Just Semantics: The Lost Readings of the ADA

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Disability rights advocates and commentators agree that the ADA has veered far off course from its mandate of protecting people with actual or perceived disabilities from discrimination. They likewise agree that the fault lies in the language of the statute itself and in the courts’ so-called literalist reading of its definition of disability. As a result, many disability rights advocates have pinned their hopes for doctrinal reform on the proposed ADA Restoration Act, now in Congressional Committee. While the Act would likely be a boon to plaintiffs, its chances of passage are slim.

I tell a very different story of the problem and its solution. I agree that blame should fall on the courts, but not for reading the statute too closely. Rather, they have not read it closely enough. A truly rigorous interpretation of the ADA would expose a structural ambiguity in the “regarded as” prong of the disability definition, with important consequences for interpretation. For while this ambiguity is a basic one---the kind that we resolve every day without thinking about it—it creates what is in fact a nine-way ambiguity in the statute. The courts have to date ignored all but one of a corresponding nine readings: the other eight are effectively lost.

Drawing on ordinary intuitions about sentence meaning, and borrowing some basic conceptual tools from formal linguistics, this article aims to make ambiguity in the regarded-as prong visible to the reader. This opens the door to invoking the ADA’s rich legislative history

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for the purpose of resolving the ambiguity. Such history favors a broad reading of the statute and would mark a departure from an era of increasingly narrow interpretation of the ADA’s disability definition. Thus, while it may be a surprising alliance to consider, formal linguistic rigor in the hands of civil rights advocates holds the potential to realign ADA jurisprudence with the statute’s purpose.

INTRODUCTION

“Absurd;”2 “bizarre;”3 “counterintuitive.”4 These are the ABC’s of the ADA---the Americans with Disabilities Act of 1990---from the perspective of many disability rights advocates and commentators on the jurisprudence interpreting this statute.5 The ADA, heralded upon its enactment as comprehensive civil rights protection6 for people with disabilities in areas such as employment,7 has lost much of its expected force in the courts. There the statute’s definition of an “individual with a disability” has become a tripwire for plaintiffs,8 who must meet this definition in order to claim ADA protection.9


5 While this article focuses on the ADA, its arguments are equally pertinent to the Rehabilitation Act of 1973, whose definition of disability the ADA incorporates. 29 U.S.C. § 705(20)(B) (2000). See infra note 41 and accompanying text for the ADA’s disability definition.


7 The ADA’s employment protections are found in Title I of the Act. 42 U.S.C. § 12101 et seq. (2000). The present analysis considers the employment context in particular because it represents the bulk of case law on the definition of disability, but its conclusions are equally applicable to other contexts, such as public transportation (Title II) and public accommodations (Title III).

8 Susan Stefan, 52 Ala. L. Rev. 271, 275 (citing failure to meet disability definition as “primary reason that [ADA employment discrimination] plaintiffs . . . are losing their cases”).

Particularly vexing for plaintiffs is the requirement to show as a threshold matter that they have, or are regarded as having, “an impairment” that substantially limits a “major life activity[10].” The detailed inquiry around these terms has tended to eclipse or preclude argument over what would typically be the crux of a discrimination claim: whether discriminatory animus motivated an employment action. This disconnect between ADA goals and ADA jurisprudence has given litigation under the statute a surreal tinge. For example, an employee suffering from schizophrenia, who was refused employment after the employer told her she was “physically and mentally incapable of having a job,” loses her case because she cannot prove that she was regarded as having a mental impairment.[11] Similarly, the claim of an employee with end-stage kidney failure, who was denied accommodation for dialysis treatment, becomes a contest over whether “eliminating waste from the body” is a major life activity.[12]

Advocates and commentators largely agree that the root of this doctrinal problem is the language of the disability definition itself, compounded by the courts’ unwillingness to veer from it.[13] As the lament goes, the courts’ “literalist reading”[14] of the definition’s unfortunate wording yields absurd results, results that run counter to the clear intent of Congress. In interpreting “impairment” and “major life activities” narrowly, courts have held that conditions ADA drafters assumed would be covered as actual disabilities under the Act are not disabling. They have likewise dulled the “regarded as” prong of the statute, which had been understood as a catch-all provision for conditions that are not actually disabling but are viewed by employers as such. Advocates have conceded that the regarded-as prong of the definition suffers from the same technical flaws as the actual-disability prong. Accordingly, the critique of the courts’

10 The statute also covers individuals who have a “record of” a disabling impairment. 42 U.S.C. § 12102(2) (B) (2000). I do not address the jurisprudence of the record-of prong, which has not received the same level of attention in litigation or commentary as the definition’s other two prongs.


12 Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 382-83 (3d Cir. 2004) (holding kidney failure disabling because eliminating waste from body is a major life activity).

13 See, e.g., Feldblum, supra note 3, at 139 (“The bottom line is that statutory text matters, some times even too much.”); Anderson, supra note 1, at 107 (stating “language of the ADA is [to blame]” for absurd results for plaintiffs).

14 Feldblum, supra note 3, at 141.

15 Id. at 157.

16 Examples of such impairments are cancer, heart disease, and hypertension. Id. at 101-102, 131 (noting intent of Congress to cover broad range of impairments).

17 Mayerson, supra note 2, 609-11. See also Michelle T. Friedland, Note, Not Disabled Enough: The ADA’s “Major Life Activity” Definition of Disability, 52 STAN. L. REV. 171, 183-185 (explaining choice of “major life activities” wording in definition of disability).

18 See, e.g., Anderson, supra note 2, at 124 (asserting regarded-as prong “by its plain language . . . incorporates the flawed idea” of requiring substantial limitation in major life activity); Lisa Eichhorn, Major Litigation Activities
“obsessive” literalism is a tempered one: as one important commentator notes, it is hard to fault the courts for reading the statute as written.**

The conversation in the disability rights movement, then, has moved from a stunned “what happened” to the ADA, to a determined “what can we do about it?” Recently, a swell of dissatisfaction with the statutory language has sparked an effort to legislatively overhaul the definition of disability. This revision has been termed “the big prize” sought through the multifaceted ADA Restoration Act of 2007.** The goal of this proposed legislation is to step back to an earlier, more expansive understanding of what Congress intended having a disability—and being regarded as disabled—to mean. Now in Congressional Committee, the Act would eliminate the “major life activity” requirement and thereby remove an important hurdle for plaintiffs. But would and will are not the same thing, and though the former may reflect the hopes of the plaintiffs’ bar, the latter is a function of another kind of will—the political variety—that many view as currently lacking. If the outlook for rewriting the ADA is gloomy, then the same may be said for much of disability rights advocacy in the near term.

I suggest taking a different kind of step back: rather than throw in the towel on the wording of the disability definition, advocates should reconsider the potential of the statute as written. For as I argue, the courts have not read the disability definition too closely, but just the opposite: they—and perhaps we all, as lawyers—have not read it closely enough. Were they to access ordinary intuitions as to what it can mean to regard someone as having a disability, they would notice that this language can describe categorically distinct types of factual scenarios.

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**Feldblum, supra note 3, at 104.

** Id. at 151.

** Id. at 93, 160 (accounting for veering of jurisprudence from Congressional intent and proposing legislative amendment of disability definition).


** Id.
That is, the definition is structurally ambiguous in a very precise way. This type of ambiguity is easily spotted and well-theorized in the field of linguistics——where it is termed the de dicto-de re distinction——yet it has gone all but unnoticed in the law. To make matters worse, the ambiguity is not a simple two-way split. Because both “impairment” and “major life activities” are susceptible of three different interpretations, the full regarded-as prong has no fewer than nine distinct literal readings——nine possible ways a plaintiff might count as disabled under this prong. It is striking then, that the courts to date seem to have missed all but one of those legitimate readings; the other eight are effectively lost.

Eight “lost readings” of the regarded-as prong might sound overwhelming, for the reader or for the courts. But the ambiguity in question is actually a kind that we resolve every day without thinking about it, as some simple sentences discussed in Part II will show. And like anything we handle naturally and unconsciously but would be hard pressed to explain, it is thinking about it that poses a challenge in law, where we thus far lack a vocabulary for making structural semantic ambiguity salient. Toward that end, I borrow some terms, methods, and logical notation from basic formal linguistics in order to (1) make the ambiguity stand out to the reader, and (2) give the reader some handles to hold onto for distinctions of meaning that can be slippery. Importantly, though, this article is less an attempt to bridge the gulf between law and linguistics than to reconcile everyday speaker competency on the one hand with legal

26 It is important to distinguish this structural ambiguity from mere vagueness, or indeterminacy of meaning in borderline cases. See, e.g., FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 572 (6th ed. 2003). The argument presented in this article is not based on vagueness, i.e., the notion that the regarded-as language is blurry at its conceptual edges and has been read too narrowly at those edges. Rather, my claim concerns the availability of clear alternate readings of that language to the one reading tacitly endorsed by the courts.


28 Only two works in the legal literature, both of them short essays in one symposium volume, take up the de dicto-de re distinction in any detail. See Howard Pospesel, Toward a Legal Deontic Logic, 73 NOTRE DAME L. REV. 603, 617 passim (1998) (presenting technical account of “may” and “must” contexts in law); Robert E. Rhodes, De Re and De Dicto, , 73 NOTRE DAME L. REV., 627 passim (listing twelve short legal puzzles, most of them involving intent issues, that can be explained by de dicto-de re analysis). I am aware of no published case that mentions the de dicto-de re distinction by name or by reference to any related account of ambiguity, or that acknowledges ambiguity in a way that clearly maps onto this distinction.

29 For discussion of how the jurisprudence of the regarded-as prong favors a single one of these nine readings, see infra notes 122-166 and accompanying text.

30 If the reader is familiar with the “magic eye” computer-generated images that were popular in the 1980s, where a three-dimensional image at once emerges from apparent visual gibberish, that is the experience hoped for in making de dicto-de re ambiguity visible: the distinction should pop out for the reader. I use visual metaphors here, but one may engage ambiguity in other ways. Whether one hears the distinction like a chord, or feels it snap into place like a puzzle piece, etc., the hallmark of apprehending ambiguity is a crisp rather than fuzzy sense of alternative sentence meanings.
reasoning on the other, in a context where the need for such competency in the courts is a pressing matter of civil rights.

A close, formally rigorous reading of the statute would expose its structural ambiguity and call for grappling with these lost readings. Acknowledging ambiguity would require courts to consult information outside the words of the regarded-as prong itself—in particular, the statute’s legislative history. Tapping this history for the purpose of statutory construction would be a significant triumph for the disability rights movement, perhaps nearly as much of a triumph as a legislative overhaul of the statute. That history is where advocates hold all the high cards: Congress placed ample signposts of the broad remedial intent behind the ADA throughout this record. A thorough interpretive process would undoubtedly expand judicial interpretation of the regarded-as prong.

Yet this approach would not extend the ADA unreasonably, as some employers may fear, to make every workplace grievance a potential regarded-as-disabled claim. Of the nine readings I identify, I propose that only four of them comport with legislative intent. The kinds of claims reached by these four readings would in no way stretch the intended application of the ADA. Rather, such claims are emblematic of disability discrimination, yet paradoxically they have been held not to be actionable under the current state of the law.

To be sure, the ADA’s definition of disability is far from perfectly tailored to its purposes. Experience in disability rights litigation might suggest that crafting such categories as “major life activity” was a design flaw in the first place. The explanation, of course, is that the ADA’s disability definition was never the product of design at all. Rather, it is an artifact of tinkering with the language of predecessor statutes, particularly the Rehabilitation Act of 1973. In this way, the ADA resembles an old Victorian house that has been modified over time to suit modern needs: its layout may be quirky and suboptimal at this point, but what matters is whether it is ultimately functional once we see its potential. Before setting sights on an extensive and politically unlikely remodel of the ADA, we may first want to expand our sense of its structural capaciousness, re-evaluate the narrow paths thus far trodden through it, and find new ways to make it livable. Doing so would require reclaiming the high ground of rigorous interpretation and faithfulness to the text of the statute, territory that has too long been ceded to a jurisprudence of blunting the ADA’s impact.

31 Concededly, the ambiguity argument applies only to the regarded-as prong of the disability definition. However, the regarded-as prong can serve as a catch-all for cases in which the plaintiff is deemed not disabled enough to meet the actual-disability definition under 42 U.S.C. 12102(2)(a), yet where the facts support a finding that discrimination based on impairment has occurred.

32 For an indispensable first-hand perspective on the history of the ADA disability definition, see Feldblum, supra note 3, at 91 passim.

33 For an description of the courts narrow reading of the ADA and the call for amending the statute, see generally National Council on Disability, Righting the ADA (December 1, 2004) available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm#17 (last visited Nov. 12, 2007).
This article has six parts. Part I lays out the background of the courts’ narrow interpretation of the disability definition, its counternintuitive results, and advocates’ calls to amend the statute. Part II walks through the ambiguity at work in the regarded-as prong, first using simple sentences as conceptual building blocks, and ultimately arriving at a matrix of nine distinct readings of the regarded-as prong. Part III reviews the specific ways the courts have failed to apprehend all but one reading of the ambiguous language and the analytical flaw at the heart of this failure. Part IV discusses which of the nine readings comport with the intent behind the ADA. Part V discusses three categories of cases in which admitting certain of the “lost readings” could cover plaintiffs in a way that comports with antidiscrimination norms. Part VI discusses how this analysis would change the strategy of reforming ADA doctrine, short of legislative amendment, to harmonize ADA litigation with the statute’s remedial purpose.

I. THE NARROWED DISABILITY DEFINITION

The importance of the courts’ failure to notice ambiguity in the regarded-as prong is an outgrowth of the trend toward a tightened reading of the actual-disability prong of the disability definition. Before turning to this background, an example will illustrate the current gap between ADA goals and ADA interpretation.

A. A Smoking Gun Scenario?

The following is an example of an employment action that the ADA was surely meant to remedy, but arguably does not prohibit under the current state of the law, owing to a flawed interpretation of the regarded-as prong.

Employer Sonia is about to call applicant John to offer him a job. First, though, she notices this sentence in a reference letter from John’s current employer:

John has outperformed all of his peers, which is especially noteworthy in light of his disability.

Imagine that Sonia has no further information or belief as to any impairment or limitation that John may have. She emails John this message:

John, I recently learned from your current employer that you have a disability. For this reason alone, I have decided not to hire you.

Now, surely an employer would never send such a smoking gun communication to an applicant in this age of the Americans with Disabilities Act, which protects individuals with disabilities from discrimination in a variety of domains. But is it a smoking gun? Imagine further that John does not have an actual disability by the ADA’s now narrow standard. Because the ADA

34 Titles I (employment), II (public services), III (public accommodation), and V (miscellaneous provisions) of the ADA are found at 42 U.S.C. §12101 et seq. (2000).
protects only individuals with disabilities from discrimination, John’s claim under the ADA will hinge on whether he can prove he is “regarded as” having a disability. Does John meet the definition of disability under the regarded-as prong? Intuitively, there could hardly be a clearer case of being regarded as disabled than John’s.

However, while no court has decided a regarded-as case on such spare and stark facts, by the reasoning of many courts, John’s case will fail for lack of proof that Sonia regarded him as having “a[n] . . . impairment that substantially limits one or more [of his] major life activities.” This is because the courts have required ADA claimants to prove the particular impairment they were regarded as having, and the particular major life activity that the employer regarded as being limited. John cannot prove either, simply because there is no such particular impairment or major life activity that Sonia had in mind. Thus, although a clearer instance of discrimination based on disability per se would be difficult to imagine, the very fact that the employer’s actions are so categorical and sweeping, so non-specific as to John’s condition, and so characteristic of stereotyping, is what forecloses an ADA claim. And if the above scenario seems removed from the reality of the workplace, this shows only how much more difficult it would be for a plaintiff to prevail against the savvier employer, whose motives for discriminating may be equally categorical but more veiled. How can this be, for a statute billed as “comprehensive civil rights legislation”?

The explanation for this paradox is the failure of courts to apprehend ambiguity in the regarded-as prong of the ADA. That ambiguity concerns the noun phrases embedded in the regarded as prong and whether they must refer to particular “impairments” and “major life activities” or not. While these terms have been a part of federal antidiscrimination legislation since the 1970s, the courts’ scrutiny of them is a relatively recent phenomenon, which I turn to next.

B. Scrutinizing “Impairment” and “Major Life Activity”

While the ADA provides protection from discrimination across many domains, including employment, it protects only “a qualified individual with a disability.” The general rule is that


36 The definition of disability under the regarded-as prong is “being regarded as having [a physical or mental impairment that substantially limits one or more of the major life activities of the individual].” 42 U.S.C. § 12102 (C) (2000).

37 42 U.S.C. § 12102 (2) (2000). For the full text of this definition, see text accompanying infra note 41.


“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual.” The definition of “disability” with respect to an individual is this:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

Thus, the plaintiff must establish that she has “an impairment” that substantially limits at least one “major life activity” or have a record of, or be regarded as having, such an impairment. This three-part definition---known by its separate “actual,” “record of” and “regarded as” prongs---was borrowed the Rehabilitation Act of 1973, which prohibits disability discrimination in federally funded programs. Under the Rehabilitation Act, the question of whether a plaintiff was “really” disabled within the meaning of the statute was rarely the subject of litigation. However, when the ADA was enacted in 1990 to make disability discrimination actionable in private contexts, focus returned to the definition as defendant employers challenged whether an individual plaintiff’s condition was sufficiently serious to warrant the ADA’s protection.

In 1999, the Supreme Court signaled that the issue of whether an impairment substantially limits a major life activity would be a focus of ADA jurisprudence. In *Sutton v. United Airlines, Inc.*, the Court held that two airline pilots, who were refused hire due to their poor uncorrected vision, did not meet the disability definition. They were not actually disabled because they were not substantially limited once mitigating measures (e.g., contact lenses) were taken into account. Further, they were not regarded as limited in “the major life activity of working” because United disqualified them only from the job they were seeking, and not from “a

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41 Id., § 12101 (2000).
42 I use “an impairment” as shorthand for “a physical or mental impairment,” where the latter forms of impairment are defined separately for each Title in the implementing regulations (e.g., for Title I: 29 C.F.R. § 1630.2(h) (2000)).
44 Feldblum, *supra* note 3, at 106.
45 Id.at 138-39.
46 527 U.S. 471 (1999) (scrutinizing term “substantially limited in a major life activity” in application of disability definition and holding mitigating measures must be considered in this assessment).
47 Id. at 482.
broad class of jobs.” This decision dramatically raised the bar for plaintiffs relying on “working” as a major life activity for the purpose of establishing disability.

