Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights

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Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights

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The social model of disability teaches that it is society’s treatment of impairments, not the impairments themselves, which limit people. But this model permits two different approaches to civil rights coverage: protect only some (the “minority group” approach) and protect all (the “universal” approach). While some scholars suggest that the Americans with Disabilities Act’s (ADA) protected class of people with “disabilities” constituted an abandonment of the universal approach to coverage, this article argues that the ADA’s three-pronged definition of “disability” embodied a tension between the minority group approach (in its first and second prongs) and the universal approach (in its “regarded as” prong). Although the minority group approach ultimately won out in the courts, that victory was not the result of a deliberate decision on the part of disability rights advocates to subordinate the universal approach.

The ADA Amendments Act of 2008 (ADAAA), the product of negotiations between the business community and disability rights advocates...

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advocates, resolves this tension and brings coherence to the ADA’s definition of disability by providing nearly universal nondiscrimination protection under the “regarded as” prong, and by extending reasonable accommodations under the first and second prongs to a broader but not unlimited group of people whose impairments are stigmatized.

The resolution of this tension matters for the ADA and for disability rights more generally. The new “regarded as” prong represents a bold step forward for the social model of disability by acknowledging that any one of us may be subjected to discrimination based on an impairment and, for that reason, nearly all of us should be protected. Likewise, the ADAAA greatly dilutes the limitation required under the first and second prongs and limits its relevance to reasonable accommodations only, thereby elaborating on what it means to be stigmatized, and ensuring reasonable accommodations to those who are.

The ADAAA is not the cure-all that many disability rights advocates had hoped for. But by reorienting our conception of “disability,” the ADAAA changes how we think about ourselves, and, ultimately, how we treat—and ought to treat—each other.

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I. INTRODUCTION

A woman with an amputated limb who, unlike her colleagues, is not rehired after lay-offs.¹ Not “disabled.” A career electrician with muscular dystrophy whose job offer is revoked when the company doctor learns that he needs a ladder to reach light fixtures above shoulder-level.² Not

² McClure v. Gen. Motors Corp., 75 F. Appx. 983 (5th Cir. 2003).
“disabled.” A 19-year-old man with intellectual disabilities (“mental retardation”) who is denied the opportunity to have his job coach present during an interview for a cart-push position. Not “disabled.”

The story of lower courts striking down the claims of people with significant medical impairments under the Americans with Disabilities Act of 1990 (“ADA”) because they are not “disabled” is a familiar one in legal scholarship. In fact, the narrowing of coverage under the ADA is used in law schools across the country as a textbook example of how language intended by Congress to mean one thing can be interpreted by courts to mean something completely different.

But this story is one that is changing. On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008 (“ADAAA”), which amends the ADA in a variety of ways, primarily by broadening the definition of disability to include those Congress intended to cover. Early judicial decisions suggest a new chapter in the struggle against discrimination based on impairments. In November 2009, the Ninth Circuit held that a person with insulin-dependent type II diabetes had a disability under the (unamended) ADA, but noted that the ADAAA “bolstered” that conclusion by “significantly expand[ing] the scope of the term ‘disability’ under the ADA.”

In his characteristically original and thoughtful book, Law and the Contradictions of the Disability Rights Movement, Professor Samuel Bagenstos states that while the ADAAA is “a worthy effort that is likely to make things somewhat better” under the ADA, it is not “a magic solution.” Bagenstos explains that the ADA is premised on the “social model” of disability—a model in which we all exist on a spectrum of impairments, and it is our society, not our biology, that makes some of us “disabled.” But the social model, he writes, can be understood to call for

5. See Amy L. Allbright, 2009 Employment Decisions Under the ADA Title I—Survey Update, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 341 (2010) (stating that dismissal of cases based on plaintiff’s inability to prove ADA-protected disability “is likely to change in future surveys because of the changes Congress made to the definition of ‘disability’ in the ADA [Amendments Act]”).
9. Id. at 2.
10. Id. at 18 (“To most disability rights advocates, ‘disability’ is not an inherent trait of the ‘disabled’ person. Rather, it is a condition that results from the interaction between some physical and
either of two very different approaches to the question of civil rights coverage: protection for some (the “minority group” approach) or protection for all (the “universal” approach). In the lead-up to passage of the ADA in 1990, Bagenstos argues, the disability rights community urged both approaches. Faced with the political reality of a White House opposed to an explicitly universalist ADA, he argues, the disability rights movement coalesced around the more conservative minority group approach, deliberately subordinating the universal approach to win political support. The result was a limited law—one that protected only some people from discrimination. While the ADAAA pushes the boundaries of the minority group approach, he argues, it does not chart a universalist course.

