the assumption that ADA accommodations compensate for endogenous biological limitations.

By conditioning the ability to sue for reasonable accommodations on the severity of the individual's endogenous biological traits, the ADAAA obscures the role that socially constructed workplace barriers play in creating the need for ADA accommodations. It also hides the reality that persons who fall within the ADA's scope cannot be neatly sorted into two groups comprised of "those who need accommodations" and "those who do not" because the need for accommodations hinges not solely on the severity of the individual's condition but also on the characteristics of the job and the work environment within which it is performed. Persons with impairments that the ADAAA considers substantially limiting can succeed in many jobs without disability-related accommodations. For example, a paraplegic accountant, whom the ADA would consider "substantially limited," likely will need no accommodations from his employer in order to perform his job duties, assuming an accessible building. Similarly, persons with impairments that the ADA might not consider substantially limiting often encounter unnecessary workplace barriers traceable to the historical assumption that only species-typical persons would occupy the workplace. For example, "someone with a very mild case of diabetes likely still requires accommodation" in job situations that do not routinely provide regular opportunities to eat and monitor one's blood sugar.[116]

Conditioning the ability to sue for reasonable accommodations on a "substantial limitation" would better fit a civil rights conception of disability if the term "substantial limitation" measured the unnecessary barriers a particular work environment imposed on an individual rather than the individual's endogenous biological limitations. This understanding of "substantial limitation" would acknowledge that the design and culture of the workplace, in interaction with the individual's biological traits, contributes to the limitations a person experiences in a particular job. However, courts have consistently rejected this interpretation of "substantially limits," concluding that evidence that a person is substantially limited by an unnecessary workplace barrier in a

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114. ADA Amendments Act § 4(a).

115. *Cf.* Long, *supra* note 2, at 622 ("An individual who is capable of performing the essential functions of a position without an accommodation does not seek special treatment; such an individual simply seeks to be treated like other employees. As such, these kinds of ADA plaintiffs are virtually indistinguishable from plaintiffs who seek relief from discrimination under Title VII." (citation omitted)).

116. 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, 214 (2008).

particular job is not sufficient to require the employer to remove that barrier.[117] Fueled in large measure by the ADA's treatment of work as just one of many "major life activities" that, if substantially limited, can qualify a person for membership in the ADA's protected class, courts have concluded that an ADA plaintiff must prove that she would experience a substantial disability-related limitation in a broad class of jobs, not just the job she currently desires or possesses, in order to receive a reasonable accommodation.[118]

However, even defining "substantial limitation" as a measure of the difficulties an employee experiences in a particular job would not necessarily remove the risk that courts might interpret a two-tiered protected class as underwriting the assumption that accommodations compensate for inherent limitations. In 2003, a division of the Washington State Court of Appeals briefly interpreted Washington's disability discrimination statute to tie the availability of reasonable accommodations to whether the individual experienced substantial limitation in the particular job he desired or possessed.[119] Despite this workplace-barriers approach to determining "substantial limitation," the court's language revealed that the court nonetheless viewed disability accommodations as "request[s for] special treatment."[120] The court characterized reasonable accommodation suits as fundamentally different from disparate treatment cases, in which, according to the court, the employee is "asking only to be treated like all other employees."[121] The court did not address the extent to which ADA accommodations may be understood as analogous to the accommodations employers provide as a matter of course to employees without disabilities (such as furniture, lighting, and breaks designed to fit their biological needs).

In order to emphasize that the purpose of the ADA's reasonable accommodations provision is to remove unnecessary workplace barriers rather than to compensate for inherent biological limitations, disability advocates should stress that the ADAAA's two-tiered protected class is a product of political compromise rather than a conscious attempt to articulate a theoretical justification for requiring employers to accommodate persons with disabilities. The bill drafted by the National Council on Disability would have eliminated the substantial limitation requirement for all ADA litigation, including reasonable accommodation claims.[122] But the business community, which had benefited significantly from the Supreme Court's restrictive interpretations of the ADA's protected class, was not willing to endorse amendments that would have exponentially increased the number of individuals who could sue for reasonable accommodations.[123] In light of this political compromise, disability advocates should

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117. Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999) ("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."), *superseded in part by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101).

118. *Id*. at 491–92.

119. McClarty v. Totem Elec., 81 P.3d 901, 908 (Wash. Ct. App. 2003), *rev'd en banc*, 137 P.3d 844 (Wash. 2006).

120. *Id*. at 910.

121. *Id*.

122. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 110.

123. *See* Memorandum from the ADA Disability Negotiating Team to Interested

argue that the ADAAA's bifurcated protected class is not a signal that Congress understands the ADA as a graduated disability benefits system that distributes different levels of benefits keyed to the severity of an individual's endogenous limitations. Instead, the rationale for ADA accommodations remains the same: accommodations are needed to remediate socially constructed barriers embedded in the workplace. By authorizing only persons with more severe impairments to sue for accommodations, the ADAAA does not shift the ADA toward a compensatory regime but instead simply compromises the goal of remediating socially constructed barriers to account for employers' concerns about the costs of this remediation.