As a counterpart to Sutton’s pronouncements in the area of “working” as a major life activity, the Supreme Court in 2002 laid out a standard for determining both what constitutes a major life activity apart from working, and a substantial limitation therein. The Court in Toyota Manufacturing of Kentucky, Inc. v. Williams held that major life activities cannot concern merely on-the-job tasks, but must be activities of “central importance to most people’s daily lives.” Here, a plaintiff with job-related carpal tunnel syndrome was found not to be substantially limited in the “major life activity of performing manual tasks” because she could still perform personal tasks such as brushing her teeth and washing her face. In order to be “substantially limited,” the Court held, a plaintiff must show that she is “prevented or restricted” from performing the activity in question.

The Sutton and Toyota decisions have had three important, related effects. First, they have resulted in waves of cases, often decided on summary judgment, in which impairments that would have been found disabling prior to the narrowing of the definition—such as breast cancer, epilepsy, and diabetes—may now not be considered limiting enough to qualify the plaintiff for the ADA’s protection. Second, in terms of litigation, the lion’s share of plaintiff-side litigation energy and expense has been allocated to establishing that the plaintiff meets the disability definition, not to proving that discrimination was “because of” disability. Third, because proving that a plaintiff is disabled in this way has so little to do with the nature of the discriminatory harm that occurred, the jurisprudence of the ADA has taken on an abstruse and “tortured” quality quite divorced from the harm of disability discrimination and the remedial

48 Id. at 491. Two other cases in the “Sutton trilogy,” Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999) (holding medicated high blood pressure not disabling) and Albertson's, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999) (holding monocular vision mitigated by perceptual compensation not disabling), came to the same conclusion.


50 Id. at 202.

51 Id. at 187.


53 E.g., Todd v. Acad. Corp., 57 F. Supp. 2d 448, 455 (S.D. Tex. 1999) (lifelong epilepsy not disabling where seizures were weekly and short duration). The Todd court notes that, prior to Sutton, epilepsy would result in “nearly automatic ADA protection.” Id. at 452.

54 E.g., Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (affirming summary judgment for employer where diabetic employee presented no evidence of current substantial limitation).

55 See generally, Feldblum, supra note 3; Anderson, supra note 1; Eichhorn, supra note 4; Friedland, supra note 17.
purposes of the ADA.\textsuperscript{56}

Against the tightening of the “actual disability” prong, advocates might have expected to find refuge in the definition’s regarded-as prong. This provision had been understood by many, including some among its drafters, to be a catch-all category for those who are not limited enough to be actually disabled, but who can show that the employer treated them as though they were so limited.\textsuperscript{57} Advocates found support for this view in the Supreme Court’s 1987 decision under the Rehabilitation Act, \textit{School Board of Nassau Co. v. Arline}.\textsuperscript{58} The \textit{Arline} Court held that, where an employee with asymptomatic tuberculosis was dismissed for fear of contagion, she was regarded as disabled.\textsuperscript{59} Citing Congressional intent to take aim at prejudiced attitudes surrounding impairment, the Court reasoned that “society’s accumulated myths and fears about disease and disability are as handicapping as are the physical limitations that flow from impairment.”\textsuperscript{60} Thus, the \textit{Arline} Court did not base its reasoning on the statutory requirement that the regarder view an impairment as “substantially limiting a major life activity.” Rather it held the regarded-as prong to apply where the limitation flowed from the regarding itself.\textsuperscript{61}

While the Court in \textit{Sutton} cited \textit{Arline} approvingly,\textsuperscript{62} it endorsed a different, slimmer path to protection under the regarded-as prong based more directly on the statutory language. That Court stated two “apparent ways” that one may be regarded as disabled: “(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.” In other words, under \textit{Sutton}, the employer must apprehend the impairment itself as substantially limiting, as opposed to the \textit{Arline} approach wherein it is the “regard” of the employer and others that creates the limitation.\textsuperscript{63} So, where many lower courts prior to \textit{Sutton} had found plaintiffs to be regarded as

\textsuperscript{56} Feldblum, \textit{supra} note 3, at 122-27 (chronicling how Department of Justice memorandum’s “tortured” analysis of asymptomatic HIV as disabling later resurfaced as legal reasoning in \textit{Bragdon v. Abbott}, 524 U.S. 624 (1998)).

\textsuperscript{57} Mayerson, \textit{supra} note 2, at 609. \textit{See also} Feldblum, \textit{supra} note 3, at 157 (referring to regarded-as prong as “the safety valve”).

\textsuperscript{58} 480 U.S. 273 (1987).

\textsuperscript{59} \textit{Id.} at 301.

\textsuperscript{60} \textit{Id.} at 319.

\textsuperscript{61} The EEOC echoed this view of the regarded-as prong in its regulations defining that provision as reaching one who: “(A) has a physical or mental impairment that does not substantially limit major life activities but that is treated . . . as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined [in the actual impairment paragraph] but is treated . . . as having such an impairment.” 29 C.F.R. § 1630.2(l) (2000).


\textsuperscript{63} Professor Feldblum notes that this turn was foreshadowed by a legal memorandum issued by the Department of Justice, which stated that \textit{Arline} “appears not to accept the distinction between being perceived as having an
disabled primarily because an employment action was based on irrational prejudice, courts since *Sutton* have tended to apply the actual-disability prong’s stringent inquiry into substantial limitation of a major life activity to claims under the regarded-as prong. 64 This poses for plaintiffs the additional problem of producing evidence of the employer’s state of mind with respect to particular major life activities, and claims under the regarded-as prong tend to fail wherever the actual-disability claim fails as well. 65

In an important work explaining the narrowing of the disability definition, Professor Chai Feldblum pits the “concededly circular” 66 approach of the *Arline* Court against a “literalist reading” 67 of the statute that emerged in the lower courts and was endorsed by *Sutton*. Of the *Arline* approach she states: “Indeed, the circular approach was the only way to provide coverage for individuals with certain impairments, such as cosmetic disfigurements, who were limited in life activities solely because of the responses and attitudes of others to their impairments.” 68 Professor Feldblum thus concedes that the definition as written fails to encompass many of the claims that Congress intended to be covered. She views judicial attempts to broaden its application as mere “band-aids” on a gaping wound, and she concludes that Congressional action is needed, either to clarify the meaning of the existing definition, or to remove the requirement of substantial limitation in a major life activity. 69

64 See, e.g., Robinson v. Lockheed Martin Corp., 2007 U.S. App. LEXIS 331, *9 (3d Cir. 2007) (holding employer’s granting disability leave and suggesting FMLA leave for known seizure disorder did not amount to regarding employee as disabled without evidence of perceived limitation in a major life activity); Kupstas v. City of Greenwood, 398 F.3d 609 (affirming summary judgment for employer where employee with back injury where perceived major life activity limitation not shown); Lessard v. Osram Sylvania, 175 F.3d 193 (1st Cir. 1999) (holding plaintiff must show she was regarded as substantially limited under regarded-as prong rather than base claim on myths associated with impairment).

65 For discussion of the relationship between the “actual disability” and “regarded as” prongs, see, e.g., Anderson, supra note 2, at 123-29 (asserting regarded-as prong “by its plain language . . . incorporates the flawed idea” from actual-disability prong that only certain impairments can be disabling”); Eichhorn, supra note 4 at 1422 (1999) (conceding regarded-as prong analysis follows interpretation of “actual disability” prong); Friedland, supra note 17, at 180 (discussing problem of “major life activities” language from “actual disability” prong as incorporated in regarded-as prong); Sharona Hoffman, Corrective Justice and Title I of the ADA, 52 AM. U.L. REV. 1213, 1232 (2003) (noting that regarded-as prong does not meaningfully broaden ADA coverage beyond actual-disability prong).

66 Feldblum, supra note 3, at 158 (“This circular, non-literalist reading of the third prong of the definition never caught on in the lower courts.”)

67 Id. a 141.

68 Id at 157-58.

69 Id. at 161.
But the Arline approach is not the only way to provide coverage for the impairments Professor Feldblum speaks of, or for many other conditions held not to constitute actual disability. While amending the definition of disability to rid it of the major-life-activity requirement would bring the statute into greater harmony with Congressional intent, a more expedient and feasible solution to much of the ADA’s drift lies in revisiting the maligned language of the statute itself. This is because the regarded-as prong, read literally, is ambiguous in very distinct, structural way. Acknowledging that ambiguity would open the door to using legislative history to ascertain Congressional intent, which would undoubtedly favor a broadened interpretation. But first we have to see the distinctions of meaning.

II. DE DICTO-DE RE AMBIGUITY IN THE REGARDED-AS PRONG

This Part walks through the semantic ambiguity operating in the regarded-as prong. But the claim that this ambiguity has been present quite literally “to the nines” in the definition of disability, without engendering comment until now, may naturally meet with skepticism. For this reason I first discuss why lawyers tend to miss the fact of this ambiguity as an initial matter.

A. Ambiguity and Lawyers

The regarded-as prong of the ADA’s disability definition manifests a phenomenon that linguists and philosophers have traditionally called the dicto-de re distinction. Simply put, a sentence is de dicto-de re ambiguous—i.e., it has both a de re reading and a de dicto reading—when a term within it can be understood as functioning in either of two ways: (1) as a “referring expression” that points to a particular thing in the world (e.g., a particular impairment), or (2) as a “non-referring expression” that designates a category but does not point to a particular individual member within that category (e.g., the concept of “an impairment” in general). The

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70 De dicto and de re are traditional terms used in the philosophy of language. See, e.g., L.T.F. Gamut, Logic, Language, and Meaning 46-47 (1991); Chierchia, supra note 27, at 243; Gillian Ramchand, personal communication (July 6, 2007) (on file with author). For a discussion of the history of the distinction, see Catarina Dutilh Novaes, A Medieval Reformulation of the De Dicto/De Re Distinction, Logica Yearbook at 111 (2003). The modern philosopher most closely associated with theoretical developments around the class of phenomena that the distinction captures is W.V.O. Quine, whose thinking on de dicto-de re is summarized in Michael Morris, Introduction to the Philosophy of Language 113-33 (2002). Quine’s work in turn relates back to generalizations noted by Gottlob Frege between reference (Bedeutung) and sense (Sinn). Gottlob Frege, Über Sinn und Bedeutung, in Zeitschrift für Philosophie und Philosophische Kritik 25-50 (1892), translated as On Sense and Reference by Peter Geach & Max Black, in Translations from the Philosophical Writings of Gottlob Frege 56-58 (1970). For an explanation of the de dicto-de re phenomenon in epistemic contexts (e.g., believing, thinking, regarding, etc.), see Chierchia, supra note 27, at 243-47.

71 I take some liberties here with the terminology, defining de dicto and de re in terms of referring and non-referring expressions, because I think these are the most accessible terms to use to keep track of the distinctions. The most accessible discussion of reference I have encountered is found in James R. Hurford and Brendan Heasley, Semantics: A Coursebook 35 (1983) (hereinafter Hurford and Heasley). That text does not use the de dicto-de re terminology, but it addresses the same class of phenomena under a discussion of ambiguity in “opaque contexts.” Id. at 38-40. More on opaque and transparent contexts infra at notes 95-96 and accompanying text. To see why it makes sense to define the de dicto-de re distinction in terms of non-referring and referring expressions,
regarded-as prong contains two terms that give rise to a de dicto-de re distinction: “a[n] impairment” and “major life activities.” To complicate matters, each of these two sites of ambiguity is independent of the other, and each yields a three-way distinction in meaning. The combined result is that the regarded-as prong is susceptible of no fewer than nine different readings, each corresponding to a distinct semantic structure. More on these nine readings in Part II below, but first, a note on why this type of ambiguity in the ADA has not even come up to date.

A nine-way ambiguity---is this not a paradise for lawyers, or at least our equivalent of a crossword aficionado’s New York Times Sunday Puzzle? Whether arguing for dual meaning of a term in the Internal Revenue Code or positing an alternate grammatical structure in an insurance contract, spotting ambiguity and making hay with it is considered quintessentially lawyerly. So it may seem hard to believe that, with so many eyes from the bench and the bar trained on federal disability discrimination law, such a rich patchwork of meaning could slip by undetected for over thirty years.

What explains this puzzle is that competency in resolving linguistic ambiguity in language is largely tacit, and it is hard to make tacit knowledge explicit. This is especially true where the ambiguity not the usual kind of dual meaning that lawyers are used to confronting. That is, it is not a simple matter of a single term having two meanings (e.g., does “term” in the sentence you are now reading mean “word” or “time period”?). To verify such “lexical ambiguity” we can look it up a dictionary, and see two or more distinct entries. And the distinction is not even as easily understood and diagrammable as the case where a sentence has two possible grammatical structures (e.g., does “easily” in the present sentence modify “understood and diagrammable” or just “understood”?). As contract law professors know, you can write such a “syntactically ambiguous” sentence on the blackboard, mark it up with brackets to highlight its constituent phrases and with arrows to show various relations among them, and expect the expressions of students to signal, “Aha! I see the distinction now.” Seeing is believing: depicting ambiguity on the page or the blackboard makes it real for speakers,

compare the examples in HURFORD AND HEASLEY at 36-39 (stated in terms of referring expressions) with the examples in CHIERCHIA, supra note 27, at 243-47. Both concern the same class of ambiguous sentences.

72 The term “substantially limits” is also likely another site of ambiguity: by whose measure (i.e., in fact or in the view of the regarder) must there be a substantial limitation? This is an important issue, but one outside the scope of this article.

73 This claim is not uncontroversial: because “major life activities” is embedded in a subordinate clause relative to “impairment,” one could argue that the range of readings available for “major life activities” is constrained the reading of “impairment.” Semanticists I have consulted disagree on this point.

74 See Figure 2 infra in Part II for a matrix of these nine readings.

75 While the ADA was enacted in 1990, the language of the current definition of disability under the ADA first appeared in the Rehabilitation Act as amended in 1974.

76 See HURFORD AND HEASLEY, supra note 71, at 128, for a definition of lexical ambiguity.
including lawyers. 77

By contrast to lexical and syntactic ambiguities, the *de dicto-de re* distinction is obscured because it occurs at the level of “compositional semantics.” 78 Compositional semantics concerns not the meanings of individual words, but with how words combine to yield complex sentence meaning. 79 These relations are often highly abstract, so that the formalism linguists use to show the logical structure of a sentence ends up looking very little like the sentence itself, or even like English, for that matter. 80 If this were not daunting enough, there is also not much payoff in practical terms for mastering such a formalism. We do not need it to resolve ambiguity in natural language, which we do more or less “on the fly” in conversation. 81 And unlike the dictionaries and knowledge of grammar that help us detect lexical and syntactic ambiguity, semantic formalisms are of little use in everyday life. Where we might wish we had them in our lawyering toolbox, though, is when we sense that some interpretative matter has gone awry, perhaps absurdly so, yet we cannot put a finger on exactly what went wrong. This is just what is happening now with judicial interpretation of the regarded-as prong.

In sum, it is a glaring oversight of sorts for the legal community to have missed ambiguity in the ADA, but it is also not astonishing, given that we lack the tools to expose it. This Part aims to bring the *de dicto-de re* distinction into view by offering a Swiss-army-knife version of a linguist’s tools. First, some simple, concrete sentences will serve as conceptual building blocks to construct the ambiguity as it operates in the ADA. I adopt a streamlined formal notation, so that one can see the relevant distinctions clearly before mapping this understanding onto the regarded-as prong. Formal notation aside, the most important equipment to bring along in this undertaking is something the reader already possesses: ordinary intuitions about language and meaning.

**B. Nouns as Referring or Non-Referring Expressions**

*A noun is a person, place or thing.*

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77 Farnsworth et al., * supra* note 26, at 574. The casebook gives this example of syntactic ambiguity in a contractual clause: “All domestic water piping and rainwater piping installed above finished ceiling under this specification shall be insulated,” which is ambiguous as to whether “installed above . . .” modifies “domestic water piping and rainwater piping just “rainwater piping.”


79 *Id.*

80 There are actually many different formal notations used to express semantic structure. To convey an impression of the “barriers to entry” for using but one of them, here is how the common formalism known as Montague Grammar depicts the logical structure of the verb phrase, “thinks that a student hates every professor”: \( \lambda x [\text{think}'(x, \forall y [\text{student}'(y) \land \forall z [\text{professor}'(z) \rightarrow \text{hate}'(y,z)]]]) \). In fact, this represents the structure of just one of three possible readings of this phrase. Chierchia and McConnell-Ginet, *Meaning and Grammar, supra* note 27, 344.

81 See Part II(C) for a brief discussion of how context enables us to resolve ambiguity without conscious effort.
The ambiguity that I address concerns the nouns, “impairment” and “major life activities,” and how they behave differently in the regarded-as prong versus the actual-disability prong. Because it may seem strange to think of nouns as “behaving” at all, I begin by calling attention to a basic split in the types of roles nouns can play, one that everyone knows intuitively if often not explicitly: nouns can either refer or not.  

We tend to think of nouns as naming things: nouns pick out and point to entities in the world. In linguistics, “reference” is the term for this pointing relationship between words and things: a referring expression (the noun phrase itself) is one that points to a referent (the actual entity in the world). The concept of reference gives us little trouble in analyzing nouns, as we can see by analyzing the phrase “a dog” in this simple sentence:

(1) John has a dog.

Here, “a dog” straightforwardly refers to a particular dog, John’s dog. In the terms used thus far, “a dog” is a referring expression, with the actual animal as its referent. We can paraphrase the logic of the sentence this way: “There is some thing in the world that is a dog and that John has.” Using a simplified notation borrowed from linguistics, we can describe the logical structure of the sentence with this formal expression:

(1a) There exists some “x” such that [“x” is a dog and John has “x”]

This notation makes visible something important that this sentence does via reference: it asserts the existence of a thing in the world, the referent of “a dog.” In order for this sentence to be true, there must exist an actual dog in the world (one that meets the criterion of belonging to

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83 WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 47 (2d ed. 1961).