As a member of the team of attorneys who helped negotiate the proposed legislative language that became the ADAAA, I largely agree with Professor Bagenstos’ analysis. Specifically, I agree that the disability rights movement’s rendering of the social model permits two seemingly conflicting versions of coverage: the minority group and universal approaches. I also agree that the ADA has been interpreted by courts consistent with the former approach.

I do not agree, however, that in the lead-up to passage of the ADA, the disability rights movement consciously abandoned the universal approach in favor of a minority group approach. Building on the work of others, I argue that the ADA did not adopt the minority group approach over the universal approach—it adopted both. As a result, the statute’s definition

mental characteristic labeled an ‘impairment’ and the contingent decisions that have made physical and social structures inaccessible to people with that condition.”).

11. Id. at 20-21.
12. Id. at 44-45.
13. Id. at 45.
14. Id. at 45.
15. Id. at 51-53.
17. BAGENSTOS, CONTRADICTIONS, supra note 8, at 20-21.
18. Id. at 45.
19. Id. at 44-45.
20. See, e.g., Chai R. Feldblum, Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?, 21 BERKELEY J. EMP. & LAB. L. 91, 128-29 & n.198 (2000) [hereinafter Feldblum, Definition] (arguing that ADA’s definition of disability, particularly its “regarded as” prong, was not intended to cover “a particular subordinated group” but was instead intended to cover “any person who had been discriminated against because of any condition”).
of disability effectively codified the tension between the two approaches, and in the ensuing years the minority group approach prevailed in the courts. While the minority group approach ultimately won out in the courts, it was not the result of a deliberate decision on the part of disability rights advocates to subordinate the universal approach.

The ADAAA resolves the original tension by striking a balance between the universal and minority group approaches, thereby bringing coherence to a statute long misunderstood. Specifically, the ADAAA provides nearly universal nondiscrimination protection under the ADA’s “regarded as” prong, and it extends reasonable accommodations under the first and second prongs to a broader but not unlimited group of people whose impairments are stigmatized.

Resolution of this tension matters for the ADA and for disability rights more generally. The ADAAA’s new and improved “regarded as” prong represents a step, albeit a measured one, toward universalism that will have a positive impact not only on ADA cases, but on the law governing disability rights in general. By protecting nearly everyone from discrimination based on impairments, the ADAAA’s “regarded as” prong relieves people of the need to show that they are different because of the way their impairments limit them. Now all they need show is that others limited them because of their impairments. That negative treatment, itself, brings them within the ADA’s coverage, just as negative treatment based on other characteristics brings plaintiffs within the coverage of other civil rights laws. And while Congress retained the much maligned language requiring substantial limitation of a major life activity, the ADAAA greatly dilutes this language and limits its relevance to reasonable accommodations only. By relaxing the “disability” standard under the first and second prongs, the ADAAA elaborates on what it means to be stigmatized, and ensures reasonable accommodations to those who are.

The ADAAA is not the sea change in American law that many disability rights advocates and scholars may have hoped for. However, by blurring the line between “us” and “them,” and highlighting the ways in which we, as a society, draw this line, the ADAAA is a radical step in the right direction.