Advocates should also note that the amendments' extension of the ability to sue under the ADA to a broader range of individuals could, in some measure, be understood to harmonize the ADA with Title VII. The ADA's limited protected class is perhaps the most salient difference between the ADA and Title VII, which permits all individuals—even members of historically advantaged groups—to sue for race and sex discrimination.[124] By broadening the ADA's protected class, the amendments bring the ADA closer to Title VII by addressing a larger amount of disability-based animus. Prior to the amendments, the ADA provided no remedy for persons with conditions that courts did not regard as substantially limiting (such as seizure disorders or mental illness controlled with medication).[125] Employers who blatantly refused to hire fully qualified individuals "because the person has a disability" or "because the person's disability will make his prospective co-workers uncomfortable" avoided liability for disability-based discrimination because the victim could not demonstrate that either his disability substantially limited a major life activity or that the employer believed that he was substantially limited as courts had defined that term.[126] As amended, the ADA's ability to capture a broader range of disability-based animus brings the ADA in line

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Stakeholders, *supra* note 78, at 2 (explaining that this modification to the original bill "is unavoidable if we want to pass a bill with the support of the business community"). The compromise also resolved a question that had split the courts of appeals: whether a person merely "regarded as" having a disability could sue for a reasonable accommodation. Some courts, giving a literal reading to the ADA's text and following precedent under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796*l*, had concluded that the ADA permitted persons who had no endogenous limitations to sue for reasonable accommodations if they could demonstrate that their employer believed they had a substantially limiting impairment within the meaning of the ADA. *See, e.g.*, Kelly v. Metallics West, Inc., 410 F.3d 670, 675–76 (10th Cir. 2005). Although these courts required accommodations most often in situations where the plaintiff in fact had an impairment (albeit one that was not substantially limiting), their analysis appeared to theoretically entitle people to accommodations when the employee's impairment was entirely in the employer's mind. *See id*.; H.R. REP. NO. 110-730, pt. 1, at 12–14 (2008).

124. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1) (2006).

125. *See* Mosher v. Tex. Dep't of Criminal Justice, No. 01-40386, 2001 WL 1692423, at *1 (5th Cir. Nov. 20, 2001) ("Because [the plaintiff's] bipolar disorder [is] corrected by medication, his mental impairment does not substantially limit his major life activities and, therefore, does not constitute a disability under the ADA.").

126. Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 1062 (2008) ("[I]n a hypothetical case in which Sonia tells John simply, 'I will not hire you because of your disability,' John may not be able to invoke protection under the regarded-as prong" because courts have held that "'[i]t is not enough . . . that the employer regarded that individual as *somehow* disabled; rather, the plaintiff must show that the employer regarded the individual as disabled *within the meaning of the ADA*.'" (emphasis in original)).

with Title VII, which does not condition the ability to sue for race- or sex-based discrimination on the degree to which the plaintiff exhibits race- or sex-based characteristics.

III. LOOKING FORWARD: FUTURE ADA INTERPRETATION

By broadening the scope of the ADA's protected class and attempting to focus courts' attention on employer conduct rather than on plaintiffs' biological traits, the ADAAA will raise a host of new interpretive issues about the scope of the ADA's nondiscrimination mandate. It will also require courts to address issues that they confronted but did not fully resolve prior to the amendments. The courts' conceptual understanding of the ADA's goals and purposes will likely affect the resolution of these issues. This Part explores four important interpretive questions that the ADAAA will require courts to address and argues that the resolution of these questions will turn on the courts' understanding of the conceptual relationship between the ADA and traditional civil rights statutes.

A. Intraclass Discrimination

One issue that the ADAAA's broadened protected class may raise is the question of whether the ADAAA prohibits employers from preferring a protected class member with a more biologically severe disability over a protected class member with a less biologically severe disability. By broadening the ADA's protected class to include nonsubstantially limited persons who experience discrimination on the basis of disability, the ADAAA increases the possibility that an ADA plaintiff may allege that an employer refused to hire him because of his disability and instead hired another member of the ADA's protected class. For example, it is not difficult to imagine a case in which a plaintiff with Asperger's syndrome, a relatively mild neurological condition related to autism, might claim that an employer refused to hire him for a computer programming position in favor of a less qualified wheelchair user, a person whom a court might regard as possessing a more biologically "severe" disability. As a textual matter, the amended ADA does not appear to preclude the person with Asperger's syndrome from bringing an ADA suit claiming that the employer refused to hire him on the basis of his disability. The amendments do codify existing judicial conclusions that the ADA does not permit "reverse discrimination" suits by persons who claim that they were "subject to discrimination because of [their] lack of disability,"[127] but they do not