84 My analysis invokes the term “have,” although this verb is not present in the actual-disability prong, because “to have a disability” is equivalent to “being a person with a disability.” The “have” formulation makes the actual- and regarded-as prongs parallel in structure and therefore easier to compare. 42 U.S.C. § 12102(2)(A) and (C) (2000).

85 See, e.g., CHIERCHIA, supra note 27, at 65; HURFORD AND HEASLEY, supra note 71, at 29-36.

86 HURFORD AND HEASLEY, supra note 71, at 35.

87 An equally valid paraphrase would be “the union of the set of things that John has and the set of dogs is non-empty.” See CHIERCHIA, supra note 27, at __.
John). It is crucial to view this assertion of existence as a special function of nouns in certain contexts, rather than to take it for granted that all nouns behave as referring expressions, as the contingency of reference is the fulcrum of ambiguity in the regarded-as prong.

It may seem obvious, and even necessary, that nouns refer to things in the world. Yet in many contexts this is not the case. Compare Sentence 1 above to this equally commonplace one:

(2) John does not have a dog.

Here it is easy to see that “a dog” has no referent: there is no dog to which the phrase points. The meaning of this sentence in logical terms is roughly: “There is no thing in the world that is a dog and that John has.” More formally:

(2a) There does not exist an “x” such that [“x” is a dog and John has “x”]

In this context, then, “a dog” is a non-referring expression. Saying that “a dog” in this context is a “non-referring expression” is not to say it has no meaning, of course. But instead of deriving its meaning by pointing to something in the world, a non-referring noun is a description of a set of properties (e.g., for “a dog,” those properties that all dogs have in common), corresponding to what we would say the word “dog” means in general. Unlike Sentence 1, Sentence 2 does not assert the existence of any thing; indeed, it may be true even if no dogs exist in the world at all.

The fact that referring expressions assert the existence of some thing—and non-referring expressions do not—has important implications for determining whether sentences that contain such expressions are true or false. To ascertain the truth or falsity of “John has a dog,” (i.e., a referential context) we would naturally ask about the referent itself, the supposed dog: “What is the dog’s name? How old is the dog? Show us a photo of the dog.” But this strategy is useless, even absurd, where “a dog” is a non-referring expression. To see why, imagine testing the truth of the sentence, “John does not have a dog,” by asking John: “What is the name of the dog [you do not have]?”; “How old is the dog [you do not have]?”; “Show us a photo of the dog [you do not have].” More generally, any question about “the X” makes no sense in a context where there is no referent of “an X” to begin with, because this amounts to asking about something that is not asserted to exist. Where there is no dog in the world to refer to, we cannot reasonably speak of “the dog.” Or, if Gertrude Stein were making this point, she would need only to drop two letters from her famed quip and put it this way: There’s no the there.

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88 This is equivalent to “There is nothing that John has that matches the description of ‘a dog,’” Alternatively: “The union of the set of things that John has and the set of dogs is empty.” The reader may be tempted to claim that the semantic distinction between (1) and (2) lies in the lexicon: namely, that the article “a” is ambiguous, meaning “one dog” in the affirmative context and “any dog” in the negation context. A problem with this account is that it introduces a layer of complexity that is not needed on an account where negation operates globally and regularly on the entire sentence. The reader inclined in this direction, however, is very much in step with the linguistically reductive tendencies of legal reasoning in general, a matter I take up in A Preference for Reference: Legal Reductionism and Interpretive Errors (in progress).

89 This corresponds to a notion of the “sense”of a word. HURFORD AND HEASLEY, supra note 71, at 30.
To summarize thus far, sometimes nouns refer and sometimes they do not. Whether a noun refers does not depend on the noun (as shown by the dual results for “a dog”) but on the context in which it occurs.

The next step is to consider contexts that are ambiguous as to whether they contain a referring expression. The ADA’s regarded-as prong is just such a context. Owing to the courts’ failure to grasp the ambiguity, the jurisprudence concerning the regarded-as prong has been nearly as absurd as “asking John the name of the dog he does not have.” But before considering the complex statutory language itself, I aim to make the de dicto-de re phenomenon visible in simpler, concrete contexts.

C. Referentially Ambiguous Contexts and the De Dicto-De Re Distinction

Sentences that are ambiguous as to whether nouns within them refer are said in linguistics to manifest a de dicto-de re distinction. The following sentence may seem straightforward, but in fact it is ambiguous with respect to whether “a dog” is a referring expression.

(3) John is looking for a dog.

This sentence admits of two distinct readings, corresponding to two different types of factual situations. On one reading, “a dog” is a referring expression: John has a particular dog in mind that he is seeking, perhaps his own dog. We can paraphrase this reading this way: “There is some particular thing in the world that is a dog, and John is looking for that particular thing.” More formally:

(3a) There exists some “x” such that [“x” is a dog, and John is looking for “x”]

This is known as the de re reading of Sentence 3. The Latin term de re translates as “about the thing,” meaning that “a dog” gets its referential meaning by virtue of its relationship to some particular thing (in Latin, the legally familiar res) in the world. On a de re reading, then, “a dog” behaves similarly to the way it behaves in the context of “have” when used affirmatively as in Sentence 1: it points to a referent. But this is not the only way to read the sentence, as an alternate context shows.

A second reading of Sentence 3 is one in which “a dog” is a non-referring expression. This reading would describe a very different scenario, perhaps one in which John is whiling away countless hours on “petfinder.com,” an internet database of domestic animals available for adoption, looking for a new family pet. Here, John has no particular dog (i.e., no res) in mind at all; rather, he is seeking something more generally matching the description of “a dog.” The corresponding formalism would be this:

90 See supra note 71 and accompanying text for a brief definition of the distinction.


92 Pronounced like “race.”
(3b) John is looking for some “x” such that [“x” is a dog]

This is the *de dicto* reading of Sentence 3. *De dicto* translates from Latin as “about the saying” (i.e., the legally familiar *dictum*). On this reading, “a dog” gets its meaning not by pointing to a thing, but through the category “dog” and its relation other categories, namely, the set of properties that we understand as essential to the meaning of that word. To further illustrate the contrast, on the *de re* reading, there must necessarily be some actual dog in the world—a *res*—that John is seeking; not so for the *de dicto* reading, where no dog need exist at all for the sentence to be true. We can see this difference in the logical structures of the two readings given in Sentences 3a and 3b above: the *de re* formulation asserts the existence of some “x”; the *de dicto* reading does not.

To head off potential misunderstanding, it is important not to confuse a high degree of detail in *de dicto* description on the one hand with reference on the other. On the *de re* reading corresponding to the lost dog scenario, there is necessarily one and only one dog that exists as a referent of “a dog.” By contrast, on the *de dicto* (petfinder.com) reading, even with a very detailed description, there may be many dogs meeting that description, or there may be none. No matter how many criteria our “petfinder John” may have for the type of dog he is seeking (a dalmation, housebroken, etc.), there will still be no referent: he has only the *dictum*, not a *res*, in mind.

Common sense tells us that we resolve *de dicto-de re* ambiguity in everyday natural language without thinking consciously about it. The sentences above may be ambiguous, but they are not confusing when they occur in natural language. What enables us to resolve the ambiguity is, crucially, *context*. If John knocks on your door saying he is looking for a dog (i.e., *de re*), you are unlikely to reply, “I know of a good dog you might like.” Conversely, if the utterance arises where you know that John is in the market for a canine companion (i.e., a dog *de dicto*), it would be peculiar to ask, “If I approach the dog you are looking for, will it bite me?” Context is so helpful---in fact, essential---to resolving ambiguity, that we are unlikely even to realize that we are dealing with ambiguity in the first place.

If we intuitively choose between *de dicto* and *de re* readings based on context, it should be equally clear that the two readings may split as to their truth or falsity, depending on the facts. Working still with the looking-for-a-dog sentence, the *de dicto* reading will be true where John is looking for a new family pet; the *de re* reading will be false.

A corollary of this point is that the method of proving that an ambiguous sentence is true differs according to which reading or readings we believe the speaker intends. If a *de re*...
interpretation alone is intended, the inquiry is straightforward: we ask about the supposed referent that John is looking for---what color is the dog, and so forth. Under the *de dicto* formulation, however, there is no referent to ask about. Instead, we would ask about John’s more abstract relationship to “a dog” as a category: is he looking for something matching that general description? Unless we have drawn on context to figure out which reading is intended, we cannot know which of these two paths of inquiry is appropriate. We cannot say, for example, that the ambiguous sentence “John is looking for a dog” is false in the pet-search (*de dicto*) scenario just because John cannot identify a particular dog he is seeking. Yet this is exactly the mistake courts make---demanding proof of reference where none is required by the statute---in interpreting the ADA. As I show in Part III below, asking plaintiffs “what is the impairment” and “what is the major life activity” may be yield the right results under a *de re* reading of the regarded-as prong. But on a *de dicto* reading, they are unanswerable and inapposite. What remains is to show that “a[n] impairment” and “major life activities” are ambiguous in the “regard” context.

D. Ambiguity in the Regarded-As Prong

In linguistics, verbs that give rise to a *de dicto-de re* distinction are known as “opaque” verbs, where the opacity describes the fact that we cannot “see through” the verbal context to know whether a noun within it is a referring expression or not. As shown above, “look for” is an opaque verb; by contrast, “have” is termed a verb that is “transparent” to reference, as seen in Sentence 1.

Verbs pertaining to lack or desire (of which “look for” is one) and thought or attitude (such as “believe” and “regard”) are major classes of opaque verbs. To see how the ambiguity arises in a “regard” context, consider this sentence:

(4) Sonia regards John as having a job.

On the *de re* reading, Sonia regards John as having some particular job, a *rex*, perhaps because she has seen John at work. In formal terms:

(4a) There exists some “x” such that [“x” is a job and Sonia regards [John as having “x”]]

On the *de dicto* reading, by contrast, “a job” does not refer to any particular job at all: Sonia

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95 CHIERCHIA, supra note 27, at 242. *See also* John A. Barndern and Donald M. Peterson, Artificial Intelligence, Mindreading, and Reasoning in Law, 22 Cardozo L. Rev. 1381, 1395-96 (2001). Under an alternative account, these verbs are termed “intensional” verbs as opposed to “extensional” ones. Chierchia at 243.

96 BARBARA PARTEE AND ALICE TER MEULEN, MATHEMATICAL METHODS IN LINGUISTICS 409-10 (1990) (discussing major classes of opacity).

simply regards John as being *employed*, perhaps because she has heard John complain about his taxes every April. More formally:

\[(4b) \text{Sonia regards } [\text{there exists some } x \text{ such that } [\text{“}x\text{” is a job and [John has “}x\text{”}]]]^{98}\]

The formal structures of the two readings point up a difference concerning the asserted existence of “x.” Because the *de re* reading in 4a asserts the existence of a particular “x,” which is a particular job, the proof inquiry may reasonably begin, “So, tell us about the job Sonia regards John as having.” The *de dicto* reading is quite different with respect to the existence of “a job.” On this reading, no particular “x” (a job) is asserted to exist. Rather, Sonia thinks there exists *some job or other* that John has, which may be the more natural reading of the sentence. If we were to ask Sonia about “the job” she regards John as having, she might legitimately respond, “I can’t answer that. I just think he’s employed.” Certainly, her inability to answer questions concerning “the job” does not make the sentence any less true.

If one accepts that the regard-context gives rise to *de dicto-de re* ambiguity in the above example, one need do little more than plug in the more contestable terms “impairment” and “major life activities” to see the statute’s ambiguity. The sentence at issue here is this one:

\[(5) \text{Sonia regards John as having an impairment that substantially limits one or more of John’s major life activities.}^{99}\]

This sentence is *de dicto-de re* ambiguous with respect to both “an impairment” and “major life activities.” For impairment, the *de re* reading requires that Sonia have a particular condition in mind, such as heart disease, diabetes, or depression. The *de dicto* reading would correspond to a scenario in which, for example, Sonia regards John as impaired because his doctor says he cannot lift more than 20 pounds (which could be due to any number of impairments), or where Sonia regards John as either being depressed or bipolar but does not know which. Concerning “major life activities,” a *de re* reading would correspond to facts where Sonia has a particular activity in mind, such as walking, seeing or breathing.\(^{100}\) A *de dicto* reading would describe a scenario in which Sonia regards John as limited in some important activity or other, but not in any particular one.

The ambiguity concerning “major life activities” is independent of the ambiguity

\(^{98}\)This is an awkward formulation owing to the unusual syntax of the verb regard as taking a nominal object (here, John) and a gerund as its complements, and to my efforts to make the semantic formalism correspond as closely as possible to the syntactic structure.

\(^{99}\)This sentence assumes “physical or mental” within the definition of “impairment.” 42 U.S.C. § 12102(2) (2000).

\(^{100}\)Both of these are listed as impairments in the ADA’s implementing regulations promulgated by the EEOC. 29 C.F.R. § 1630.2(i) (2000).
concerning “impairment.” Sonia may have a referent in mind for both (e.g., she regards John’s walking as being limited by his back injury). Or she may have a referent in mind for “an impairment” but not for “major life activities” (e.g., she regards John’s thyroid cancer as a severely limiting condition but has no thought as to what particular activities it may limit). Conversely, she may regard some particular activity (i.e., a referent) as being limited by some impairment in a general sense, without a view as to what particular impairment that might be (e.g., she observes John’s inability to walk more than 20 feet without resting and assumes this is a longstanding physical problem, but she has no view as to the nature of the impairment – it might be heart disease, or emphysema, etc.). Finally, Sonia may lack a referent for either term, simply viewing John as mentally or physically limited in some major way.

In sum, the pair of two-way ambiguous terms combine to yield four possible readings of the regarded-as prong so far. While four readings may be an arresting conclusion where the courts have not acknowledged ambiguity at all, in fact the regarded-as prong is still more semantically complex, as the next section shows.

E. Wide-scope and Narrow-scope De Re Readings

The regarded-as context introduces another split in meaning: it presents two possibilities for the ordering of “impairment” and “major life activities” with respect to “regard.” This results in two distinct de re readings, which some linguists have termed “wide-scope de re” and “narrow-scope de re.” The distinction is fairly technical at the level of logical structure, but it helps answer an intuitive question: what if the condition Sonia regards John as having is “an impairment” in Sonia’s view only and not within the meaning of the ADA? Though such a condition, such as being left-handed, would not meet the test of “impairment” under the “actual disability” prong, it is nevertheless a legitimate reading of the statute that Sonia “regards John as having an impairment.” Whether or not this is an intended reading of Congress is taken up infra in Part IV.

To see how this distinction works, consider a simplified version of Sentence 5, ignoring “major life activities” for now and focusing on “impairment”:

(6) Sonia regards John as having an impairment.

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101 This is not an uncontroversial claim. If the ambiguity arises at the level of syntax, then the fact that “major life activities” is embedded within the phrase headed by “an impairment” may restrict the available readings of “major life activity.”

102 Ramchand, supra note 71. Some linguists term this an intermediate scope construction, because the existence of ‘x’ as an impairment falls in between the de dicto and wide-scope de re formulations. Richard Holton, Attitude Ascriptions and Intermediate Scope, MIND v. 103, 123-26 (1994).

This can correspond to two *de re* interpretations and facts. Under one scenario, Sonia regards John as having a particular condition (e.g., heart disease), and that condition is an impairment within the meaning of the ADA. Under another, Sonia likewise regards John as having a particular condition (e.g., left-handedness), and she regards that condition as an impairment, but it is not an impairment within the meaning of the statute. Two distinct logical structures capture these *de re* readings:

**Wide-scope de re:**

(6a) There exists some “x” such that [“x” is an impairment and Sonia regards [John as having “x”]]

**Narrow-scope de re:**

(6b) There exists some “x” such that [Mary regards [John as having “x” and “x” is an impairment]]

Where these structures differ is in whether the impairment-ness of the *res* falls outside (for wide-scope) or within (for narrow-scope) the scope of “regards.” We differentiate them by asking if the *res* is an impairment in fact\(^{104}\) or only in Sonia’s view. The narrow-scope *de re* reading will be satisfied where, for example, Sonia regards John as having turquoise eyes and she views this condition as an impairment. These facts will not satisfy the conditions of the wide-scope *de re* reading, because having turquoise eyes is not a legal impairment.\(^{105}\) Conversely, where Sonia regards John as having epilepsy (held to be an impairment within the meaning of the ADA\(^{106}\)), but she views epilepsy as a spiritual condition rather than a mental or physical condition,\(^{107}\) the wide-scope *de re* reading will be true and the narrow-scope reading false. Where the *res* is an impairment in view of both the law and Sonia, both *de re* readings will be true.

The wide- versus narrow-scope *de re* distinction occurs also with respect to “major life activities.” For example, Sonia may regard John as being substantially limited in swimming, and she may regard swimming as a major life activity. This would satisfy the narrow-scope *de re* reading. But because swimming is unlikely to be considered a major life activity,\(^{108}\) these facts would not satisfy a wide-scope *de re* reading.

To summarize, the regarded-as prong contains two terms, “an impairment” and “major

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\(^{104}\) Notwithstanding the traditional “in fact” vs. “at law” distinction, here “in fact” means “within the meaning of the ADA,” because this is the standard that determines whether something is “really” an impairment, as opposed to whether it is an impairment in the view of an individual.

\(^{105}\) EEOC, *supra* note 103.

\(^{106}\) E.g., Todd v. Acad. Corp., 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (recognizing epilepsy as an impairment, if not a disabling one).


\(^{108}\) Martinez v. City of Roy, 1998 U.S. App. LEXIS 5906, *7 (10th Cir. 1996) (“concluding, as we must, that recreational swimming is not a major life activity”).

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life activities,” that are ambiguous as to whether they refer at all (*de re* versus *de dicto*). Where they do refer, the statute is ambiguous as to whether its terms must reflect the state of the law or the state of the regarder’s mind (wide- versus narrow-scope *de re*). The following diagram depicts the relationships among these three readings:

**Figure 1: The Family of Readings**

Must the noun refer to a particular thing (a *res*)?