21. See infra notes 262-264 and accompanying text (explaining that broad reading of definition of disability never caught on in the lower courts).
22. See infra notes 115-132, 474-483 and accompanying text (discussing ADA’s “regarded as” prong and ADAAA’s changes to that prong).
23. See infra notes 117-119, 484-93 and accompanying text (discussing ADA’s first and second prongs and ADAAA’s changes to that prong).
24. See infra notes and 474-483 and accompanying text.
25. See id.
26. See infra notes 484-493 and accompanying text.
27. See id.
In Part II of this article, I briefly address two conceptual models of disability: the “medical model” and the “social model.” The medical model locates the cause of disability within the person—in one’s limiting impairments—and points to a remedy in medical cures, charity, and social welfare. The social model, on the other hand, locates the cause of disability outside the person—in the treatment a person receives—and points to a remedy in civil rights protection. As I explain in Part III, while the social model teaches that it is society’s treatment of impairments, not the impairments themselves, which limit people, the social model permits two different approaches to civil rights coverage: protect only some (the minority group approach) and protect all (the universal approach). Under the minority group approach, only those with stigmatized impairments are “disabled” and eligible for civil rights protection. Under the universal approach, any person treated adversely because of an impairment is “disabled” and eligible for civil rights protection.

With this conceptual foundation laid, I challenge the view that in the lead-up to passage of the ADA, disability rights advocates chose the minority group approach over the universal approach and, in effect, got what they asked for—civil rights protection of a small minority. In Part IV, I highlight the tension between these dueling approaches in the ADA’s three-pronged definition of disability. In Part V, I trace the history of this tension back to the Rehabilitation Act of 1973, where the three-pronged definition first appeared, and conclude that the ADA’s definition of disability always embodied a tension between the minority group and universal approaches.

In Part VI, I briefly examine how Supreme Court and lower court decisions obscured the ADA’s universal aims in favor of protection of a narrow minority group and, in Part VII, I discuss the disability rights community’s policy response to those decisions: the “ADA Restoration” effort. I emphasize how the tension between the minority group and universal approaches informed both the advocacy effort and negotiations between the disability and business communities that culminated in passage of the “ADA Amendments Act of 2008,” and how the ADAAA reconciles this tension. In Part VIII, I discuss some of the ADAAA’s limitations as well as the benefit that the statute will produce in terms of parity with other civil rights laws, near fulfillment of the universal approach in the nondiscrimination context, expansion of the minority group approach in the reasonable accommodation context, and, at long last, coherence in the definition of “disability.” In Part IX, I offer some concluding remarks.
II.
A QUESTION OF CAUSATION: THE MEDICAL AND SOCIAL MODELS OF DISABILITY

While there is no universally accepted definition of “disability,” virtually all definitions imply some limitation on ability. How one defines disability depends on where one locates the cause of that limitation. Definitions of disability fall roughly into one of two intellectual camps: the medical model of disability, which points to one’s biology as the cause of limitation, and the social model of disability, which points to one’s environment.28

Throughout much of American history, the medical model has predominated.29 Under this model, disability is something intrinsic to the person—an individual, medical problem (or “personal tragedy”) that limits bodily function and precludes full participation in society.30 Society’s proper response to disability, according to this model, is to cure the disability through medical interventions or to ameliorate it through charity and social welfare interventions like work rehabilitation and public assistance.31 This response, in turn, involves delineating those who are “truly disabled”—those who are in need of medical treatment or deserving of social services—from those who are not.32

The medical model’s roots in American law date back to the Civil War pension system, which “first linked the definition of disability to an inability to work and established physicians as the medical gatekeepers of disability benefits.”33 Throughout the first half of the twentieth century, federal law continued this model by providing vocational rehabilitation services to “disabled” veterans and civilians seeking to re-enter the workforce, and cash and other benefits to those unable to work because of a physical or mental impairment.34


29. Areheart, supra note 28, at 185; see also U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 87 (1983) [hereinafter Accommodating the Spectrum] (“Most popular conceptions and official usages of the term ‘handicapped’ are based on the idea that there are observable physical and mental conditions called ‘handicaps,’ that the people denominated handicapped are significantly impaired in ways that distinguish them from ‘normal’ (nonhandicapped) people, and that one either is or is not handicapped.”).