127. ADA Amendments Act of 2008, Pub. L. No. 110-325, § (6)(a), 122 Stat. 3553, 3557–58 (to be codified at 42 U.S.C. § 12101); *see id.* ("Nothing in [the ADA] 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* H.R. REP. 110-730, pt. 1, at 17 (2008) ("The bill prohibits reverse discrimination claims by disallowing claims based on the lack of disability . . . ."). Even before the ADAAA codified the ADA's prohibition of reverse discrimination suits, the ADA's limited protected class made this conclusion easy to reach as a textual matter because unlike Title VII, which prohibits discrimination on the basis of "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), the ADA prohibited disability discrimination only against "individual[s] with a disability," 42 U.S.C. § 12112(a). *But see* Woods v. Phoenix Soc'y of Cuyahoga County, No. 76286, 2000 WL 640566, at *2–3

appear to bar suits alleging that an employer avoided hiring a person with a particular disability by hiring another member of the ADA's protected class.[128]

Whether courts view the ADA as civil rights legislation or welfare legislation may significantly affect courts' conclusions about whether to follow the ADA's literal text and permit suits in which a member of the ADA's protected class alleges that an employer discriminated against him in favor of a person whose disabilities are more biologically severe. Judges who regard the ADA as welfare legislation might reason that the ADA should not bar employer preferences for persons with more severe disabilities. They might assume that, although the ADA's protected class encompasses persons on a large continuum from greater to lesser biological impairment, an employer's preferences for some types of disabilities rather than others (particularly preferences for more biologically severe impairments) do not constitute disability discrimination.[129] To justify this assumption, judges might reason by analogy to the

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(Ohio Ct. App. May 18, 2000) (permitting a reverse-discrimination suit to proceed on separate common law grounds).

128. *See* ADA Amendments Act § (4)(a). Several courts, including the Supreme Court, have indicated that the ADA and its predecessor statute, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006), permit at least some types of intraclass discrimination claims. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 598 n.10 (1999) (rejecting Justice Thomas's conclusion that the term "discrimination" does not encompass "disparate treatment among members of the *same* protected class" (emphasis in original)); Iwata v. Intel Corp., 349 F. Supp. 2d 135, 149 (D. Mass. 2004) ("Title I of the ADA prohibits discrimination amongst classes of the disabled."); Martin v. Voinovich, 840 F. Supp. 1175, 1192 (S.D. Ohio 1993) ("[T]he language of § 504 evinces an intent to eliminate handicap-based discrimination and segregation. A strict rule that § 504 can never apply between persons with different disabilities would thwart that goal. Such a rule would, in effect, allow discrimination on the basis of disability."); Gieseking v. Schafter, 672 F. Supp. 1249, 1263 (W.D. Mo. 1987) ("[A] section 504 cause of action may lie where plaintiffs assert discrimination between classes of handicapped persons . . . ."). *But see* Traynor v. Turnage, 485 U.S. 535, 548–49 (1988) ("[T]he central purpose of § 504 . . . is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals . . . . There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." (citation omitted)); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1019 (6th Cir. 1997) ("[T]he ADA . . . does not prohibit an insurance company from differentiating between different disabilities. . . . Rather, the ADA, like the Rehabilitation Act, prohibits discrimination between the disabled and the non-disabled."); Colin K. v. Schmidt, 715 F.2d 1, 9 (1st Cir. 1983) ("[W]e have serious doubts whether Congress intended § 504 to provide plaintiffs with a claim for discrimination vis-à-vis other handicapped individuals . . . ."); Rome v. MTA/New York City Transit, No. 97-CV-2945, 1997 WL 1048908, at *3–4 (E.D.N.Y. Nov. 18, 1997) (concluding, in a case involving a claim that an employer's health insurance policies discriminated against persons with autism that "[i]n order to establish a claim of discrimination under the ADA, plaintiffs must show that they have been treated differently than similarly situated non-disabled persons. Merely distinguishing among disabilities does not constitute discrimination under the ADA"); Harding v. Winn-Dixie Stores, Inc., 907 F. Supp. 386, 391 (M.D. Fla. 1995) ("[T]he ADA and the Rehabilitation Act apply only to discrimination between or among disabled and non-disabled persons.").

129. Thus far it appears that courts have permitted intraclass discrimination claims only in situations where the severity of the plaintiff's disability matched or exceeded the severity of the disability possessed by the comparison group. *See, e.g.*, Jackson v. Fort Stanton Hosp. & Training Sch., 757 F. Supp. 1243, 1299 (D.N.M. 1990) ("The severity of plaintiffs' handicaps is

Age Discrimination in Employment Act (ADEA), which textually appears to bar all discrimination on the basis of age against persons aged forty and over[130] but is understood to disallow claims by younger members of the protected class challenging employer preferences for older workers.[131] The Supreme Court reached this interpretation of the ADEA after concluding that the statute was designed to target the problem of employer preference for younger employees rather than to eliminate all age discrimination in employment. Courts that view the ADA as designed to compensate for biological limitations might reason that the ADA should similarly be read to allow, or even encourage, employers to prefer persons with more medically severe disabilities over persons whose disabilities are less medically severe.[132]