/                        \
Yes – *de re*              No – *de dicto*

|                                                   |
| Must the *res* be “an impairment”                 |
| or a “major life activity” in fact,              |
| or in the view of the regarder?                  |
|                                                   |

/                        \
In fact                  In view of regarder

Wide-scope *de re*       Narrow-scope *de re*

Two independent terms showing a three-way ambiguity yields, in combination, nine possible readings of the regarded-as prong. It is essential to see that none of these readings is any more literal than any other: each is derived from the words of the statute and the logical ways they may combine. The Readings Matrix below organizes these readings into nine categories. It also gives a factual example corresponding to each reading, based on the “reference letter” scenario discussed above in Part I. For each box in the Matrix, employer Sonia has received a letter from applicant John’s current employer, mentioning some condition of John’s and some limitation in activity. Each such example uses a different combination of language supporting a *de dicto*, wide-scope *de re*, or narrow-scope *de re* reading of “an impairment” and “major life activity,” assuming that Sonia’s view of John’s condition is based on the information in the letter alone. Thus, the Matrix shows how the sentence, “Sonia regards John as having an impairment that substantially limits one or more of John’s major life activities,” may be true on nine different classes of facts.
Figure 2: Readings Matrix

“Sonia regards John as having an impairment that substantially limits one or more of his major life activities.”

<table>
<thead>
<tr>
<th>Readings of “an impairment”</th>
<th>wide-scope de re</th>
<th>narrow-scope de re</th>
<th>de dicto</th>
</tr>
</thead>
<tbody>
<tr>
<td>res = a particular impairment in fact</td>
<td>res = a particular impairment in regarder’s view</td>
<td>no res; impairment = “some impairment or other”</td>
<td></td>
</tr>
</tbody>
</table>

| Box I                                           | “John has epilepsy, which substantially limits his ability to work in a broad class of jobs.” |
| Box II                                          | “John is left-handed, which substantially limits his ability to work in a broad class of jobs.” |
| Box III                                         | “John has an impairment that substantially limits his ability to work in a broad class of jobs.” |

| Box IV                                          | “John has epilepsy, which substantially limits his ability to drive to work.” |
| Box V                                           | “John is left-handed, which substantially limits his ability to drive to work.” |
| Box VI                                          | “John has an impairment that substantially limits his ability to drive to work.” |

| Box VII                                         | “John has epilepsy, which substantially limits some of his major life activities.” |
| Box VIII                                        | “John is left-handed, which substantially limits some of his major life activities.” |
| Box IX                                          | “John has an impairment that substantially limits some of his major life activities.” |
Which of the nine readings in this Readings Matrix the courts have tacitly validated is the subject of Part III; which ones comport with Congressional intent behind the ADA is the subject of Part IV.

III. HOW THE COURTS (AND OTHERS) MISS AMBIGUITY

In this Part, I show that the courts tend to ignore all but one of the nine readings of the regarded-as prong. The single reading that has been given effect is represented in Box I, in which both “impairment” and “major life activities” are read as wide-scope de re. That is, courts have assumed both terms to be referring expressions that denote particular (de re) impairments and major life activities that would meet the legal definitions of those terms (i.e., wide-scope).\(^{109}\) In a measure, then, the courts are neglecting nearly ninety percent of what the statute can be read to capture. This inattention to a range of meaning is troubling for a statute intended to have broad remedial effect. Just as important is the fact that courts do not acknowledge textual ambiguity. Rather, they appear to take the reading in Box I for granted as the statute’s literal meaning. The result is that courts ask the wrong questions for claims brought under the regarded-as prong. This Part walks through this interpretive lapse and its consequences, before I turn in Subsequent parts to discerning the proper readings of the regarded-as prong.

A. The Supreme Court is Silent on Ambiguity in the Regarded-As Prong

The Supreme Court has not engaged the question of ambiguity in the regarded-as prong. However, the *Sutton* decision did speak to the criteria for being regarded as disabled.\(^{110}\) There the Court held that that two pilots who were refused hire due to their poor uncorrected vision were not regarded as substantially limited in the major life activity of working because the employer did not regard them as unable to perform a broad class of jobs.\(^{111}\) The Court stated,

> There are two apparent ways in which individuals may fall within [the regarded-as prong of the] statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual -- it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the

\(^{109}\) In fact, it is very likely that possible formal readings of the statute number far more than nine. *See supra* note 72 concerning “substantially limits” as a further site of ambiguity).


\(^{111}\) *Id.* at 468.
impairment is not so limiting.\textsuperscript{112}

The “two ways” thus appear to differentiate claims where the “mistake”\textsuperscript{113} goes to the presence or absence of impairment, as opposed to the degree of limitation of a correctly apprehended, actual impairment.\textsuperscript{114} This formulation does little to resolve \textit{de dicto-de re} ambiguity. The first “way” does not clarify whether there must be a particular (\textit{de re}) impairment or major life activity. Nor does it state whether any such particular \textit{res} must be an impairment or a major life activity by the legal standard, as opposed to in the mind of the regarder. Rather, it simply restates the ambiguous statutory language. Thus, the first “way” alone may correspond to any of the nine readings. Even if it were argued that \textit{Sutton} adopts a \textit{de re} reading of impairment,\textsuperscript{115} lack of discussion of ambiguity would weaken that argument. After \textit{Sutton}, all nine literal readings are in play.

It bears noting, though, that \textit{Sutton} does appear to answer a question related to the \textit{de dicto-de re} distinction. By stating that one can be regarded as disabled where an employer mistakenly believes the individual’s impairment is more limiting than it is, the Court implied that the regarded-as prong does not require proof that the perceived impairment be \textit{actually} substantially limiting.\textsuperscript{116} This arguably revised the law in a number of jurisdictions where courts had held that, in order to prove that the plaintiff had a disability under the regarded as prong, she must show that she was actually substantially limited by the perceived impairment.\textsuperscript{117} At first glance, such a requirement may seem at odds with the plain language of the regarded as prong, and the \textit{Sutton} correction may seem obvious. Certainly, the sentence, “Sonia regards John as having an impairment” may be true even if “John has an impairment” is false.\textsuperscript{118} Why then should John have to prove that he actually has a substantially limiting impairment in order to prove that Sonia so regards him?

\textsuperscript{112} \textit{Id.} at 489.

\textsuperscript{113} The \textit{Sutton} court equates “regarding” with “believing.” In \textit{Regarding is Seeing, and Seeing is not Believing} (in progress), I argue that these terms are not interchangeable: one can regard another as limited without believing that person is limited, particularly where that regard is animus-driven.


\textsuperscript{115} This argument is that reference to “an impairment . . . that one does not have” should be read \textit{de re} because any other reading would require the regarder to have this internally contradictory belief: “I think John has an impairment that he does not have.”

\textsuperscript{116} 527 U.S. at 489.

\textsuperscript{117} See, e.g., Welsh v. City of Tulsa, 977 F.2d 1415, 1417 (holding that regarded-as claims must, like actual-disability claims, must demonstrate substantial limitation in a major life activity). See also Mayerson, \textit{supra} note 2, nn. 16-43 and accompanying text (discussing courts’ effective nullifying of the regarded-as prong and collecting cases).

\textsuperscript{118} CHIERCHIA, \textit{supra} note 27, 205.
The answer is that the lower courts were tacitly adopting one logically possible reading of the statute—the wide-scope *de re* reading of the entire noun phrase: “[an] impairment that substantially limits one or more of [John’s] major life activities.” To paraphrase this reading: There exists something that is in fact “an impairment that substantially limits . . . John’s major life activities,” and Sonia regards John as having *that thing*. Though it may be counterintuitive, reading the regarded-as prong to require an actual, substantially limiting impairment is a logical possibility. To be sure, the fact that some reading is logically possible does not make it a valid or reasonable reading in context, and commentators have more than adequately marshaled reasons that this interpretation is inconsistent with Congressional intent.

So it seems some lower courts were adopting the most extreme wide-scope *de re* reading of the disability definition before the *Sutton* correction A more rigorous interpretation of the regarded-as prong would have acknowledged the ambiguity of the language in question and looked to its context—including legislative history—to resolve it. Instead, the *Sutton* Court, in merely implying that the regarded-as prong does not require that the plaintiff have an actual substantial limitation, simply reincorporated the definition’s ambiguities. Had the Supreme Court grappled with the fact that it was dealing with an ambiguous text that that did not simply lend itself to “two apparent ways” to meet its requirements, it might have shed more light on how the statute’s multi-way ambiguity ought to be resolved. Absent this, the lower courts, while constrained from adopting the most severe and unnatural reading of the statute, have remained free to (1) recognize only a wide-scope *de re* reading of “impairment” and “major life activities,” and (2) take that reading for granted without acknowledging ambiguity.

**B. Lower Courts Miss All Readings Other Than Wide-scope *De Re***

In applying the impairment-and-major-life-activities-centered approach to the regarded-as prong, the lower courts have in effect reduced the available readings from the Readings Matrix to the one given in Box I, reading both “an impairment” and “major life activities” as

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119 This reading does not appear in the Readings Matrix, which considers the two noun phrases independently.

120 Interestingly, this is exactly the argument made by the defendant’s counsel on oral argument before the Supreme Court in *Bragdon v. Abbott*. From the transcript: “QUESTION: Well, the act seems to go further, and say if someone is regarded as having the impairment it’s covered. MR. McCARTHY: I think that the language of the act says, if someone is regarded as having such impairment, and when they say such impairment they’re referring to an impairment that substantially limits a major life activity, so the regarded as only comes into play if you have an impairment that substantially limits a major life activity.” 1998 U.S. TRANS LEXIS 18, 22 (1998).

121 Reasons to rule out this reading include that it would render the regarded-as prong superfluous to the actual-disabilities prong, that it is unreasonable to require that a “perceived” impairment be “actually” limiting, and that the statute’s implementing regulations and legislative history contemplate the regarded-as prong to cover cases where the plaintiff has no impairment and noThese reasons include the fact that *See, e.g., Anderson, supra note 2, at 123-24; Feldblum, supra note 3, at 91-100; Mayerson, supra note 2, at 611-12.

122 Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (holding that the first step in statutory interpretation “is to determine whether the language has a plain and unambiguous meaning with regard to the particular dispute in the case.”).
referring expressions. I show in sequence how the courts have ignored the *de dicto* reading of “impairment” (thereby excluding Boxes III, VI, and IX), the *de dicto* readings of “major life activities” (Boxes VII, VI, and IX), and all narrow-scope *de re* readings (Boxes II, IV, V, VI, and VII), leaving only the wide-scope *de re* reading for both terms.

1. Courts Miss the *De Dicto* Reading of “Impairment”

A telltale sign that a court has neglected a *de dicto* reading in favor of a *de re* reading of “impairment” is an implicit demand that the plaintiff answer questions about the impairment, including “What is the impairment you were regarded as having?” On a *de dicto* reading, where no such impairment need exist, such questions are misplaced. A plaintiff who is regarded as impaired on a *de dicto* reading alone will not be able to answer them or will have to concoct implausible answers. This plaintiff’s claim will therefore fail, as will any others corresponding to Boxes III, VII, and IX in the Readings Matrix, although the plaintiff in each instance may in fact be regarded as having “an impairment.”

At least one court has held that articulating a specific impairment is a pleading requirement for an ADA claim.123 Several courts have held as a matter of law that it is fatal to a claim, including one brought under the regarded-as prong, if the plaintiff does not identify a particular impairment at issue.124 Others hold that this is necessary for the plaintiff to meet her burden at trial.125 Some courts state this explicitly as in as in *Poindexter v. Atchison, Topeka & Santa Fe Railway Co.*126 That decision reversed a jury verdict for the plaintiff on the grounds that the jury had not been instructed as to specific impairments and major life activities it could consider. The *Poindexter* court explained: “A plaintiff has the option of clarifying his or her position at the pleading stage or waiting until trial to prove with particularity the impairment and major life activity he or she asserts are at issue.”127 Similarly, the court in *Murray v. John D. Archbold Memorial Hospital* upheld summary judgment for the employer where the plaintiff was obese, stating that the impairment must be a “specific condition.”128 Likewise, in *Alexander v.*


124 See, e.g., Liljedahl v. Ryder Student Transp. Servs., 341 F.3d 836, 842 (holding on state law claim under ADA standard that plaintiff must allege specific impairment and employer must know of this impairment); Hughes v. Madison Local Sch. Dist., 2006 U.S. Dist. LEXIS 28922, *13-14 (repeatedly citing plaintiff’s failure to identify specific impairment in granting summary judgment to employer); Sealey v. Tropicana Perfume Shoppes, Inc. 2006 U.S. Dist. LEXIS 83820, *12-13 (holding employer entitled to judgment as a matter of law where plaintiff did not state the name or nature of impairment).

125 E.g., Bolton v. Sprint/United Mgmt. Co., 2006 U.S. Dist. LEXIS 6955 (holding that plaintiff need not identify specific impairment or major life activity at pleading stage).

126 168 F.3d 1228, 1232 (10th Cir. 1999).

127 *Id*, citing Poindexter v. Atchison, Topeka & Santa Fe Railway Co., 168 F.3d 1228, 1232 (10th Cir. 1999).

Eye Health Northwest, P.C., the district court held that an employer’s several remarks alluding to the plaintiff’s “disability” and “your knee, your neck, your this and that other surgeries” were insufficient as a matter of law to show that the plaintiff was regarded as disabled, in part because she could not identify any particular impairment that the employer had in mind in connection with her termination.  

Other courts are not explicit about the requirement that the plaintiff articulate a specific impairment, but they make a leap from the statutory requirement that the plaintiff prove that she was regarded as having an impairment to requiring that she prove facts about the impairment. In an analysis typical of many jurisdictions, the court in Deas v. Dixon held that a prima facie showing of disability under the regarded-as prong requires evidence that “this [perceived] impairment” be the kind that would be substantially limiting. In other words, these courts assume that “an impairment” must refer to some res to which the plaintiff can point, and that she will be able to allege facts specific to the or this impairment, actual or imagined.

Another way in which the courts tacitly adopt a de re reading is by conflating the inquiries with respect to the actual-disability and regarded-as prongs. The problem with collapsing the two provisions is that they do not behave the same with respect to reference. In linguistic terms, the actual-disability prong is a transparent context in which nouns must refer; the regarded-as prong is an opaque context in which nouns may or may not refer. If a plaintiff claims she has an impairment under the actual-disability prong, then yes, she must mean a particular impairment. But this requirement does not hold for the regarded-as prong, because a de dicto reading of that provision does not require reference. Thus, while the language of the


130 Gerdes v. Swift-Eckrich, Inc., 949 F. Supp. 1386 (citing regarded-as cases that failed where plaintiff failed to generate evidence creating a genuine issue of material fact as to the employer’s perception of the necessary impairment) (emphasis added); Wooten v. Farmland Foods, 58 F.3d 385, (“The limiting adjectives ‘substantially’ and ‘major’ indicate that the perceived ‘impairment must be a significant one,’”).

131 See also Deane v. Pocono Med. Ctr., 142 F.3d 138, 143 (3d Cir. 1998) (stating “regarded as” claim requires determination of whether “the impairment” as perceived by would have been substantially limiting); Barnett v. Tree House Cafe, Inc., 2006 U.S. Dist. LEXIS 88999 (S.D. Miss. 2006) (holding in regarded-as case that “the impairment, whether real or imagined, must substantially limit a major life activity or be perceived as actually substantially limiting a major life activity”); EEOC v. Exxon Corp., 124 F. Supp. 2d 987, 998 (N.D. Tex. 2000) (citing Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996) ) (outlining inquiry focusing on ‘whether the particular impairment constitutes for the particular person a significant barrier to employment’).


133 Gerdes v. Swift-Eckrich, Inc., 949 F. Supp. 1386 (“Read in conjunction with subsection (A), subsection (C) prescribes that a person is considered disabled for purposes of the ADA if that person is ‘regarded as having’ an impairment that ‘substantially limits’ a ‘major life activity.’” The limiting adjectives “substantially” and “major” indicate that the perceived ”impairment must be a significant one.” See also Byrne v. Board of Educ., Sch. of West Allis, 979 F.2d 560, 564 (7th Cir. 1992).

134 See nn. 95--96 and accompanying text for a definition of opaque and transparent contexts.
regarded-as prong directly invokes that of the actual-disability prong, merely plugging the terms of the latter into the former will screen out meritorious claims that can prevail on a *de dicto* reading.

The Second Circuit in *Jacques v. DiMarzio* spelled out this conflation of regarded-as and actual-disability inquiries. There the court first stated that, “to prevail under the ‘regarded as’ provision of the ADA, a plaintiff must show more than ‘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.’” The court then turned to the definition of disability under the actual-disability prong, and it inserted that prong’s “three-step” inquiry into the regarded-as analysis. The court concluded that the plaintiff must show that “the impairment . . . substantially limit the major life activity identified,” (emphasis added).

In many cases, the employer may very well have particular impairment mind, in that it may have been a topic of discussion between the employer and employee. For this reason, and also haps because plaintiffs know they must articulate a particular impairment under the regarded-as prong, there are few published cases in which the plaintiff has not argued the impairment issue with specificity. *Toussaint v. Sheriff of Cook County* is a rare instance where the complaint did not allege a specific impairment. The plaintiff had returned to work from a triple-bypass surgery and had a heart condition that rendered him weak. He alleged that his employer regarded him as disabled and discharged him for that reason. The court held that his failure to allege a specific impairment foreclosed his meeting the definition of disabled under the

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135 42 U.S.C. Sec. 12101(2)(A) and (C).

136 386 F.3d 192 (2d Cir 2003) (holding that plaintiff under “regarded as” prong must prove disability within meaning of ADA).

137 *Id.* See also Walton v. United States Marshals Serv., 2007 U.S. App. LEXIS 15159 (9th Cir. 2006) (“if the plaintiff does not have direct evidence of the employer's subjective belief that the plaintiff is substantially limited in a major life activity, the plaintiff must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment) (emphasis added).

138 *Id.* at 221 (citing Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998)).

139 This “three step process” was articulated by the Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). The steps are: (1) "whether the plaintiff suffered from a physical or mental impairment," (2) whether "the life activity' upon which the plaintiff relied . . . constitutes a major life activity under the ADA," and (3) whether "the plaintiff's impairment 'substantially limited' [the] major life activity identified."

140 But see *Alexander v. Eye Health Northwest, P.C.*, 2006 U.S. Dist. LEXIS 72282. There, the plaintiff produced evidence that her employer had said she was “going out on disability” and “not coming back,” and that the president of the company had said to her, “Oh that’s right, your knee, your neck, your this and that other surgeries.” The court held that this was insufficient to show that she was regarded as having a substantially limiting impairment, in part because she could not identify any particular impairment that the employer had in mind in connection with her termination.