30. BAGENSTOS, CONTRADICTIONS, supra note 8, at 18.


33. PETER BLANCK ET AL., DISABILITY CIVIL RIGHTS LAW AND POLICY 3 (2d ed. 2009); see also Bagenstos, Future, supra note 31, at 10.
disability.\textsuperscript{34} By mid-century, “disability law was effectively nothing more than a subcategory of social welfare law,” providing “rehabilitation services, cash benefits, and medical care to people with disabilities.”\textsuperscript{35} Disability welfare benefits, in particular, remain a central component of disability policy today, with the lion’s share of disability welfare spending devoted to providing cash (SSI, SSDI) and health care (Medicare and Medicaid) benefits to those who have an “inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”\textsuperscript{36}

The modern American disability rights movement—and its articulation of the social model of disability—arose in the 1970s, largely in response to the medical model of disability.\textsuperscript{37} Building on the success of the independent living movement, which consisted largely of people with physical impairments who demanded “independence” from medical and rehabilitation centers, and “integration” through the formation of independent living centers, the disability rights movement sought to reframe disability as a primarily social condition.\textsuperscript{38}

The social model of disability finds no inherent distinction between those with disabilities and those without.\textsuperscript{39} Rather than two separate and distinct classes, this model holds that all people lay along a spectrum of ability—we all have biological impairments of one sort or another that impact our bodily functions (e.g., epilepsy, psoriasis, Parkinson’s Disease).\textsuperscript{40} What distinguishes us, and what makes some of us “disabled” and others not, is not whether our medical impairments limit our bodily functions, but rather whether our society limits us based on those impairments. Under this model, “disability” is primarily a social construct

\begin{itemize}
  \item \textsuperscript{34} BLANCK ET AL., supra note 33, at 24-25; see also Feldblum, \textit{Definition}, supra note 20, at 96 (“Th[is] model presumed . . . that integration required changing the person with the disability, not changing any aspect of the surrounding society that might have made it difficult for the person to function in that society.”).
  \item \textsuperscript{35} Bagenstos, \textit{Future}, supra note 31, at 10.
  \item \textsuperscript{36} Social Security Act, 42 U.S.C. § 423(d)(1)(A) (2006); see Bagenstos, \textit{Future}, supra note 31, at 11.
  \item \textsuperscript{37} Bagenstos, \textit{Subordination}, supra note 28, at 427; see also Feldblum, \textit{Definition}, supra note 20, at 97.
  \item \textsuperscript{39} See, e.g., Bagenstos, \textit{Subordination}, supra note 28, at 427.
  \item \textsuperscript{40} Robert L. Burgdorf Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 519 (1997) [hereinafter Burgdorf, \textit{Substantially Limited}].
\end{itemize}
that results from the interaction between a person and his or her environment. 41 People with “disabilities” are “normal and ordinary people” who, because of their impairments, are “caught at a physical and social disadvantage.” 42 As one disability scholar has noted:

In the socio-political model, disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations. All of these, in turn, reflect overly narrow assumptions about what constitutes the normal range of human functioning. 43

Under the social model, then, disability is not a problem with the individual—it is a problem with our response to the individual. Barriers to full participation lay not with the individual but rather with a society structured so as to be inaccessible to certain people. Because our attitudes and institutions exclude certain people based on their impairments, the social model goes, we have a moral obligation to alleviate that exclusion, just as we have an obligation to alleviate exclusion based on race or sex. 44 Under this model, disability is a civil rights issue, and society’s proper response is to remove barriers and integrate those whom society has “disabled.” 45

III.

A QUESTION OF COVERAGE: THE MINORITY GROUP AND UNIVERSAL APPROACHES

Although the social model points to social attitudes and practices as the cause of the problem of “disability” and to civil rights laws as the solution,

44. See Bagenstos, Subordination, supra note 28, at 430 (“Once one thinks of disability as arising primarily from the human environment, rather than from anything inherent in an individual’s physical or mental condition, it ‘becomes a problem of social choice and meaning, a problem for which all onlookers are responsible.’”) (quoting MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 119 (1990)).
45. BAGENSTOS, CONTRADICTIONS, supra note 8, at 18.
the social model does not direct who ought to be able to claim the protection of those civil rights.\textsuperscript{46} If everyone exists on a spectrum of ability and only some of us are “disabled” by society’s treatment of our impairments, should civil rights law protect only those of us whose impairments are generally thought of as “disabling” in society’s eyes, or everyone? The social model supports both interpretations: the minority group approach and the universal approach.\textsuperscript{47}