Courts with a civil rights conception of the ADA, by contrast, might note that it is not necessarily the case that members of the ADA's protected class with more medically severe disabilities encounter more socially constructed barriers to finding and retaining employment. In light of corporate incentives to achieve visible diversity in the workforce, it is not difficult to imagine an employer who prefers employees with physically obvious disabilities that can be easily accommodated within existing facilities (such as wheelchair users) over employees with less obvious disabilities who might be more difficult to accommodate or whose disability-related traits might be

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itself a handicap which, under § 504, cannot be the sole reason for denying plaintiffs access to community programs. Defendants' failure to accommodate the severely handicapped in existing community programs while serving less severely handicapped peers is unreasonable and discriminatory." (citations omitted)); McGuire v. Switzer, 734 F. Supp. 99, 113 (S.D.N.Y. 1990) (reasoning, in a case that involved equal protection claims as well as section 504 claims, that a paraplegic could challenge discrimination he experienced vis-à-vis blind persons in the provision of state benefits, because "Congress has classified both blindness and paraplegia, plaintiff's condition, as severe handicaps . . . [and thus has] determine[d] that visually-disabled individuals are similarly situated to those individuals as severely disabled as plaintiff" (citing 29 U.S.C. § 706(15)(A)(iii) (2006)); Klostermann v. Cuomo, 481 N.Y.S.2d 580, 584 (Sup. Ct. 1984) (holding that it would violate section 504 and the Equal Protection Clause to provide lesser services to persons with more severe disabilities).

130. *See* 29 U.S.C. § 623(a)(1) (2006) ("It shall be unlawful for an employer—to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age* . . . ." (emphasis added)); *id*. § 631(a) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.").

131. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 598 (2004) ("[T]he prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race and sex. That narrower reading is the more natural one in the textual setting, and it makes perfect sense because of Congress's demonstrated concern with distinctions that hurt older people."); *id.* at 590–91 ("[T]he ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young.").

132. One of the Supreme Court's reasons for interpreting the ADEA to permit employer policies that disadvantage younger members of the ADEA's protected class was Congress's decision to limit age discrimination protection to persons forty and over. The Court reasoned, "[i]f Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40." *Id.* at 591. The ADAAA's restriction of reasonable accommodations to persons substantially limited in a major life activity, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102), might lead courts to similarly conclude that the ADA is not concerned about employer practices that favor persons whose disabilities are more biologically severe.

more likely to elicit negative responses from fellow employees (such as persons with Asperger's syndrome, seizure disorders, or certain mental illnesses). Furthermore, courts taking a civil rights view of the ADA might reason that although disability, like age, may be understood as existing on a severity-based continuum, this continuum should not govern judgments about the extent to which the ADA requires the remediation of socially constructed obstacles to an individual's participation in the workplace.[133] The relevant continuum, if any, focuses on the number and intensity of socially imposed obstructions that hinder a person with a particular disability from working, a factor that does not always strictly correlate with the medical severity of the individual's impairment.

B. Medical Technology and the ADA's Protected Class

A second issue that the ADAAA will require courts to consider involves the small category of potential ADA plaintiffs who have forgone corrective surgery or other medical procedures that could reduce the effects of their disability. Whether such plaintiffs fall within the ADA's protected class is particularly important to members of the "Deaf culture" community who refuse to undergo cochlear implant surgery based on their belief that deaf persons comprise a cultural minority group for which American Sign Language is the primary language.[134] Like racial minorities and women, members of this group hope to demonstrate that their physical difference is not an inherently negative trait that must be "cured" or eliminated.[135] Usually born deaf (as opposed to becoming deaf later in life), they resist characterizing themselves as suffering from a disease and regard cochlear implant surgery as designed not to remove a defect and restore them to a preexisting "whole" state but instead designed to alter what they perceive as their natural condition.[136] In making this claim, Deaf activists

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133. The courts might further reason that the variegated nature of the disability classification makes the continuum nearly impossible to construct. For example, it would be difficult for a court to determine whether deafness is more or less severe than blindness.

134. Disability studies scholar Harlan Lane explains that:

> From the vantage point of Deaf culture, deafness is not a disability. British Deaf leader Paddy Ladd put it this way: "We wish for the recognition of our right to exist as a linguistic minority group . . . Labeling us as disabled demonstrates a failure to understand that we are not disabled in any way within our own community."

Harlan Lane, *Constructions of Deafness*, *in* THE DISABILITY STUDIES READER 153, 159 (Lennard J. Davis ed., 1997) (citation omitted). As Lane's discussion indicates, Deaf culture scholarship often denotes "deafness" or "deaf" as a physical condition with a lower case "d," and "Deafness" or "Deaf" in the cultural sense with an upper case "D." CAROL PADDEN & TOM HUMPHRIES, DEAF IN AMERICA: VOICES FROM A CULTURE 2 (1988).

135. Edward Dolnick, *Deafness as Culture*, ATLANTIC MONTHLY, Sept. 1993, at 37, 43; *see also* J. William Evans, *Thoughts on the Psychosocial Implications of Cochlear Implantation in Children*, *in* COCHLEAR IMPLANTS IN YOUNG DEAF CHILDREN 307, 307 (Elmer Owens & Dorcas K. Kessler eds., 1989) ("In an informal survey (Evans, unpublished raw data), prelingually deafened adults were asked whether they would choose to have an implant if it were possible that some hearing could be restored. The response was approximately 85 percent negative.").