142 *Id.* at *8.

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regarded-as prong. The court stated, “In fact, other than complaining about suffering from some vague ‘weakness,’ Plaintiff offers absolutely no specifics as to which impairment rendered him disabled.” In granting the employer’s motion for summary judgment, the court did not admit of the possibility that the plaintiff’s heart surgery and subsequent weakness would support an inference that the defendant regarded him as being generally physically frail and thus having some impairment or other that limited him in some major life activity or other.

Not every court has been entirely unsympathetic to reading “an impairment” de dicto, if not in name or by recognizing statutory ambiguity. The Fifth Circuit in EEOC v. R.J. Gallagher Co. reversed a district court decision holding that a critically ill leukemia patient was not disabled under the regarded-as prong. The trial court had stated, “Assuming that [the employer] perceived [the employee] as ill, that is not a perception of disability. The ‘or perceived’ language is in the law to protect people who have some obvious specific [disability] . . .” In reversing and remanding, the Fifth Circuit stated that one need not have an obvious specific impairment to satisfy the regarded-as prong. The court’s language was thus friendly to the introduction of non-specific notions of impairment, but it might also be read as doing no more than rejecting the requirement that the plaintiff actually have an impairment.

Other courts have used language corresponding to a de re reading of impairment, but have arrived at results that reflect a de dicto reading with respect to “impairment.” In Stockton v. A World of Hope Childcare Learning Ctr., the plaintiff had an irregular gait and problems with balance owing to an allergic reaction to a childhood immunization. The court held that,

“as with the actual disability prong . . . [u]nder the ‘regarded as’ prong, a person is regarded as disabled if the employer ‘mistakenly believes that the person’s actual, nonlimiting impairment substantially limits one or more major life activities.’ . . . To put it another way, as with actual impairments, a perceived impairment must be one that, if real, would substantially limit a major life activity.”

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143 The Toussaint court discussed the consequences of failing to allege a particular impairment concerning the actual disability prong, not the regarded-as prong. However, it offered no separate explanation of why, even if the failure to allege a specific impairment might preclude a finding of actual disability, this should preclude a finding of disability under the regarded-as prong.

144 181 F.3d 645 (5th Cir. 1999).


146 Id.

147 484 F. Supp. 2d 1304, 1310 (S.D. Ga. 2007) (granting summary judgment for employer where employee not regarded as substantially limited).

148 Id. at 1312 (citations omitted).
Here, the court seems to be reading “a perceived impairment” as an impairment \textit{de re}, because otherwise there would be no way to assess whether “it” would be substantially limiting “if [it were] real.” However, the court did not end up requiring the plaintiff identify a particular impairment in terms of a physical disorder. Instead, it looked to her functional limitations and was apparently satisfied that she had, and was regarded as having, some impairment or other.\footnote{\textit{Id.} at 1310. (“Plaintiff has certain physical impairments such as difficulties in her balance and her stride. Plaintiff also has an unsteady gait and poor reflexes. Finally, she has trouble lifting certain objects and weight . . . . A physical impairment alone, however, is not necessarily a disability under the ADA.”)} But this apparent friendliness to \textit{de dicto} findings on the “impairment” issue may be trivial: the court went on to find that the plaintiff had failed to prove the employer regarded her as substantially limited in any particular (\textit{de re}) major life activity.

In sum, while the courts’ interpretation of “an impairment” may not be monolithically \textit{de re}, most courts require this term to refer to a particular impairment that the plaintiff must specify. In doing so, they foreclose three of the possible readings in the Readings Matrix: Boxes III, VI, and IX. Thus, our remaining matrix of available readings at this point looks schematically like this, with these three ignored readings shaded:

\begin{figure}
\centering
\includegraphics[width=\textwidth]{readings_matrix}
\caption{Courts Miss the \textit{De Dicto} Reading of “An Impairment”}
\end{figure}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Major Life Activities} & \textbf{Impairment} & \\
\textit{de dicto} & wide-scope \textit{de re} & narrow-scope \textit{de re} & \textit{de dicto} \\
\hline
\textit{w.s. \textit{de re}} & Box I & Box II & Box III \\
\hline
\textit{n.s. \textit{de re}} & Box IV & Box V & Box VI \\
\hline
\textit{Box VII} & Box VIII & Box IX \\
\hline
\end{tabular}
\end{table}

2. Courts Ignore the \textit{De Dicto} Reading of “Major Life Activities”
Courts have been at least as insistent on a *de re* reading of “major life activities,” but with far more prejudicial consequences for plaintiffs. Much more is riding on the availability of *de dicto* readings with respect to major life activities than to impairment. For impairment, common sense suggests that there is often a particular referent known to both plaintiff and defendant, frequently in accord with the plaintiff’s actual condition and perhaps accompanied by a medical diagnosis. Any such impairment is likely to be germane to the underlying dispute, and the plaintiff may not be hard-pressed to identify it. By contrast, the concept of “major life activity” is a legal construct that may be virtually unrelated to the underlying facts of the dispute.\(^{150}\) The existence of some particular major life activity in the regarder’s mind, as opposed to some general view of the plaintiff as limited in a major way, is far more speculative and contingent on the imagination of the regarder. Because that imagination may be influenced by general and diffuse “myths, fears, and stereotypes,” the availability of *de dicto* readings for “major life activities” is central to linking the text of the regarded-as prong to its purpose.\(^ {151}\)

Failure to plead a specific major life activity is in some jurisdictions fatal to the plaintiff’s case. In *Kaiser v. Banc of America Inv. Services*, for example, the court held that a complaint was deficient for failure to allege “which major life activity was regarded as impaired.”\(^ {152}\) Other courts have held that plaintiff “must select the major life activities that he will attempt to prove the employer regarded him as being substantially limited by his impairment,” and that not doing so is enough to reject the claim on a motion to dismiss.\(^{153}\) Where a complaint does not specify a particular major life activity at issue, some courts have assumed particular activities and evaluated the plaintiff’s claim with respect to those activities only.\(^ {154}\) Whether required at the pleading stage or not, the demand of plaintiffs to articulate “which major life activity” the regarder had in mind is a steady refrain.

The Seventh Circuit in *Mack v. Great Dane Trailers*\(^ {155}\) shows how the courts plug the actual-disability inquiry into the regarded-as analysis, with a result that leaves no room for *de dicto* readings. Having applied the Supreme Court’s *Toyota* analysis to the plaintiff’s actual-disability argument, the Court turns to the regarded-as claim, with this to say about the relationship between these two provisions:

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\(^{150}\) A prime example of a particular impairment, but not a major life activity, being germane to an underlying dispute is *Bragdon v. Abbott*, 524 U.S. 624, 647 (1998), in which a dentist refused to treat a patient with asymptomatic HIV. The Court held that the major life activity limited by the impairment was reproduction.

\(^{151}\) See infra nn. 206—228 and accompanying text for a discussion of *de dicto* readings and stigmatized impairments.

\(^{152}\) 296 F. Supp. 2d 1219, 1222.


\(^{155}\) 308 F.3d 776 (7th Cir. 2002)
While Toyota did not address a claim that the employee was regarded as disabled, its analysis still controls in this case. Under the ADA, the concepts of "substantially limits" and "major life activity" are the same whether the employee is proceeding under a claim that she is actually disabled or regarded as disabled. The statute defines disability to include "being regarded as having such an impairment," - the referenced impairment being that described in the definition of actual impairment.\(^\text{156}\)

Facts that satisfy only a \textit{de dicto} reading of “major life activities” (i.e., amounting to “some major life activity or other”) will never be able to meet this standard of particularity that the actual-disability prong requires. In Section C below I discuss the analytical flaw in this type of analysis.

Some courts make the related mistake of shaving some language from the disability definition as though there doing so will have no semantic consequences. From the requirement that the individual plaintiff be regarded as limited in one or more one of “the major life activities \textit{of the individual},”\(^\text{157}\) courts move to assessing whether the plaintiff is regarded as limited in “one or more of the major life activities,”\(^\text{158}\) period. This has the subtle but important effect of suggesting a small, fixed number of Major Life Activities, (as opposed to the broader notion of “some major activity or other,”) and therefore indirectly pushing in favor of a \textit{de re} reading.

By demanding specificity with respect to “major life activities,” the courts foreclose \textit{de dicto} readings of that term. In our Readings Matrix, such an analysis rules out Boxes VII, VIII, and IX, shown in the bottom row of a schematic Readings Matrix here:

\[^\text{156}\] Id. at 781-82 (citations omitted).


\[^\text{158}\] Johnson v. American Chamber of Commerce Publishers, 108 F.3d 818, 820 (7th Cir. 1997) (“to be disabled under the ADA . . . [the] perception of [plaintiff’s mumbling] must substantially limit one or more of the major life activities”).
3. Courts Ignore Narrow-Scope De Re Readings

Just as the courts tacitly endorse de re readings to the exclusion of de dicto readings, they also accept without explanation wide-scope de re readings, to the exclusion of narrow-scope de re readings, of both “an impairment” and “major life activities” in the vast majority of jurisdictions.\(^\text{159}\) This may ultimately be less problematic than is the exclusion of de dicto readings,\(^\text{160}\) but it points up the courts’ missing the range of meanings available under the regarded-as prong.

What distinguishes narrow-scope from wide-scope is that narrow-scope readings require the referent to meet the criteria for “impairment” or “major life activity” only in the view of the regarder, not necessarily in the view of the law. Courts frequently state that the inquiry under the regarded-as prong is entirely or “almost entirely” a matter of the state of mind of the regarder.\(^\text{161}\) This suggests that narrow-scope de re readings may be available. However, nearly all of these

\(^{159}\) *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals* is the only case I know of that speaks favorably of a narrow-scope de re reading. 10 F.3d 17 (1st Cir. 1993) (stating that a non-impairment may be an impairment for regarded-as prong purposes).

\(^{160}\) See infra notes 196-Error! Bookmark not defined. and accompanying text for argument that narrow-scope de re readings may be legitimately ruled out.

\(^{161}\) Clawson v. Mt. Coal Co., L.L.C., 18 Am. Disabilities Cas. (BNA) 1874 (“In a "regarded as" claim, the focus is not on the objective effect of the employee's actual or perceived impairment on a major life activity, but instead upon the employer's subjective impressions of the consequences of the employee's actual or perceived impairment”) See also Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2001).
courts require the particular impairment and major life activity to conform to the legal definitions of those terms. That is, they overlook the possible narrow-scope *de re* reading and require that the “regarded” impairment be one that meets a *legal* standard of “impairment,” and one that would substantially limit a “major life activity,” rather than be merely something the employer would characterize as such.

Cases that pit wide-scope against narrow-scope interpretations are those where the employer regards the employee as having a particular condition (the *res*), and regards this as an impairment, but either the *res* does not meet the legal definition of impairment, or the activity that the regarder views as major (and substantially limited) is not one deemed under ADA law to be “major.” For example, the court in *EEOC v. Watkins Motor Lines, Inc.*, explained that the impairment (in this case obesity) that the employee is regarded as having must be “an impairment protected by the ADA (rather than a disability not named in the ADA that is perceived by the employer to be limiting).” Thus, whether the regarder viewed obesity as an impairment was immaterial: if it is not “really” an impairment, then it does not satisfy the regarded-as prong. The EEOC had argued that an employee who has a condition perceived by the employer to be a disabling, but which does not meet the ADA definition of impairment, may satisfy the requirements of the regarded-as prong. In essence, the EEOC was arguing that “impairment” ought to be given its narrow-scope *de re* reading, an argument the court rejected. The court in *Felten v. Eyemart* came to a similar conclusion concerning major life activities, stating that under the regarded-as prong, “. . . the definition[] of . . . ‘major life activity’ still appl[ies].”

In sum, then, ruling out narrow-scope *de re* readings rejects the cases covered by Boxes II, IV, V, VI, and VIII of the Readings Matrix, as shown here in the additional shading of all but the corner boxes:

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162 See, e.g., Heartway, 466 F.3d at 1162 (employee must show that employer "subjectively believed the employee to be significantly restricted as to a class of jobs").

163 This is not to say that the *res* must be an “actual” impairment (i.e., that the plaintiff actually have the condition), only that the impairment, if actual, would have to be a substantially limiting one.

164 *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440 (6th Cir. 2006) (holding that non-physiologically-caused morbid obesity is not an impairment and thus regarded-as is precluded).

165 *Id.* at 441.

Figure 5: Courts Ignore Narrow-scope De Re Readings

<table>
<thead>
<tr>
<th>Major Life Activities</th>
<th>Impairment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>wide-scope de re</td>
</tr>
<tr>
<td>w.s. de re</td>
<td>Box I</td>
</tr>
<tr>
<td>n.s. de re</td>
<td>Box IV</td>
</tr>
<tr>
<td>de dicto</td>
<td>Box VII</td>
</tr>
</tbody>
</table>

Only the reading in Box I---wide-scope de re with respect to both “impairment” and “major life activity”---remains as the one given effect by courts.

4. The Practice Community Misses the Definition’s Ambiguity

Finally, the failure to apprehend ambiguity in the regarded-as prong pervades other legal arenas, such as advocacy and ADA compliance. No published decision that I am aware of discusses any argument made on behalf of a plaintiff that she need not prove the regarder had a particular major life activity in mind, let alone a particular impairment. Rather, the arguments cited tend to name strings of putative major life activities, which courts often shoot down in series: they find each to be either not a “major” life activity, or not supported by evidence that the regarder viewed the plaintiff as “substantially limited” in that discrete activity. In commentary, the ambiguity of the statute has been discussed not in a precise structural sense but in a broader way encompassing vagueness, with the bulk of the conclusions of commentators

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167 Lanman v. Johnson Co., 2003 U.S. Dist. LEXIS 25301, *13-21 (D. Kan. 2003) (serially considering and rejecting working and interacting with others as regarded-as substantially limited activities, and rejecting “thinking” for lack of evidence, where plaintiff alleged employer regarded her as mentally unstable). See also Walton v. U.S. Marshals Serv., 2007 U.S. App. LEXIS 15159 (9th Cir. 2006) (“if the plaintiff does not have direct evidence of the employer's subjective belief that the plaintiff is substantially limited in a major life activity, the plaintiff must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment,”); Littleton v. Wal-Mart Stores, 2007 U.S. App. LEXIS 11150, *7-10 (11th Cir. 2007) (considering and rejecting arguments based on working, learning, thinking, and communicating).

being that the language of the statute craves redrafting. It likewise appears that the requirement to articulate “the impairment” and “the major life activity” tends to be assumed at the level of ADA compliance and enforcement: for example, a published intake form offered by an ADA technical assistance and education entity asks, “Does the individual claim that s/he is ‘regarded as’ having a disability? (Yes/No) If yes, what is the major life activity [s/he is regarded as being limited in]?” Furthermore, law firms considering partnering pro bono with advocacy organizations on ADA cases may take for granted a wide-scope de re reading of the statute.

C. The Analytical Flaw in Applying a De Re-Only Inquiry

“What is the impairment?”; “What is the major life activity?” These may seem like the right questions of plaintiffs claiming ADA coverage, given that all three prongs of the disability definition invoke the same terminology. They, however, the wrong questions for the regarded-as prong. Courts that require the regarded-as-disabled plaintiff to articulate a specific impairment or major life activity commit an error of reasoning about language that was intuitively clear in our simple sentences above. I now turn to the flawed logic by which this error happens.

The courts’ analytical misstep lies in treating the regarded-as prong just like the actual-disability prong with respect to proof. The reason they do this is clear: the regarded is stated in terms of the actual-disability prong. But in fixating on commonality of certain words in the two provisions, courts overlook important differences in sentence meaning between them. That is, they treat a referentially ambiguous provision (the opaque context of “regard”) as though it were one whose terms are unambiguously referential (the transparent context of actually “having” a disability). True, the “tell us about the particular impairment and major life activity” method of proof is appropriate under the actual-disability prong; it will also lead to a correct result on a de re reading of the regarded-as prong. Both such contexts require a res for impairment and major-life-activity, so it makes sense to ask about that thing: “What is the impairment called? How is it limiting, and how severely?” and so on. But on a de dicto reading of these terms, where no such res need exist, the correct proof inquiry looks very different. With no real or imagined res to point to, we must consider a broader range of evidence to ascertain whether the employer’s state of mind meets the definition’s criteria. That is, we would need to ask whether that employer’s words or conduct support an inference that she regarded the plaintiff as having some impairment or other that limited him in some major way or other.

169 See, e.g., Anderson, supra note 2, at 124 (asserting regarded-as prong “by its plain language . . . incorporates the flawed idea” of requiring substantial limitation in major life activity); Lisa Eichhorn, supra note 4, at 1422 (conceding regarded-as prong analysis follows interpretation of “actual disability” prong); Friedland, supra note XX, at 180 (discussing problem of “major life activities” requirement in regarded-as prong).


171 See text accompanying infra notes 224-225 for an account of advocates viewing the viability of a claim as a function of being able to identify a particular major life activity.
From a lawyer’s perspective, it may be tempting to characterize the error courts make as one of allocating the burden of proof. The thinking would go like this: Why should the burden be on the plaintiff to show which impairment she was regarded as having (or which major life activity is at issue), when we might more fairly place the burden on the employer to show that there was no impairment she regarded the employee as having; after all, it is the employer that better has access to her own state of mind, which the plaintiff cannot be expected to divine. Some courts have made a similar move, finding for the employer only after concluding that there was no “possible major life activity” (argued or not), that the employer could have regarded as limited. This might at first seem correct, in fact fair: if, for every “possible” major life activity, we can established that the defendant did not regard that activity as limited, then how can we say that the plaintiff was regarded as limited in a major life activity at all? But this process of elimination approach is also analytically misguided—and fated to fail for plaintiffs—where the regarder lacks a referent for “major life activity” in the first place.

To see why these lines of reasoning—burden-shifting and “ruling out possible major life activities”---miss the point as a matter of logic, consider this next hypothetical. Sonia sees John in a pinstriped baseball uniform outside a baseball stadium in the Bronx. She points to John and exclaims, “There’s a New York Yankee!” Imagine Sonia has no knowledge or belief about any individual Yankees players; she simply regards John as a member of that team because the uniform tipped her off. That is, she regards him as “a Yankee” de dicto: to her, he matches the general description, “a Yankee.” But how would John prove that he was “regarded as being a Yankee” under an inquiry analogous to the regarded-as prong jurisprudence? Because Sonia has only the general description of “a Yankee” and not any particular individual in mind, John will surely fail to identify “which Yankee” Sonia regarded him as being. This alone may be fatal to his claim.