\textbf{A. The Minority Group Approach}

According to the minority group approach, people who are “disabled” by society are a finite, identifiable group whose impairments subject them to systematic disadvantages in society.\textsuperscript{48} While any person may face an isolated act of discrimination as a result of an impairment, disability attaches only to those whose impairments result in “similar, systematic obstacles to participation in a range of activities in public and private life.”\textsuperscript{49} This finite group of people who are systematically disadvantaged, Professor Bagenstos argues, generally consists of those whose medical impairments are “stigmatized,” that is, those who “differ too much from a socially defined ‘norm,’” such that they are considered “abnormal or defective in mind or body.”\textsuperscript{50} They are the people most likely to experience the kinds of social practices that result in systematic disadvantage, namely, prejudice (i.e., animus-based attitudes, such as “I don’t like people with that condition”), stereotypes (i.e., overbroad generalizations, such as “People

\begin{itemize}
  \item \textsuperscript{46} Id. at 20-21.
  \item \textsuperscript{47} In much of the legal scholarship, the “minority group model” of disability is understood to be the natural outgrowth of the social model, demanding civil rights coverage for a “minority” of individuals who are disabled by society. \textit{See, e.g.}, Laura L. Rovner, \textit{Disability, Equality, and Identity}, 55 ALA. L. REV. 1043, 1054 (2004). This Article deliberately uses the words “minority group approach” to signal another possible response to the social model — the universal approach — which demands civil rights coverage for everyone. \textit{See} \textit{BAGENSTOS, CONTRACTIONS}, supra note 8, at 21 (stating that both the minority group and universal understanding of disability “are firmly rooted in the social model”).
  \item \textsuperscript{48} \textit{See} \textit{Bagenstos, Subordination, supra} note 28, at 421-22; \textit{see also} \textit{NATIONAL COUNCIL ON DISABILITY, ACHIEVING INDEPENDENCE: THE CHALLENGE FOR THE 21” CENTURY} 19 (1996), \textit{available at} http://www.ncd.gov/newsroom/publications/1996/achieving.htm (last visited Feb. 28, 2010) (“The disability rights perspective views people with disabilities as a minority group that has been subject to discrimination and unfair treatment — in legal terms, a class of people.”).
  \item \textsuperscript{49} \textit{Bagenstos, Subordination, supra} note 28, at 436; \textit{see id.} at 479 (“While every person at some point has some physical or mental condition that could be described as an impairment, and many may suffer isolated instances of poor treatment as a result, only a smaller group of people is ‘designated handicapped’ in the process. That is the class of people who are likely to experience systematic disadvantage through the mechanisms of prejudice, stereotypes, and neglect.”).
  \item \textsuperscript{50} Id. at 437, 445 (internal quotation marks omitted). “Although ‘stigma’ refers colloquially to animus and prejudice,” Professor Bagenstos uses the term to refer to a broader problem: “the condition of ‘undesired differentness’ from what society deems ‘normal’ or expected.”
\end{itemize}
with that condition can’t do X”), and neglect (i.e., historical exclusion, such as sidewalks without curb-cuts).51

As Professor Bagenstos notes, “[m]any people with minor or temporary impairments may lose out on discrete opportunities but not experience or expect social marginalization as a result.”52 For example, a person with epilepsy would probably be considered “disabled” under the minority group approach because people with epilepsy have historically been deprived of opportunities as a result of widely held prejudicial and stereotypical attitudes about their impairment. A person with a broken leg, on the other hand, would probably not be considered disabled under this approach because broken legs are generally not stigmatized. While such a person “may not be able to enter a particular inaccessible building... she can hardly be said to experience systematic disadvantage.”53

The minority group approach thus “take[s] society’s construction of disability and go[es] with it: through prejudice, stereotypes, and neglect... society has created a distinct (though not naturally distinct) minority group of people with disabilities.”54 Because society systematically disadvantages—or “disables”—only this group of people, the minority group approach holds that civil rights law should likewise protect only this group, in effect, those whose impairments are stigmatized.55