136. *See* Dolnick, *supra* note 135, at 43. While members of the "Deaf culture" community have most forcefully articulated this view, persons with other disabilities have also expressed

often draw analogies to the civil rights movement, explaining that from the Deaf point of view, the notion that implants are beneficial "is both inappropriate and offensive—as if doctors and newspapers joyously announced advances in genetic engineering that might someday make it possible to turn black skin white."[137]

Although no published opinions have considered the impact of a plaintiff's decision not to undergo cochlear implant surgery, many courts and commentators prior to the ADAAA concluded that the ADA's protected class excludes persons who decline available medical technology.[138] Following the Supreme Court's conclusion in *Sutton*

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their wish to retain physical traits labeled a "disability" by the majority culture. *See Experiences of Deviance, Chronic Illness, and Disability*, *in* THE SOCIAL MEDICINE READER 75, 76 (Gail E. Henderson et al. eds., 1997) ("[A] study of 88 seriously physically restricted persons . . . posed the question, 'If you were given one wish, would you wish that you were no longer disabled?' Only half said they would wish to remove their disability." (citation omitted)); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 14 (1993) (quoting a wheelchair user as stating that she would not take "a magic pill" that would allow her to walk again and that asking her to do so is "the same thing as asking a black person would he change the color of his skin"); Nancy Weinberg, *Physically Disabled People Assess the Quality of Their Lives*, 45 REHABILITATION LITERATURE 12, 13 (1984) (finding that many people with disabilities indicate that they would refuse a risk-free surgery that would completely eliminate their disabilities, because they "fear that they would no longer be the same person"); Joe Griffith, *Disability Studies Chairman Chosen*, INDEP. COLLEGIAN, Apr. 14, 2008 ("'The medical field tends to view physical disabilities as a negative condition needing to be fixed, Wilkins said. 'In our world, we believe the disability is part of us,' he said. 'We're fine how we are.'" (quoting Dan Wilkins, manager of public relations for the Ability Center of Greater Toledo)); Amy Harmon, *How About Not 'Curing' Us, Some Autistics Are Pleading*, N.Y. TIMES, Dec. 20, 2004, at A1 ("'We don't have a disease,' said Jack, echoing the opinion of the other 15 boys at the experimental [school for autistic teenagers]. 'So we can't be "cured." This is just the way we are.'").

137. *See* Dolnick, *supra* note 135, at 43; *see also* Marie Arana-Ward, *As Technology Advances, a Bitter Debate Divides the Deaf*, WASH. POST, May 11, 1997, at A1 ("'Let me put it this way,' says [Judith Coryell, head of the deaf education program at Western Maryland College]: 'Say you were black. Do you think you'd be considering surgery to make yourself white?'").

138. *See, e.g.*, Johnson v. Maynard, No. 01 Civ. 7393(AKH), 2003 WL 548754, at *4 (S.D.N.Y. Feb. 25, 2003) ("[A plaintiff] cannot be said to [be] substantially impaired if she neglect[s] to avail herself of . . . corrective measures."); Hooper v. Saint Rose Parish, 205 F. Supp. 2d 926, 929 (N.D. Ill. 2002) ("Where a person's impairment can be treated and symptoms alleviated by mitigating factors such as medication or treatments, such medications or treatments must be taken into account in determining disability."); Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) ("A plaintiff who does not avail himself of corrective medication is not a qualified individual under the ADA."); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000) ("A plaintiff who does not avail herself of proper treatment is not a 'qualified individual' under the ADA." (citation omitted)); Mont-Ros v. City of W. Miami, 111 F. Supp. 2d 1338, 1356–57 (S.D. Fla. 2000) (denying ADA protection because plaintiff's "condition is treatable and can be corrected"); Spradley v. Custom Campers, Inc., 68 F. Supp. 2d 1225, 1232–33 (D. Kan. 1999) (expanding the *Sutton* opinion's holding to assert that "[t]he Supreme Court has recently held that if a disorder can be controlled by medication or other corrective measures, it does not substantially limit a major life activity"). *But see* Nawrot v. CPC Int'l, 277 F.3d 896, 904 (7th Cir. 2002) ("[*Sutton*] is not . . . license for courts to meander in 'would, could, or should-have' land. We consider only the measures actually taken and consequences that actually follow. . . . Those who discriminate take their victims as they

v. United Air Lines that the ADA's protected class excludes persons who use medical technology to eliminate the "substantial[] limit[ation]" they would otherwise experience,[139] some courts reasoned that the ADA's protected class also excludes persons who *could* use such technology. In other words, they concluded that the availability of medical technology to remove an otherwise substantially limiting condition precluded membership in the ADA's protected class.[140] The ADAAA, of course, undermines this rationale for excluding nonmitigating plaintiffs. The amendments expressly reject *Sutton* and bring into the ADA's protected class most persons who have effectively ameliorated their disability with medical technology.[141] Accordingly, with *Sutton* gone from the ADA's interpretive landscape, there is a good textual argument for reading the ADA to include persons who forego available medical technology that would reduce the effects of their disability: the ADA now provides that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."[142] Nonetheless, the weight of legal commentary on this issue prior to the ADAAA recommended that, even without the influence of the *Sutton* opinion, courts should read the ADA as preventing an individual from suing for accommodations that would be unnecessary if the individual used medication or underwent surgery to reduce his physical limitations.[143]