Would it make a difference if we gave John a second path to proving that Sonia regarded him as a Yankee, namely by using the Yankees’ roster and working through all the “possible New York Yankees” Sonia could have regarded him as being? No, it would not, simply because there is still no res that John, Sonia, or anyone else can identify and link to Sonia’s state of mind. In other words, we could go down the Yankees roster and ask John, “Which Yankee were you regarded as being? Derek Jeter? Hideko Matsui? Johnny Damon . . . ?” and John will not be

172 A clear example of this reasoning is Taylor v. Wal-Mart Stores, Inc., 376 F. Supp. 2d 653 (E.D. Va. 2005). That court stated of the plaintiff: “Mr. Taylor does not specify which major life activity his impairment substantially limits. Due to the deference given Mr. Taylor as a pro se litigant, the Court will attempt to identify the possible major life activities that might be affected by his impairment.” The court went on to evaluate several particular “possible major life activities,” and it found evidence lacking for any regarded-as limitation for each one, ultimately granting summary judgment to the employer. See also Talanda v. KFC Nat’l Mgmt. Corp., 1997 U.S. Dist. LEXIS 4006, *7 (N.D. Ill. 1995) (“the only major life function [plaintiff’s] injury may have limited [under the regarded-as prong] was working at certain jobs”).

173 If this seems implausible, assume Sonia is an embittered Seattle Mariners fan who avoids any mention of the Yankees.
able to answer Yes for any individual. Not because he does not know which one it is, but because no such one exists. More to the point, Sonia herself can truthfully and credibly deny, for every individual Yankee, that she regarded John as being that individual. And yet it is uncontroversially true that Sonia regarded John as being a Yankee on a legitimate (de dicto) reading of that sentence. By analogy, the logical flaw in requiring a plaintiff to prove which impairment and major life activity are at issue cannot even in theory be repaired by seemingly plaintiff-friendly manipulations of a misguided inquiry.

Crucially, then, the analytical misstep plaguing the regarded-as prong, sometimes characterized as an epistemological problem, is more centrally an ontological problem: it concerns what is assumed to exist as opposed to what can be known. While it certainly burdens plaintiffs to have to prove the mental states of their employers, it is least within the realm of possibility to do so. By contrast, the question, “what is the major life activity that your employer regard as limited?” often cannot be answered in an absolute, logical sense, because it presupposes something that may not exist: a referent in the mind of the regarder. The problem of a false or contestable presupposition is more familiar when what is presupposed is a state of affairs rather than a referent: such a question is (unfortunately) termed a “when did you stop beating your wife” question. The frustration one feels in being asked such a question is perhaps typical of the mood of disability rights advocates at present, who sense that ADA interpretation has fallen down the rabbit hole but have difficulty tracing that slide to a particular analytical error. Against this backdrop, a de dicto-de re account not only explains the interpretive failure, but it captures the distinctive flavor of the problem, too.

D. Courts Take De Re Readings for Granted

Perhaps the most troubling aspect of the courts’ misreading of the regarded as prong is their wholesale failure to apprehend ambiguity in the first instance. None of the cases cited here mentions ambiguity in any way that could be mapped conceptually onto the de dicto-de re distinction. One might term a jurisprudence that does not admit of ambiguity a “plain language” approach to statutory construction. But courts do not tend to use this phrasing or otherwise indicate that they are constrained by the text to require proof of a particular major life activity or impairment. It is as though the meaning of the regarded-as prong is so plain as not to even register as “plain.” Instead, the courts appear to consider the proof inquiry under the regarded-as prong to be a matter of simple substitution of equivalent expressions from the actual-disability prong. Given this flawed reasoning, current interpretation of the regarded-as prong might be

174 See, e.g., Hoffman, supra note 65, at 1232 (suggesting that requiring proof of regarder’s inner thoughts makes regarded-as prong of limited value to plaintiffs).

175 The presupposed state of affairs is, of course, that the addressee was at some prior point beating her wife. For a generic example of the use of this term in case law, see e.g., United States v. Kragness, 830 F.2d 842, 868 (8th Cir. 1987) (noting objection by defendant’s counsel to government asking a “when-did-you-stop-beating-your-wife” question).

176 I am aware of no case referencing a “plain meaning” or “plain language” approach when requiring, implicitly or explicitly, that the plaintiff articulate a particular impairment or major life activity.
better described as logical fallacy than as narrow interpretation. At the very least, courts seem to skip
the first step in statutory interpretation: to determine whether there is ambiguity or not.\footnote{177}

Neglecting ambiguity in the regarded-as prong creates two problems. The more obvious is that it
forecloses finding for individual plaintiffs who would meet the definition of disabled \emph{de dicto} but not
\emph{de re}.\footnote{178} The second is that courts, perhaps believing that they are applying the
language of the statute in its only literal sense, never consider the one thing that would help them
resolve the ambiguity, the same thing that enables us to resolve ambiguity in natural language:
context. In terms of the statute, context takes the form of extrinsic evidence of Congressional
intent. As disability rights advocates have persuasively argued, the ADA’s legislative history
favors a broader interpretation of the regarded as prong than the courts have thus far allowed.\footnote{179}
Thus, acknowledging ambiguity has important implications for reconnecting the ADA with its
underlying purpose.\footnote{180}

To summarize, the courts’ and advocates’ interpretive failure lies in analyzing claims under the
regarded-as using the same inquiry that they use for the actual-disability prong. Because the regarded-as
prong manifests an ambiguity not present in the actual-disability prong, this all-purpose inquiry asks the
wrong questions---and screens out valid claims---when applied to facts that satisfy the statute \emph{de dicto}.

IV. RESOLVING AMBIGUITY

\textit{I ain’t no semanticist, ain’t no semanticist’s son, but I can resolve your ambiguities til your semanticist comes...}

\begin{flushright}
-- Mark Liberman\footnote{181}
\end{flushright}

A. \textit{De Dicto} Readings Should be Endorsed

\footnote{177} Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (holding first step in statutory interpretation “is to
determine whether the language has a plain and unambiguous meaning with regard to the particular dispute in the
case,”).

\footnote{178} See infra notes 192-204 and accompanying text for argument that readings containing a narrow-scope \emph{de re} term
can be properly excluded.

\footnote{179} See generally, Feldblum, supra note 3, at 130-31; Mayerson, supra note 2, at 602.

\footnote{180} Nat’l Council on Disability, Policy Brief Series: Righting the ADA No. 15, The Supreme Court's Decisions
Discussing the "Regarded As" Prong of the ADA Definition of Disability (May 21, 2003), available at

De dicto readings, at a minimum those that are fully de dicto and those that combine with wide-scope de re readings, should be held valid as interpretations of the regarded-as prong. These readings are those in Box III, VII, and IX of the Readings Matrix.\footnote{These represent the readings in which either impairment or major life activities or both are read de dicto, and otherwise the reading is wide-scope de re. I take up the matter of whether readings that are entirely or partially narrow-scope de re in Part IV infra.}

The most important reason to recognize de dicto readings is that claims that can prevail only on a de dicto reading epitomize the sort of sweeping forms of discriminatory animus that the ADA---like other civil rights protection---was intended to prohibit. Such claims, where the regarder has no particular impairment or limited activity in mind, are those in which the employer’s adverse action is least tailored to the actual abilities and limitations of the employee. That action is more likely to be driven by “myths, fears, and stereotypes,”\footnote{29 CFR pt. 1630, App. § 1630.2(l) (explaining purpose of regarded-as prong).} often because information specific to the individual is lacking or ignored.\footnote{See, e.g., Talanda v. KFC, 1996 U.S. Dist. LEXIS 7634, * (E.D. Ill) (worker missing teeth fired based on expected customer reactions though “customers were pretty friendly [to her]”).} When Sonia declines to hire John because she regards him as being impaired in some way or other and limited in some major way or other, she is generalizing not just to a group that shares a particular impairment, but to all people with significant limitations due to impairment, i.e., people with disabilities. In this way, it is the de dicto reading that puts the ADA more on a par with Title VII, which prohibits employers from generalizing as to race and other protected categories in decision making.\footnote{See 42 U.S.C. Sec. 2000e et seq (2000).}

Because the regarded-as prong is the part of the disability definition that speaks most directly to an antidiscrimination principle,\footnote{See, e.g., Vande Zande v. Wisconsin Dep’t of Admin. 44 F.3d 538, 541 (7th Cir. 1995) (stating regarded-as prong is “better fit” than actual-disability prong with statements in Act’s preamble comparing disability discrimination to other forms of invidious discrimination).} the validity of de dicto readings ought to be uncontroversial.

A second basis for recognizing de dicto readings as valid is historical, and it concerns the heavily contested meaning of “major life activities.” This term was introduced into the definition of disability by 1974 amendment to the Rehabilitation Act of 1973, which originally defined disability as “having a physical or mental disability which . . . constitutes or results in a substantial handicap to employment.” Thus, by substituting the major-life-activities phrasing for “employment,” Congress was recognizing that it was not an impairment’s effect on work alone, but on any activity of importance, that may be constitute disability for the purposes of antidiscrimination law.\footnote{See School Board of Nassau Co. v. Arline, 480 U.S. 273, 278 (1987) (explaining Congress found the definition for purposes of vocational rehabilitation too narrow to address various forms of discrimination).}

That is, the major-life-activities language signified a broadening of the statute. A fair reading of this shift is one from the particular domain of employment to “any activity of importance” rather than to a fixed or small set of specific activities. This
contextualized understanding of the disability definition coincides with a paraphrase of the de dicto reading of “major life activities”: in some major way or other.

Moreover, de dicto readings may be necessary to capture cases of cosmetic disfigurement and similar non-limiting impairments. Burn victims, for example, are repeatedly mentioned in the legislative history as being covered by under the regarded as prong. However, courts have repeatedly granted summary judgment to defendants in cases where such plaintiffs are unable to show that they were “regarded as limited” in a particular major life activity. On a de dicto reading, where the requirement is only that the individual be regarded as “substantially limited in some unspecified but important respect,” plaintiffs in such cases would be covered if they can show evidence of their being generally regarded as substantially and importantly limited in some major activity or other. The negative reactions of the regarder can serve as evidence that the regarder attributes limitation to the individual, perhaps irrationally, through the impairment.

Finally, one can make a counterfactual argument that Congress intended the regarded-as prong to be read de dicto: had Congress intended for only the de re reading to be in play, it could easily have disambiguated the definition to read, “... a certain impairment” or a “certain major life activity.”

B. Narrow-Scope De Re Readings May Be Properly Rejected

Critics will likely argue that opening up interpretation of the ADA to include more than the single wide-scope de re reading (Box I) will unreasonably broaden the statute so as to cover far more individuals than Congress meant to protect. On the other hand, many of the kinds of claims Congress certainly contemplated as being actionable under the ADA (e.g., the smoking gun scenario discussed above, burn victims, etc.) currently founder on the threshold question of whether the plaintiff has a disability on a wide-scope de re reading.

Between these extremes I suggest that, of the nine possible readings of the regarded-as prong discussed here, an interpretation that admits a certain four of them perhaps best

189 By contrast, Professor Feldblum argues that, now that the Court has distanced itself from the reasoning of Arline as to the regarded-as prong, legislative amendment is necessary to capture cases of cosmetic disfigurement without resorting to circular reasoning. Feldblum, supra note 3, at 157-158 (“Indeed, the circular approach was the only way to provide coverage for individuals with certain impairments, such as cosmetic disfigurements, who were limited in life activities solely because of the responses and attitudes of others to their impairments.”).


191 HURFORD AND HEASLEY, supra note 76 at ___. See infra note 192 and accompanying text for a usage of “a certain” do disambiguate a sentence in this article.

192 This phrasing shows the de dicto de re distinction in action. Using the term “certain” here to disambiguates in favor of a de re reading of “four of them.” My intention is to convey that a particular “four of them” should be valid interpretations, not simply that I advocate an interpretation that endorses “[some] four of them,” (de dicto) as though there is something special about “four.”
comports with the intent of Congress. The principle that excludes the other five is this: any case that can prevail only on a narrow-scope *de re* reading of either “impairment” or “major life activities” should not meet the definition. Turning back to the Readings Matrix, this would allow as available readings only those at the corners: Boxes I, III, VII, and IX. I turn now to the rationale behind this limitation, first recalling the narrow- versus wide-scope distinction.

Narrow-scope *de re* readings are similar to and different from wide-scope *de re* readings. They are similar in that each involves a *res* in the mind of the regarder. Where they diverge is in whether that *res*—e.g., the referent of “an impairment”—must be an impairment in fact (for wide-scope *de re*) or in the mind of the regarder (narrow-scope *de re*). Most of the time, these readings will either both be true or both be false, because the law and common intuitions as to impairment tend to coincide: few would doubt that quadriplegia is an impairment; few would contend that having a “whiny voice” is an impairment.

On some facts, however, wide- and narrow-scope readings will yield different results. For example, an employer might regard a person with a certain eye color as impaired, although this would not be a legal impairment under the ADA. On such facts, a narrow-scope *de re* reading of “an impairment” would be satisfied (because the particular *res* the regarder has in mind is, in her view, an impairment), but it would be false on a wide-scope *de re* reading (because eye color is not in fact an impairment). Endorsing narrow-scope *de re* readings, some may argue, might thus create a federal cause of action under the ADA for discrimination based on categories that are arguably not generally understood as protected by the ADA, such as sexual orientation or gender identity disorder. It is plausible that these identity features could be regarded as impairments by some, as shown by the fact that until 1974 homosexuality was listed as a psychiatric disorder in the Diagnostic and Statistical Manual of the American Psychiatric Association (“DSM”), and gender identity disorder remains listed there. While the statute expressly excludes those categories as being legal impairments, it would arguably not rule

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193 The shorthand “narrow-scope readings” here includes any reading in which either “impairment” and “major life activities” is understood as narrow-scope *de re*.

194 It may be the case that the *res* is an impairment both in fact and in the mind of the regarder. In that case, both the narrow and wide-scope *de re* readings would be true.

195 This is the hypothetical case raised in Cook v. Rhode Island, 10 F.3d 17, 25-26 (1st Cir. 1993) (“By way of illustration, suit can be brought against a warehouse operator who refuses to hire all turquoise-eyed applicants solely because he believes that people with such coloring are universally incapable of lifting large crates . . . .

196 EEOC, *supra* note 103, at Sec. 902.2(c)(2) (“Simple physical characteristics are not impairments under the ADA. For example, a person cannot claim to be impaired because of blue eyes or black hair,


them out as being “regarded-as impairments” if a narrow-scope *de re* reading is endorsed.\footnote{It is also arguable that the statute rules out considering same-sex orientation, bisexuality, or transexualism as an impairment under (a narrow-scope *de re* reading) of the regarded-as prong. Sections 12211(A) and (B) provide that they are not “impairments” or “disability[ies]” under the full disability definition, which includes the “regarded as” prong. However, the statute elsewhere refers to “disability” in ways where it is clear that it is not intended to include those who would be within the definition only under the “regarded as” prong. For example, the Congressional findings that “43 million” people are disabled cannot be understood to include those who are disabled only under the “regarded as” prong, because any individual at all is potentially regarded as disabled. \textit{See} 42 U.S.C. Sec. 12101(1) (2000).} If any feature of an individual can qualify as an impairment in the mind of the regarder, some might worry that this would convert the ADA into the “Americans treated badly at work” Act.

Should such a reading be endorsed? The answer depends on whether one views the ADA as targeting a harm that is better described as a matter of the individual employer’s motivation or as a form of social subordination visited on people based on impairment. While both the concern for invidious motive and the concern for protecting a subordinated class are animating concerns behind the ADA, support in the legislative history for narrow-scope *de re* readings seems lacking. While the ADA’s legislative history lists examples of discrimination against people with limiting and non-limiting impairments, it does not appear to voice concern about employers who have an idiosyncratic view of what constitutes an impairment. Thus, the narrow-scope *de re* readings of “impairment” (Boxes II and VIII) may not survive statutory construction against the backdrop of legislative intent. Regardless of whether one believes such readings are within the intended meaning of the ADA, courts are likely to seek a limiting principle to constrain the definition. The ambiguity analysis provides a principled interpretive mechanism for excluding a class of readings which, at the very least, are not central to ADA purposes.

On this issue, then, my account differs from that offered by one circuit court. In \textit{Cook v. Rhode Island, Department of Mental Health, Retardation, & Hospitals}, in which the court stated that an employer who regards having turquoise eyes as a substantially limiting impairment would be liable under the ADA if she discriminated based on that attribute.\footnote{\textit{Cook v. State of Rhode Island, Dep’t. of Mental Health, Retardation, & Hosps.}, 10 F.3d 17, 25-26(1st. Cir. 1993).} That opinion is in tension with the majority of jurisdictions,\footnote{\textit{See supra} notes 159-166 and accompanying text for discussion of courts tacitly rejecting narrow-scope *de re* readings.} but it does provide a rare example of a narrow-scope *de re* reading of “impairment.”

By contrast, instances where the difference between the law and the employer’s view of impairment cuts the other way---where the law recognizes some condition as an impairment but the employer does not---should reach a different result. In such cases, it makes sense that the plaintiff should meet the disability definition. An example might be a case in which an employer regards an employee as having epilepsy, which she regards as a spiritual condition rather than a
physical or mental one. On such facts, the wide-scope *de re* reading would be true (because epilepsy is an impairment under the statute), but the narrow-scope *de re* reading would be false (because the employer does not regard epilepsy as an impairment). It seems clear in this case that definition should be satisfied. If we are to extend protection to individuals who are misperceived as having a substantially limiting form of epilepsy (in order to fully protect those who actually have such a limiting form of this condition), then the employer ought not escape liability due to her individual or cultural view of whether the condition is of physical, mental, or other etiology.