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find them." (citation omitted)); Jamison v. Dow Chemical Co., 354 F. Supp. 2d 715, 728 (E.D. Mich. 2004) ("The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantial[ly] limiting." (quoting *Sutton*, 527 U.S. at 488) (emphasis in original)).

139. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999), *superseded in part by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101).

140. A handful of courts had reached this conclusion prior to *Sutton*. *See* Pangalos v. Prudential Ins. Co. of Am., No. 96-0167, 1996 WL 612469, at *3 (E.D. Pa. Oct. 15, 1996) (suggesting that a person would not receive the ADA's protection if "the disabling condition he allege[d] could readily be remedied surgically"); Roberts v. County of Fairfax, 937 F. Supp. 541, 548 (E.D. Va. 1996) ("Roberts' refusal to seek the recommended and available treatment precludes him from [falling within the ADA's protected class].").

141. ADA Amendments Act § 4(a); *id.* § 2(b)(2) ("The purposes of this Act are to reject the requirement enunciated by the Supreme Court in *Sutton* . . . that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures . . . .").

142. *Id*. § 4(a).

143. *See* Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217, 234–375 (2004) (arguing that courts should require individuals with disabilities to reasonably mitigate their disabilities when doing so would obviate the need for employer-provided accommodations); Lisa A. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations,"* 48 HASTINGS L.J. 75, 103 (1996) (arguing that if "an individual with a mutable impairment has [not] taken all reasonable actions to minimize his condition" then "it will not be reasonable under any circumstances for his or her employer to bear the cost of an accommodation"); Bonnie Poitras Tucker, *Deaf Culture, Cochlear Implants, and Elective Disability*, HASTINGS CENTER REP., July–Aug. 1998, at 6, 10 ("When most deafness becomes correctable, which for many people has already occurred and for others may well happen in the near future, an individual who chooses not to correct his or her deafness (or the deafness of his or her child) will lack the moral right to demand that others

Whether courts view the ADA through the lens of civil rights legislation or welfare legislation may significantly influence their conclusions as to whether ADA litigation is available to persons who forgo available medical procedures. A court that views the ADA as conferring welfare benefits will likely hold that employers need not accommodate persons who could ameliorate their disability with available medical technology. Such a court might reason that when medicine can cure or reduce a disability, ADA accommodations are unnecessary and undeserved. By contrast, courts that view the ADA through a civil rights lens might more readily acknowledge that medical procedures designed to "correct" disability obfuscate the fact that many of the disadvantages associated with disabilities are attributable to socially constructed environments that unnecessarily disadvantage physically variant individuals, such as the relative scarcity of teletypewriter (TTY) telephones and the general public's lack of familiarity with American Sign Language.[144] Courts with a civil rights view of the ADA might acknowledge that the "Deaf culture" community's argument for recognition as a linguistic and cultural minority resonates with the civil rights traditions of ethnic minorities and women who have insisted that their integration into the mainstream culture should not require them to sacrifice their unique characteristics. Although courts may understandably hesitate to impose significant costs on employers in order to accommodate persons whose disabilities could be medically eliminated, a civil rights vision of the ADA enables courts to consider the idea that the ADA might, in some circumstances, require employers to modify workplace rules before insisting that an employee undergo an unwanted medical procedure.

C. Multiplaintiff Litigation

A third interpretive area that the ADAAA will likely require courts to address involves multiplaintiff litigation. In contrast to Title VII, under which class actions and other forms of multiplaintiff litigation have wielded significant power for transforming workplace norms, ADA employment discrimination litigation has proceeded almost exclusively via single-plaintiff lawsuits.[145] Similarly, although the Supreme Court has acknowledged that "disparate-impact claims are cognizable under the ADA,"[146] "[t]o date, published federal decisions have not specifically determined a single failure to accommodate employment claim under disparate-impact analysis."[147] The ADAAA's changes to the provisions governing the ADA's protected class removes a major barrier

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pay for costly accommodations . . . ."). *But see* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 878 (2008) (noting that "instead of demanding that employees assimilate, disability law seems to require the environment, rather than the individual, to change").

144. *See* Jeannette Cox, *"Corrective" Surgery and the Americans with Disabilities Act*, 46 SAN DIEGO L. REV. 113, 121–25 (2009).

145. Stein & Waterstone, *supra* note 12, at 883 ("Only a handful of disability employment-related class actions have been brought. In this limited pool of reported cases, denials of class certifications vastly outnumber grants of class status."). *But see id.* at 903 ("[A]lthough very few class actions have been brought (and fewer still, certified) in Title I cases, collective action is routinely seen in ADA cases involving discrimination in public services (under Title II) and privately owned places of public accommodation (under Title III).").

146. Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003).

147. Stein & Waterstone, *supra* note 12, at 882.

to large-group litigation: the need to demonstrate that all members of the group—either the class members for class action purposes or the comparison group for disparate impact purposes—meet the Supreme Court's stringent standard for a substantial limitation of a major life activity. After the ADAAA, lawsuits not involving "failure to accommodate" claims can proceed on the relatively simple showing that all plaintiffs have a physical or mental impairment that is not "transitory and minor."[148] The ADAAA also reduces the difficulty of accommodation lawsuits by lowering the threshold for demonstrating a substantial limitation of a major life activity.

The conceptual understanding of the ADA as either a welfare benefits statute or a civil rights statute has significant implications for whether group-based disability employment discrimination litigation will now flourish or remain unavailable. To date, courts asked to certify disability employment discrimination class actions have almost uniformly focused on each plaintiff's inherent biological limitations and viewed potential group litigants with different physical limitations as possessing an insufficient community of interest to proceed as a group for purposes of challenging workplace discrimination.[149] Disability law scholars Michael Stein and Michael Waterstone suggest that courts have focused on "the heterogeneity of disability with the result that, rather than being viewed as systemically excluded by the environment, disability is held to be the by-product of individual workers not fitting into particular workplace circumstances."[150] Their research suggests that if courts were to adopt a more robust civil rights conception of the ADA, courts might certify more disability discrimination class actions based on the idea that persons with disabilities, like ethnic minorities, constitute a coherent "other" group that society considers divergent from the biological norm.[151] Permitting more multiplaintiff ADA litigation might in turn fuel a stronger civil rights conception of the ADA. By demonstrating that existing workplace norms exclude *many* persons with disabilities from the workplace, multiplaintiff litigation may bolster the claim that workplace norms that perpetuate the exclusion of persons with disabilities should be changed.[152] In other words, the aggregation of ADA claims might encourage courts to focus not on the biological deficiencies of the plaintiffs but on the workplace norms that unnecessarily exclude them.[153]

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148. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102(3)). The ADAAA defines "transitory impairment" as "an impairment with an actual or expected duration of 6 months or less." *Id*.

149. *See* Stein & Waterstone, *supra* note 12, at 883–85.

150. *Id*. at 897. An assumption underlying this phenomenon is the notion that "race and sex are biologically and socially distinct categories, whereas the disability classification is comprised of people with many individual variations." *Id*. at 893.

151. *Id*. at 900–01.

152. To take Stein and Waterstone's example, *see id*. at 904–07, consider a plaintiff with epilepsy who sues his employer for refusing to replace the strobe lights in fire alarms (which can initiate epileptic seizures) with an alternative form of emergency illumination. If the plaintiff aggregated his claim for a reasonable accommodation with persons also affected by the strobe light—other persons with epilepsy and "persons with balance difficulties, brain injuries, and certain visual atypicalities"—it becomes more difficult for a court to view his claim as an individual request for special treatment. *Id*. at 905. His claim instead appears comparable to the claim that workplace equipment designed to be operated by persons over six feet tall disparately impacts women.

153. Hopefully, the shift in conceptual understanding of the ADA toward a civil rights vision

D. Defining "Reasonable Accommodation"

The final and most important interpretive question that the ADAAA will require courts to address is the scope and limits of the amorphous phrase "reasonable accommodation." Because of the difficulty many plaintiffs experienced prior to the amendments in establishing standing to sue under the ADA, "[t]he question of what makes a requested accommodation reasonable (and therefore obligatory unless it imposes an undue hardship on an employer) remains unsettled and hotly contested."[154] Despite a handful of high-profile and strongly criticized cases addressing the scope of the term "reasonable accommodation," the ADAAA is conspicuously silent about the meaning of this amorphous term, providing the courts no guidance about its definition.[155] Nonetheless, by reducing the initial hurdle to ADA litigation (by making it easier for plaintiffs to prove membership in the ADA's protected class), the ADAAA will likely require courts to tackle the difficult task of articulating criteria for distinguishing "reasonable" accommodations from "unreasonable" accommodations.[156]

In attempting to define "reasonableness," courts have struggled to discern intelligible criteria other than a rudimentary cost-benefit analysis.[157] Even a cost-benefit analysis, of course, invites significant debate over how to identify and measure both benefits and costs. For example, commentators have debated whether a court assessing the "benefit" of an accommodation should consider only the value of the accommodation to the requesting individual or also the benefits that will accrue to other current and future employees with disabilities. Some commentators have suggested that courts should consider the benefits to nondisabled employees and customers as well.[158] Courts and commentators also differ on the extent to which a court may privilege the status quo in assessing the "cost" of an accommodation and the extent to which nonmonetary costs (such as possible costs to employer autonomy and co-worker morale) are relevant to the reasonableness inquiry.[159]

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will also benefit plaintiffs in smaller workplaces who need reasonable accommodations that do not appear to have an immediate benefit for anyone else.