Should narrow-scope *de re* readings of “major life activities” be treated the same as those for impairment? The cases represented by Boxes II, V, and VIII in the Readings Matrix are those in which the employer regards the employee as limited in some particular activity, which the employer herself regards as a major life activity, even if the law does not. For example, employer Sonia may regard employee John as substantially limited in driving to work. If Sonia regards driving to work as a major life activity, then the narrow-scope reading of “major life activities” would be satisfied. Because driving to work has been held not to be a major life activity, the wide-scope reading would be false. For the same reasons that we may reject narrow-scope *de re* readings of “an impairment,” it seems legitimate to foreclose this reading of “major life activities” also. The legislative history makes scant mention of “major life activities” *per se.* Where actual functional limitation may be lacking in its examples (as in the case of burn victims or hypertension), the underlying concern seems to be the exaggeratedly negative reactions of others to the impairment, not the employer who idiosyncratically targets an employee based on her limitation in some task whose importance the employer exaggerates. Accordingly, the readings in which “major life activities” are understood as narrow-scope *de re* may properly be excluded as well.

On this account, one box in the Readings Matrix warrants more discussion. Box IV combines a wide-scope *de re* reading of “impairment” with a narrow-scope *de re* reading of “major life activities.” The example given is one in which Sonia regards John as having epilepsy (a legal impairment), and regards him as being substantially limited in driving to work (i.e., not a major life activity). The rule I have proposed thus far—that any reading in which either “an impairment” or “major life activities” is read as narrow-scope *de re*—would not cover John on these facts. In this context, however, we might find it problematic that the plaintiff’s epilepsy—as-regarded will not support a cause of action only because of the employer’s narrow view of the effect of epilepsy, i.e., that it merely limits driving to work. But this problem can be solved if we recognize that Box IV represents a plausible state of mind only for impairments that are generally viewed as only minimally limiting. That is, if the employer regards the employee as having an impairment that is generally regarded as significantly limiting, then it is not plausible that the regarder views the employee as limited only in an unimportant activity. In the case of

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203 See Ann Fadman, The Spirit Catches You and You Fall Down (1998) (describing Hmong cultural understanding of illness such as epilepsy as spiritual condition not amenable to medical intervention).

204 This view would likely be upheld under the current state of the law, as it falls in Box I of the Readings Matrix. I raise it here in order to show how wide- and narrow- scope *de re* structures yield different results, and why narrow-scope *de re* readings may legitimately be rejected as intended readings.
epilepsy, an employer who views the plaintiff as having this impairment could be assumed to regard the plaintiff as limited not only in driving to work, but also in some (specified de re, or unspecified de dicto) other activity of importance. If the courts permit a broad array of evidence as relevant to drawing that inference, then the plaintiff would have the opportunity to demonstrate that his case falls in Box I or Box VII (i.e., wide-scope de re or de dicto with respect to major life activities).

To summarize, I propose recognizing de dicto readings of “impairment” and “major life activities” as valid (as well as the wide-scope de re readings that the courts have thus far favored), and rejecting all narrow-scope de re readings. This leaves us with the following matrix of intended readings: the corner Boxes I, III, VII, and IX (shown in white, with the ruled-out readings in crosshatching).
We can thus allay concerns that permitting *de dicto* interpretations of the regarded-as prong will lead to an infinitely contestable, open-ended notion of disability, such that “everyone” might be able to bootstrap their circumstances into an ADA claim.\(^{205}\) If narrow-scope *de re* readings are excluded, then cases which do not speak to the harms targeted by the ADA will not survive past the disability definition threshold. Such an approach sacrifices nothing of faithfulness to the statutory text at the same time that it engages an inquiry into the harms the ADA was meant to redress.

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\(^{205}\) Of course, literally *anyone* (if only theoretically everyone) may be considered disabled under the ADA, as Congress surely intended by including the regarded-as prong (and notwithstanding the statutory findings that disabled people number a discrete 43 million, to which the Sutton Court attributed much significance), if in fact they are regarded as disabled by a covered entity.
V. APPLICATION TO CASE LAW

Thus far, in order to highlight the ambiguity in the regarded as prong, I have drawn on examples that may seem at the fringes of disability discrimination, such as the “reference letter scenarios.” Without conceding the importance of these hypotheticals in illuminating a flawed ADA jurisprudence, there are in fact significant classes of litigation that would fare differently if de dicto readings were validated by the courts. These include cases involving (1) stigmatized impairments, (2) instances where the plaintiff is considered “not disabled enough” to meet the actual disability prong, and (3) cases where the plaintiff is regarded as disabled by proxy.

A. Stigmatized Impairment Cases

Cases involving impairments associated with stigma have tended to fall victim to the major-life-activities criterion, though there is evidence that Congress intended them to fall within the sweep of the regarded as prong. These cases correspond to Box VII of the Readings Matrix, in which the regarder has in mind a particular impairment but no particular major life activity. A de dicto reading of “major life activities” would change the nature of the proof required of plaintiffs to meet this definition: a plaintiff would meet the definition if she could show that she was regarded as limited in some important way or other.

Claims involving stigma are a good fit for a de dicto reading of “major life activities,” because the reactions of employers are not based on the employee being limited in a particular way, but on a view of the individual as limited in general as a function of stigma. Stigmatized impairments tend to be regarded as more limiting than they are in fact, due to what has been termed in the social science literature “the spread effect.” By this mechanism, a range of limitations that are not rationally related to the impairment are attributed to the individual with a stigmatized impairment. For example, mobility impaired individuals who use wheelchairs are often regarded as being cognitively impaired. In Subordination, Stigma, and “Disability,” Professor Samuel Bagenstos proposes that stigmatic impairments be considered per se disabling. The analytical link he asserts between stigma and the statutory language is that “major life

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206 S. Rep. No. 101-116, 24 (1989), citing Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989) and Doe v. Centinela Hospital, 1988 WL 81776 (C.D. Cal. June 30, 1988) (“The third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. For example, severe burn victims often face discrimination, must be what limits the individual’s activities.”)


208 Id.


210 Id. at 465.

211 Bagenstos, supra note 209, at 405-6 (describing stigmatizing conditions as those that render individuals far outside the norm of health). In Uninsured in America, Susan Starr Sered and Rushika Fernandopulle use the term “caste” rather than stigma, but their findings resonate with Bagenstos’ position. UNINSURED IN AMERICA, 169 (2005) [hereinafter SERED & FERNANDOPULLE] (“Set apart---that is the essence of caste.”)
activities include those for which the inability to do them results in stigma.” An ambiguity-based account forges a still firmer link. A *de dicto* reading of “major life activities” amounts to direct textual support in the regarded-as prong for Professor Bagenstos’ move from stigma to limitation in the mind of the regarder.

1. Regarding Tooth Loss as a Disability *De Dicto*

Tooth loss may not strike us as a “core” disability, but an adult who is visibly missing one or more teeth is severely disadvantaged in employment opportunities, as well as by many indices of health. The two published federal cases considering whether tooth loss is a disability hold that it is not, under either the actual-disability or regarded-as prongs. Plaintiffs in both cases lost on the major-life-activities issue, relying on working or working and speaking.

On a *de dicto* reading of the regarded-as prong, the inquiry would have looked very different. Rather than examine discrete activities, the court would demand a showing that the employer regarded the employee as limited in some major respect, with or without any particular activity in mind. In terms of the employer’s specific conduct, statements in the record indicating disgust, an extreme or segregating response, or any other sign that the employer viewed tooth loss as so significant that the employee was thereby removed from the class of “normal” people, would be probative of an employer’s perception of the plaintiff as limited in some unspecified, yet important, respect. Where this type of argument may initially meet with skepticism is in drawing the inference of limitation from negative reactions to impairment. But this is exactly the function of the spread effect of stigma: the tendency to attribute limitation to


213 Talanda v. KFC Nat’l Mgmt Co., 140 F.3d 1090 (7th Cir. 1998) (holding fast food counter worker with missing teeth not regarded as substantially limited in a major life activity); Johnson v. Dunhill Temporary Sys., 1997 U.S. Dist. LEXIS 16771 (N.D. Ill. 1997) (holding telemarketer fired when supervisor realized he was missing many teeth not regarded as disabled).

214 140 F.3d at 1097-98.


216 S. Rep. No. 101-116, 24 (1989) (mentioning example of disabled children who were deemed “disgusting to look at” as example of who is covered under regarded-as prong).


218 Id. (stating allegation that employer said of employee missing teeth, “I’m surprised you would have someone like that in your store.”).
people with stigmatizing conditions. Social science research could also be relevant to this showing, including evidence of the social meaning of toothlessness as signifying dependency and lack of thriving, and even perhaps the fact that “toothless” in its figurative sense means “weak.”

The records in both tooth loss cases are rife with evidence of discriminatory animus. This is more likely to be true in stigmatized impairment cases, where there is an added measure of social tolerance of derision based on impairment. Where discriminatory intent is easy to show, claims tend to live or more often die by the particularized major-life-activities issue. For this reason, a reading of the statute that permits plaintiffs to clear the major-life-activities hurdle with a showing that the employer regarded the plaintiff as generally but importantly limited would be a valuable tool for litigating claims involving stigma.

2. Regarding Obesity as a Disability De Dicto

Like tooth loss claims, obesity cases tend to lack proof of a particular major life activity in the regarder’s mind. Further similarities are that obesity is an outward marker of class or caste, and that it tends to be associated with an array of health problems. To explain the error of a particularized inquiry in a case of obesity, I offer an anecdote of strategizing over an obesity case under the regarded-as prong in a healthcare context. This account can show in practical terms how asking about “the res” has an effect that might be called the “atomizing” of an otherwise integrated and meritorious claim. In this story, though, the questions come from not the courts but from advocates themselves.

As a legal services lawyer, I was involved in litigating an action under the ADA on behalf of a class of obese women who had been denied Medicaid coverage for medically

219 Goffman, supra note 207, at 15 (explaining spread effect of stigma resulting in attribution of greater limitation than impairmentrationally warrants). For a discussion of the spread effect in an ADA context, see Bagenstos, supra note 209. What might be termed a “new stigma” of tooth loss by Bagestos, Sered and Fernandopulle characterize as outward physical markers of caste. Just as Goffman and Bagenstos discuss “spread effect” of stigma into attributions of moral failing, Sered and Fernandopulle notice this and relate it to productivity in the workplace: “[M]embership in [this caste] carries a moral taint in addition to physical markings and occupational immobility. This taint is a product of the moral value that American society has traditionally placed on productive work and good health.” Id at 61.

220 Id. at 15–16 (claiming that people “know very well what rotten teeth signify in American today. . . . [T]hey understand that teeth have become one of the clearest outward markers of caste” . . . “of the chronically ill, infirm, and marginally employed”).

221 See, e.g., Talanda v. KFC Nat’l Mgmt. Corp, 1997 U.S. Dist. LEXIS 4006, *7 (N.D. Ill. 1995) (employer referred to employee who was missing teeth as “someone like that,” and said did not want to see “that ugly mouth”).

222 Indeed, in Johnson v. American Chamber of Commerce Publishers, the 7th Circuit opinion itself contains a derisive joke referring to the plaintiff’s tooth loss: “Unlike [the plaintiff], the ADA has teeth.” Johnson v. Am. Chamber of Commerce Publrs., 108 F.3d at 819-20 (7th Cir. 1997).

223 Sered and Fernadopulle, supra note 211, 169.
necessary surgical services because of their body mass index.\textsuperscript{224} We alleged that our clients were regarded as disabled, based on the state Medicaid agency’s assertion that obesity is associated with major health problems. One afternoon we spoke by telephone with the \textit{pro bono} coordinator of a private firm, seeking to partner with them in the litigation. Looking to assess the strength of our ADA case, the coordinator asked, “What is the major life activity you say your clients are regarded as being limited in?” At that instant, I could practically hear our case---or at least our chances of securing this firm’s cooperation---deflate like a punctured tire. Our weak response: “One reason the state gives for its policy is the difficulty in getting obese patients to walk after surgery, so we can argue that the major life activity is ‘walking.’” Silence on the line. We continued, “They also mention difficulty inserting a breathing tube in obese surgical patients, so we could argue that ‘breathing’ is the major life activity. Or maybe ‘healing.’” The coordinator paused and said, “Let’s look at these \textit{one at a time}. Walking---are you really saying the state regarded your clients as substantially limited in walking? And if it’s only walking post-surgery, that’s not an activity central to daily life, is it? It’s the same problem with breathing.” By the \textit{de re} reading the courts have espoused, in was difficult to argue with her on these points.

Why this effect of asking “what is the major life activity,” a seemingly reasonable question that tracks the language of the statute? I suggest this is because, where the regarder has a negative response to an individual based on obesity, she may have no particular form of limitation in mind. Rather, the regarder may have a generalized, blanket notion of overall limitation, a view that is not fully rational and that is given to the spread effect of stigma.\textsuperscript{225} In fact, the very irrationality of stigma-triggered bias will work to the regarder’s advantage under a particularized proof inquiry: the defendant’s inability to articulate a \textit{reason} for discrimination may look like evidence that the obese individual was not regarded as limited at all. To neglect the mechanism of stigma is also to distort the nature of the harm it visits on people with impairments: the problem is not one of misunderstanding (i.e., a mistake as to how limited the individual is) but of bias attendant to a deviation from a norm, perhaps reflecting, in the words of the Arline court, “almost ancient” prejudices.\textsuperscript{226} The effect of singling out individual major life activities for scrutiny is not to properly analyze but to atomize the claim. It makes a defendant’s apprehension of the plaintiff---as so unfit as to render her “other” than normal---seem diffuse and insubstantial enough to wave away.

And yet it remained clear to the plaintiffs that the state regarded them as too compromised by the form of their bodies for a procedure that was inexpensive, unusually low-risk, and life-changing. Remaining faithful to the text of the definition, the inquiry might have been framed this way: If the state regards an individual as too ill to be a suitable candidate even


\textsuperscript{225} \textsc{Goffman}, supra note 207, at ___; Bagenstos, \textit{supra} note 211, at 412. Obesity may fit well within the notion of “new forms” of stigmatic disabilities discussed by Bagenstos.

\textsuperscript{226} School Board of Nassau Co. v. Arline, 480 U.S. 273, 302 (1987). Note that what the Court was alluding to here was not a mere---or rational---mistake as to the condition of the plaintiff or her ability to function, as the \textit{Sutton} dicta suggests, but to a deep-seated visceral reaction to stigmatic impairment.
for such services, can it be inferred that the state regards the plaintiff as limited in some important, if unspecified, way? For the regarded as prong to apply on a *de dicto* reading, it is sufficient that the defendant’s words and actions are such that we can attribute to her a view of the plaintiff amounting to, “Your mental or physical impairment makes you appear very limited in some important way that ‘normal’ people are not limited.” A broad, undifferentiated array of evidence would be relevant to prove this. In this way, seeking proof appropriate to a *de dicto* reading of “major life activities” can bring the inquiry into alignment with the nature of the discriminatory harm.

Cases in which stigma drives an employment decision at times elicit judicial commentary that recognizing such “minor” impairments as disabling would trivialize the experience of individuals who are “truly disabled.” 227 Although such conditions may not be considered core disabilities, 228 discrimination against individuals based on these impairments hews very close to the heart of the harm of disability discrimination as a fear- or animus-based response to impairment. Reviving causes of action in such cases through a *de dicto* interpretation of disability would mark a significant course correction in the drift of the ADA away from its purpose.

227 As the court in a tooth loss case stated, “Indeed, the argument that the ADA extends to such minor injuries unjustly trivializes the impact of genuine disabilities on the lives of disabled persons.” Talanda v. KFC Nat’l Mgmt. Co., 1997 U.S. Dist. LEXIS 4006, *16 (N.D. Ill. 1997).

228 Bagenstos, *supra* note 209, at 478.
B. “Not Disabled Enough” Cases

Cases in which the plaintiff is impaired and functionally limited, but not limited enough to be “actually” disabled, are similar to the stigma cases in some ways. Both fall within Box VII of the Readings Matrix—in that there is a particular (de re) impairment that the employer has in mind, but the plaintiff cannot show that there is a particular major life activity in which she is regarded as being substantially limited. But plaintiffs in not-disabled-enough cases often do have some functional limitation that relates to the job in question. And unlike claims based on tooth loss or obesity, which are perhaps newly and not uncontroversially understood as disabling, “not disabled enough” cases tend to involve the more surprising examples of disabilities that ADA drafters assumed would be covered, and which tended to succeed prior to the ADA. Examples of claimants deemed not-disabled-enough include an industrial machinery operator with job-related carpal tunnel syndrome who could no longer perform her job duties, a plaintiff with a back injury who was fired after failing to report to work “without restrictions,” and an employee with diabetes who was discharged for health-related absenteeism.

What accounts for not-disabled-enough cases is a catch-22 concerning how one characterizes the activity at issue. If the plaintiff defines the activity broadly (e.g., working in a broad class of jobs) then the burden to show she is severely restricted across such a broad swath of behavior is often insurmountable. On the flipside, if she characterizes the activity narrowly (e.g., lifting over 25 lbs unassisted, working in cold weather, ambulating after surgery) then the activity itself will not be regarded as “major.” This problem is perhaps unavoidable under the actual-disability prong, where “major life activities” must refer to some identified res.

However, the text of the regarded-as prong, read de dicto, can provide a safety net in cases that Congress arguably intended to cover but which fall through the cracks of the actual-disability definition. This is because the de dicto inquiry does not require plaintiffs to make a choice as to how to characterize “the major life activity.” The plaintiff will argue, rather, that the aggregate weight of the evidence supports a finding that the employer regarded the plaintiff as limited in some major respect or other, and all evidence relevant to any sense of limitation from the regarder’s perspective should be admitted as relevant. The reasoning by which this finding would be made could go like this: “An employer who had a strong negative reaction to an employee’s functional limitations, when limitations were not severe, more likely than not regarded that employee as substantially limited in some activity that is central to daily life, whether the employer had any particular activity in mind.” Examples of evidence that an employer regarded the employee as substantially limited in some major respect might include:


230 Kupstas v. City of Greenwood, 398 F.3d 609 (affirming summary judgment for employer where employee with back injury was fired for failing to bring doctor’s note saying he could work without restriction, where perceived major life activity limitation not shown).

231 Lawson v. CSX Transp., Inc., 245 F.3d 916, 932 (N.D. Ill. 2001) (granting summary judgment to employer where employee failed to prove a major life activity that employer regarded as limited).
requesting a physical or mental health evaluation, expressing surprise that the plaintiff could perform a moderately taxing task, basing a termination decision on the job being “too stressful” because of the plaintiff’s impairment, describing the employee as “an extremely emotional and irrational individual,” or perceiving the employee as critically ill.

To highlight the difference a de dicto inquiry would make in a not-disabled-enough case, imagine that employer Sonia says to John, who is undergoing cancer treatment, “John, I am cutting your hours. You always look like I could knock you over with a feather.” Under the de dicto inquiry, we would ask whether, if Sonia regards John as being so weak that she would describe him this way, we can infer that she regards him also as being too weak to perform all of his major life activities without substantial limitation. Such an inference seems reasonable. By contrast, it is not too far fetched to suppose that the courts’ current de re inquiry would focus absurdly on the legal question: “Is remaining upright while being struck with a feather a ‘major life activity’?” The senselessness of this question captures the bizarre turn that the current method of proving disability under the ADA has taken.

C. Proxy Cases

Proxy cases may be the rarest of the case types discussed here, but they make up an important category because they point up the absolute failure of the particularized de re inquiry

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232 Tice v. Ctr. Area Transp. Auth., 247 F.3d 506 (holding that medical exam request can never amount to regarding individual as disabled).

233 Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 599 (8th Cir.1998) (holding employer's request for mental evaluation . . . is not equivalent to regarding employee as substantially impaired).


235 Ryan v. Grae and Rybicki, P.C., 135 F.3d 867, 872 (stating employer’s alleged belief that colitis made plaintiff’s job too stressful for her at most demonstrated employer believed plaintiff’s job was too stressful for her).

236 Jacques v. DiMarzio, Inc., 386 F.3d 192, 204 (2d Cir. 2004) (holding it reversible error to instruct jury that employer’s statements as to plaintiff’s irrationality support inference that employer regarded plaintiff as disabled).


238 See also Mack v. Great Dane Trailers, 308 F.3d 776, 781 (7th Cir. 2002). The Seventh Circuit in Mack circles close to a de dicto inquiry when it admits of the possibility that an employer’s belief that an employee is limited in some discrete activity could evince a more general belief that the employer is limited in other ways. (“There may well be cases in which, because of the nature of the impairment, one could, from the work-restriction alone, infer a broader limitation on a major life activity.”) Id. at 781. Yet the court returns to a de re approach, framing any such “broader limitation” in terms of a particular established major life activity. (“An inability to lift even a pencil on the job might suggest an inability to lift a toothbrush . . . or to otherwise care for oneself . . . .”) Id.

239 It appears that few cases have been argued explicitly as proxy cases. This is not surprising, considering the imperative from the courts to allege specific major life activities, and this may simply be an instance of the bar following the lead of the bench in terms of which cases it takes and how it packages legal claims.
to make cognizable discrimination that is based on disability per se. I use “proxy” in a broad sense, meaning that the some information known to the employer serves as a stand-in for disability. Examples of such information could include use of the term “disability” itself in connection with the plaintiff, the plaintiff’s known receipt of public benefits for disabled individuals, or the presence of “disability studies” on the plaintiff’s résumé. In terms of the Readings Matrix, these cases may fit into Box III, Box VII, or Box IX, depending on whether the regarder is relying on a proxy in regarding the employee as having an impairment (Box III) or being limited in a major life activity (Box VII) or both (Box IX).

In Lawson v. CSX Transport, Inc., a diabetic plaintiff alleged that he told his employer he had been “totally disabled” in the past and “was [currently] receiving Social Security disability benefits.” With respect to Social Security, the court held that, because the Social Security Administration’s (SSA) definition of disability differs from the ADA’s, that proof of receiving SSA benefits was not proof that the plaintiff was disabled within the meaning of the ADA, and that under the regarded as prong, the employee would still need to prove she was regarded as limited in a particular major life activity. What the court missed here is that, under the regarded as prong, the employer’s knowledge of the employee receiving SSA benefits is evidence that the employer regarded such employee as somehow impaired and somehow significantly limited. Such an inference is reasonable at the very least because the SSA’s definition of disability, being designed to ensure that only the “truly needy” receive scarce public benefits, is stricter than that of the ADA, which is designed to remove employment barriers to employable individuals.

But perhaps the most troubling failure of the de-re-only analysis is that, in 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. This may seem like a concern in theory only. However, several courts have suggested otherwise in holding, “It is not enough that the employer regard the employee as somehow disabled. He must regard the employee as disabled within the meaning of the ADA.” Even where the employer’s view of the employee is stated in ADA terms, the facts may not include the elusive “particular impairment or major life

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240 An interesting question is whether, in a period in which disability studies programs are proliferating in higher education, the mention of “disabilities studies” on an applicant’s résumé would support an inference of the employer regarding the applicant as disabled de dicto. This would make sense, because, like in the context of race and Title VII, protecting non-disabled individuals who are associated with disability by proxy serves chiefly to protect people who are actually disabled. Such a claim could prevail only on a de dicto reading, where no particular impairment or major life activity need be alleged.

241 245 F.3d 916, 932 (N.D. Ill. 2001). (SSA award of disability benefits would not be conclusive because ADA and SSA disability standards differ).

242 Id.

243 TOM BAKER, INSURANCE LAW AND POLICY 291 (2003) (“The definition of disability under the ADA is much more inclusive [than under Workers’ Compensation law or Social Security Disability Insurance law].”)

244 Jacques v. DiMarzio, Inc. 386 F. 3d 192 (2d Cir. 2004); Amodio v. Suffolk County Police Dep’t, 158 F.3d 635, 646 (2d Cir. 1998); Capobianco v. City of New York, 422 F.3d 47 (2d Cir. 2005).
activity” that the courts require. Of course, we might predict that, if faced with stark and highly unlikely facts in which the employer has said, “I regard the employee as having an impairment that substantially limits a major life activity,” courts would depart from a strict de re inquiry and find a way to determine that the regarded as prong had been satisfied. But this is far from clear. In *Rotter v. ConAm Mgmt. Corp.*, the vice-president of the employer company stated in an email about the plaintiff employee, “He is ADA and in the past has complained . . . that I have been discriminatory.”

That court held that this evidence did not raise an issue of fact as to whether the employee was regarded as disabled within the meaning of the ADA.

To dramatize the problems created by a misplaced de re inquiry as applied to proxy case, consider the proposal that Title VII of the Civil Rights Act of 1964 should incorporate a regarded-as type of analysis for race discrimination claims. Using the ADA’s regarded as prong as a model, two commentators propose “a new method for recognizing discrimination claims based on the use of proxies for race - even when those proxies have been used in a way that mistakenly identifies someone as belonging to a certain race.”

They intend this legal theory to cover cases in which a feature of an individual, such as a name of African origin on an applicant’s résumé, stands as a proxy for blackness (or Latina/o-ness, or femaleness), and the employer discriminates on that basis. But imagine if this were to take the shape of requiring that the plaintiff prove she was “regarded as being a person of color.” How would result in this demand of the plaintiff: “So, Jamal, which person of color were you regarded as being? Julian Bond? Barack Obama? No one? Well then you have failed to show that you were regarded as being a person of color.”

Where interpretation of a civil rights statute fails to capture the most clearly group-based examples of discrimination based on a protected category *per se* or by proxy, under the very mechanism designed to proscribe that discrimination, we are no longer talking about the mere narrowing or whittling away at the edges of that law. We are dealing with civil rights protection that has deteriorated at its core. What is left is a puzzling labyrinth of law that, even when successfully navigated, comes up short of systemic change in the law for people with disabilities. This process is reversible (literally and figuratively), if we recognize that the culprit is not a close reading of irremediably flawed statutory language, but the fact that an unsophisticated reading has caused us to pursue the wrong inquiry.

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245 393 F. Supp. 2d 1077, 1088 (W.D. Wash. 2005) (holding employer’s general remarks about plaintiff being “ADA” not sufficient to establish disability under regarded-as prong).

246 Id.


248 Id. at 1291.
VI.

IMPLICATIONS FOR DOCTRINAL REFORM

A. Shifting Focus Away from the List of Major Life Activities

Reading the regarded-as prong *de dicto* would prompt the disability rights community to reconsider a current trend in disability rights law, whereby advocates seek to expand the list of those activities that qualify as “major.” Advocates have noted that most litigation energy is currently being spent arguing that plaintiffs’ limitations (actual or as regarded) are substantial and that a particular activity is “major.” Recent successful attempts to add to the list of legally recognized major life activities include eliminating waste from the body, \(^{249}\) circulating blood, \(^{250}\) and in interacting with others. \(^{251}\) Recent unsuccessful attempts include getting along with others, \(^{252}\) driving, \(^{253}\) and operating machinery. \(^{254}\) The trouble with this legal strategy is that adding to this list has little to do with accomplishing the ADA’s goals, while also playing into the courts’ reductionist focus on isolated activities. As shown with the Yankees hypothetical, even a long list (indeed, even an infinite list naming every possible activity) will be of no use to plaintiffs whose employers had no particular major life activity in mind. A big-picture approach calling for *de dicto* interpretation would better advance disability rights.

Under a *de dicto* analysis, there is no requirement that the plaintiff either select from a menu of recognized “major life activities” or try to break new ground by adding another item to the list. A case of far more impact than the “list expanding” litigation would be one that argues we need not be bound by a list under the regarded as prong at all. This would move advocacy away from carving up the category of disability into parts, parts that aren’t even constitutive of disability as a concept when they are taken together. What *is* constitutive of disability is a generalized perception of impairment and limitation, perhaps compounded by fear or other aversion, that then results in further limitation—-in other words, facts covered by *de dicto* readings of the regarded-as provision.

Concededly, the *de dicto* inquiry does not speak to the actual-disability prong, which is *not* *de dicto-de re* ambiguous. The list-expanding approach would therefore likely continue as a by-product, if not a strategy, of litigation under the actual-disability prong, even if the *de dicto* inquiry were to take root within in regarded-as jurisprudence. However, if the regarded-as jurisprudence were interpreted to capture *de dicto* readings, it would cover many of the plaintiffs who are today failing to meet the actual disability standard. As the National Council for Disabilities has stated that the regarded-as prong, properly clarified, “would become the vehicle

\(^{249}\) Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 381-82 (3d Cir. 2004) (holding kidney failure disabling because eliminating waste from body is a major life activity).


\(^{252}\) Nuzum v. Ozark Auto. Distrbns., 432 F.3d 839, 841-42. (8th Cir. 2005).


for dealing with most complaints of disability discrimination."

Focusing on the length of the major-life-activities list, then, may distract the disability rights movement from the vast potential of a reinvigorated regarded-as prong.

B. ADA Restoration Act

Returning to the metaphor of the ADA’s disability definition as a quirky Victorian house, the question confronting reformers can be analogized to one faced by purchasers of an old home with a sagging staircase, odd floor plan, and other flaws: shall we consider this a fixer-upper, a candidate for remodel, or a tear down project? With blame for the current state of the law on the statutory language, the current proposal to make the ADA livable is to remodel it by legislative amendment through the ADA Restoration Act. The proposed legislation would preserve much of the statute’s existing structure, including the three pronged disability definition. An important change is that the Act would eliminate any mention of major life activities. Instead, it would forbid discrimination “on the basis of disability,” and would define “disability” under all three prongs in terms of impairment alone.

The end result of a de dicto-de re analysis is consistent with the aims of the ADA Restoration Act. Moreover, the Act has other important provisions not addressed here, such as an amendment defining impairment without taking mitigating measures into account. But in at least one respect, the Act would carry over the failings of the current law. The new regarded-as prong, just like the existing statute, is de dicto de re ambiguous with respect to “an impairment.” Read de re, the regarder must have in mind a some res as an impairment; read de dicto, the regarder need only regard the plaintiff as impaired in an unspecified way. Thus, even under this remodeled statute, courts may still be asking “what is the impairment” in cases where the employer may have no particular impairment in mind, such as a proxy case.

One might discount this concern as a technical one unlikely to manifest itself in case law. But what we should learn from the courts’ tacit adopting of a de re inquiry and the proof required under it is (1) courts will fail to notice this ambiguity, and (2) the present tendency to disaggregate the evidence---to see each evidentiary item as relevant only to discrete impairments and major life activities---indicates a deep reductionist tendency of the courts. This method

255 National Council on Disability, supra note 33, 110-11.


257 H.R. 3195 § 4.

258 Id. § 5. The amended ADA would protect all individuals---not just disabled individuals---from disability-based discrimination. Id. This would shift the role of the disability definition from proving that one is in a protected class to proving causation.

259 Id. §4.

260 Id.
could be trained on the notion of impairment as much as it has been in recent years on “major life activities.” In this way, the remodeled statute could still yield absurd and counterintuitive results, very much like the current statute does today.

Despite these flaws, the ADA Restoration Act would be a significant step forward for disability rights. The real worry on the part of advocates is that it is unlikely to be enacted. If it is not, “fixing up” our understanding of ambiguity in the definition of disability to recover its lost readings could accomplish many of the goals of a legislatively remodel, and with more hope of success.

C. Implications of De Dicto-De Re Ambiguity Beyond the ADA

Instances of de dicto-de re ambiguity are not limited to the ADA. Because large classes of constructions in English are formally ambiguous with respect to reference, we should expect many statutory, contractual, and testimonial contexts---in fact, any site of language use in law---to potentially give rise to this ambiguity. In a brief essay, one commentator has collected examples of de dicto-de re ambiguity in various legal contexts to illustrate this point. Perhaps more instructive, though, is a chestnut case in statutory interpretation, *Whiteley v. Chappell.* This case, often taught to law students, shows not only the potential of de dicto-de re analysis to solve interpretive problems and the failure of courts to use it, but also the failure of commentators to correctly diagnose the problem.

The statute at issue in *Whiteley* made it a crime to fraudulently “personate any person entitled to vote.” The defendant had gone to the polls using the name of a registered voter who had died prior to the election. The court acquitted, reasoning that a dead person is not a “person entitled to vote” and that therefore it could not “bring the case within the words of the enactment.” This decision is cited by commentators as an example of extreme literalism leading to absurd results.

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262 See Partee and ter Meulen, supra note 96, at 409-10.

263 Rhodes, supra note 28.


265 4 Q.B. 147.

266 Id.

But the Whiteley court was not in fact adhering to literalism; rather, it was uncritically adopting a wide-scope de re reading of the statute, ignoring equally literal de dicto and narrow-scope de re readings that better corresponded to legislative intent.\textsuperscript{268} The de re reading, assumed by the court and by many commentators to be the literal reading, requires that the defendant be pretending to be a particular person who is in fact entitled to vote. The de re inquiry asks, “What particular person did the defendant impersonate, and is that person entitled to vote”? On a de dicto reading, however, a “person entitled to vote” need not refer to a particular person: the statute is satisfied where one goes to the polls presenting oneself fraudulently as a voter.\textsuperscript{269} On a narrow-scope de re reading, the statute is triggered where one fraudulently holds oneself out as a particular individual (the res), real or imagined, and pretends that such individual is entitled to vote.\textsuperscript{270} If the court had acknowledged either of the latter readings in light of the statute’s purpose, it would have reached the correct result. The Whiteley decision from 1868 may strike us as quaint, but in the fact that we are training 21\textsuperscript{st} Century lawyers to consider it an application of literalism highlights a persistent lack of sophisticated interpretive methods in law.

\textbf{CONCLUSION}

\textit{Delicious ambiguity.}

--Gilda Radner\textsuperscript{271}

Much of the ground that has been lost to the narrowing of the ADA’s disability definition could be retaken, if only courts were to read that definition more closely. By closely I do not mean in a way that we would call conventionally lawyerly. That way—which may be better described as parsing than reading—is arguably what has charted the statute’s errant course thus far. Rather, to read closely is to read with a mind open to possibilities of meaning, sensitive to note 264, at 1149-58 (characterizing Whiteley as application of “literal rule” wherein the “literal or linguistically most probable meaning” of the statute is determinative); Sue Chaplin, "Written in the Black Letter": The Gothic And/In the Rule of Law, 17 Cardozo Stud. L. & Lit. 47, 49 (“To take the law at its word in this instance, then, is to allow the impersonator of the deceased to go free . . . ”).

\textsuperscript{268} Even defense counsel in Whiteley conceded that the defendant was “very possibly . . . within the spirit” of the statute. Whiteley, 4 QB 147 (1868).

\textsuperscript{269} This reading may not be available if the reader finds the presence of “any” to push toward a de re reading, that is, to require reference. My informal polling finds that some speakers cannot register a de dicto reading with “any,” although the narrow-scope de re reading is unaffected by “any.”

\textsuperscript{270} To see the difference in the logic of these readings, using ‘pretend to be’ as a more familiar semantic equivalent of ‘personate,’ consider these structures, which mirror the regarded-as constructions in Part II above:

\textit{De dicto:} John pretends [John is an x such that [x is a person entitled to vote]]

Wide-scope de re: There is some x such that [(x is a person entitled to vote) and [John pretends to be x]]

Narrow-scope de re: There is some x such that John pretends [John is x and x is a person entitled to vote].

\textsuperscript{271} http://www.quotationspage.com/quotes/Gilda_Radner.
context, and possessed of no more nor less specialized knowledge than the ordinary speaker demonstrates when John knocks on her door, “looking for a dog.”

If this is correct, then it seems that we in the disability rights community have gotten many things backwards in our understanding of the current failures of the ADA. First, we have blamed the language of the disability definition. In fact, while that language is far from perfect, it is capacious enough to do the work of advancing disability rights, particularly through a reinvigorated jurisprudence of the regarded-as prong. Second, we have acquiesced to the courts’ so-called literal interpretation of that language, only to find that this supposed literalism is actually sloppy masquerading as strict adherence to the statute. Finally, to the extent that hopes for reform are tied to the “big prize” of amending the disability definition, we miss opportunities to reshape the law around the statute as currently written.

There is another way through this problem, stopping short of legislation. Disability rights advocates can shake hands with a new friend: textual literalism. If this instrument is applied to expose ambiguity, then a little literalism---just enough to pry open the door to legislative history for use in interpreting the ADA---will go a long way. The aim of this article is to provide the linguistically rigorous means to undertake this, and to forge an analytical link between the language of the ADA and the insights of commentators and advocates as to how disability law might be “righted.” With nothing more than ordinary intuitions about the meaning of complex sentences---and a way to describe this knowledge---the disability rights movement can take back the text of the ADA.