154. Crossley, *supra* note 1, at 864–65.

155. *See, e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 406 (2002) (holding that a job reassignment that departs from an established seniority system is ordinarily not a reasonable accommodation).

156. *See* Crossley, *supra* note 1, at 865 ("[T]he reasonableness issue could prove to be the next vigorously litigated issue under the ADA, now that the Supreme Court has resolved many of the questions regarding who can claim the Act's protections.").

157. *See, e.g.*, Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) ("'Reasonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires an inquiry not only into the benefits of the accommodation but into its costs as well.").

158. *See, e.g.*, Emens, *supra* note 143, at 840 ("Numerous accommodations—from ramps to ergonomic furniture to telecommuting initiatives—can create benefits for coworkers, both disabled and nondisabled, as well as for the growing group of employees with impairments that are not limiting enough to constitute disabilities under the ADA."); *id*. at 921 ("Courts and other entities administering the ADA have recognized that accommodations may create third-party *costs*, but they have overlooked the potential for third-party *benefits*." (emphasis in original)).

159. *See, e.g.*, Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 315 (2007) (proposing "an amendment to the ADA that clearly defines an employer's obligation to accommodate a

Courts that view the ADA through the lens of welfare reform may feel conflicting impulses about the appropriate scope of the ADA's reasonable accommodation mandate. On one hand, their inclination to regard accommodations as preferential treatment may lead them to limit accommodations, particularly accommodations that have a non-negligible financial cost. On the other hand, the tendency to regard accommodations as compensation for endogenous biological limitations may lead courts to find reasonable some accommodations that a civil rights vision of the ADA would question.

In keeping with a civil rights vision of the ADA, Mary Crossley has suggested that "the reasonableness assessment should include asking whether a requested accommodation will serve to remove a socially imposed barrier to a disabled person's equal employment opportunity."[160] In other words, the relevant question should be "[i]s this barrier natural or socially constructed?"[161] Crossley argues that the ADA, when understood as a civil rights statute, does not require employers to provide accommodations that address barriers stemming solely from the individual's biological impairment. She explains that

> If the policy, practice, or physical structure that the disabled individual seeks to have modified is one that would not be likely to exist if persons with a wide range of disabilities were welcome, common, and fully participating members of society, then it can be deemed to be discriminatory and its removal or modification can be seen as furthering the ADA's goals. . . . By contrast, if any barrier to the disabled individual's job performance . . . flows solely from functional limitations associated with his impairment, then removal of that barrier—while it may help the disabled individual become or remain employed—will not function to remedy disability discrimination and should not be deemed a "reasonable" accommodation.[162]

As Crossley's proposal suggests, a civil rights vision of the ADA suggests that accommodations are not appropriate if they compensate for the person's endogenous limitations rather than remove a socially imposed barrier.[163] While it may be appropriate social policy to shift the cost of alleviating endogenous physical and mental limitations away from the persons who possess those limitations, a civil rights act is not the appropriate vehicle to accomplish that goal.[164]

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disabled employee even though the accommodation conflicts with the rights of other employees").

160. Crossley, *supra* note 1, at 865.

161. *Id*. at 954.

162. *Id*. at 947–48.

163. *Cf.* Bagenstos, *supra* note 6, at 52 ("[T]he more that individual employers are required to counteract broad structural obstacles that they did not themselves create, the more it looks like they are being required to provide charity. Even disability rights activists, then, might have an ideological interest in reading the accommodation requirement to mandate that an individual employer take steps to remove only those barriers that the employer itself played a part in creating.").

164. *See id*. at 51 ("[I]f an employer is required to provide personal-assistance services or transportation to enable an employee with a disability to get to work, or health insurance coverage that meets the employee's particular needs, the accommodation requirement seems much more like a requirement that the employer do something to 'make up for' the disadvantage

CONCLUSION

With the passage of the ADA Amendments Act, the ADA stands at a crossroads. In significant respects, the amendments may be understood to counter the Supreme Court's "welfare benefits" conception of the ADA by carefully reversing the Supreme Court's opinions constricting the ADA's coverage to a narrow benefits class. However, the perceived conceptual divide between the ADA and Title VII remains important after the ADAAA's passage because the extent to which courts and other interpreters view the ADA as analogous to Title VII will inevitably influence judicial assumptions regarding the amended ADA's scope. The ADAAA's recent amendments to the ADA point in both directions. In some respects, the amendments' expansion of the ADA's protected class signals to courts that the ADA is not a welfare benefits statute for which the primary legal question is the line that distinguishes those who are entitled to benefits from those who are not. In other respects, however, the manner in which the ADAAA expands the ADA's protected class may underwrite the assumption that, unlike traditional antidiscrimination statutes, the ADA compensates for inherent biological limitations.

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that people with disabilities experience because of broader societal decisions about the allocation of social services."); Weber, *supra* note 6, at 923 ("[W]elfare, broadly conceived, is and will remain important, no matter what developments occur in the law of disability discrimination.").