While it is not the purpose of this article to fully canvass the strengths and weaknesses of the minority group approach, some brief points are instructive. The strengths of the minority group approach derive from its consistency with broader normative theories. By prohibiting discrimination based on only certain kinds of impairments — those that lead to systematic disadvantage — the minority group approach finds support in egalitarian anti-subordination principles.56 Anti-subordination theory is concerned with rectifying group-based disadvantage.57 It is not concerned with eliminating idiosyncratic, individualized harms.58 The less stigmatized the impairment, one might argue, the less likely that unfair treatment of the impairment will entrench subordination, and the less concern it raises for

51. Id. at 436-37. According to Professor Bagenstos, “people who differ too much from a socially defined ‘norm’ are likely to experience all [three] of them”—i.e., prejudice, stereotypes, and neglect. See id. at 445 (“[I]mpairments that are stigmatized — that type people who have them as ‘abnormal or defective in mind or body’ — are particularly likely to meet the systemic disadvantage standard.”).
52. Id. at 479.
53. Id. at 479-80.
54. BAGENSTOS, CONTRADICTIONS, supra note 8, at 20-21 (emphasis in original).
55. See id. at 21.
56. See Bagenstos, Subordination, supra note 28, at 453.
57. See Samaha, supra note 28, at 1301-02; Bagenstos, Subordination, supra note 28, at 452-53.
58. See Bagenstos, Subordination, supra note 28, at 454-56.
anti-subordination theory. For example, while it may be irrational for an employer to terminate a person because of a broken thumb or a cold (or, for that matter, because the employee is a Capricorn or reminds the employer of a hated stepfather), one might argue that such conduct does not offend anti-subordination principles because the disadvantage is individual, not group-based. There simply is no stigmatized minority group of people with broken thumbs or colds.

Notions of corrective justice also inform the minority group approach. If wrongdoers—in this case, society—are to correct the wrongs they have done to victims commensurate with the injury caused, the victim must be identifiable. Conceiving all people with impairments as victims, one might argue, seems like a stretch. There is simply no history of discrimination against people with broken thumbs or colds (assuming no underlying, stigmatized condition) in need of correction. Identifying certain classes of people with impairments as “disabled,” therefore, seems like the better fit.

The minority group approach is also supported by utilitarian principles. For example, the person fired because of a non-stigmatized impairment like a cold will likely be able to find another job with an employer who does not share those idiosyncratic preferences—i.e., the market will correct for these preferences. However, the person fired because she is hard of hearing may not have that same luxury because the attitudes of her employer are more likely to be shared by other employers. By targeting antidiscrimination protection to those with stigmatized impairments, the minority group approach seeks the most “bang for its buck.” It carves out those whom the market is most likely to help, thereby avoiding the societal

59. See id. at 479-80; see also Mark Kelman, Market Discrimination and Groups, 53 STAN. L. REV. 833, 866-67 (2001) (“[The reason] we are not especially perturbed when a person is denied a job he is entitled to because he reminds the employer of a hated stepfather. . . . [is because] the decision not to hire in such a case does not confirm traditional status-based hierarchies, express the social power of one group over another, or demean the victim. It is far more plainly the case from the viewpoint of a particular “victim” of stepfather association that he is dealing with a stupid jerk with some social power.”).
60. See Bagenstos, Subordination, supra note 28, at 457-58, 479-80.
61. See Kelman, supra note 59, at 866-67.
63. See Bagenstos, Subordination, supra note 28, at 454 (“[W]e might expect markets (economic and political) to root out irrationality and preserve social mobility. We might therefore expect that most inequalities that result from the system will either come out in the wash or redound to everyone’s benefit.”).
64. See Kelman, supra note 59, at 864.
65. See id. at 859-60 (“We may also choose to employ state power to protect only those victims of discrimination who are members of groups frequently subjected to aversive prejudice or false stereotypes, believing that market forces will correct simple discrimination against others.”).
costs of administering a regime to eliminate individual disadvantage based on any impairment—costs that may outweigh the benefit to the individual.66

But the minority group approach is not without weaknesses. While this approach recognizes disability as the interaction between one’s impairment and one’s environment, as opposed to a purely medical phenomenon, it prioritizes civil rights protection based on the level of disadvantage that society attaches to particular impairments.67 This is problematic for several reasons.

First, by basing civil rights protection on the particular impairment one has (i.e., stigmatized impairments are covered; non-stigmatized impairments are not), the minority group approach echoes the medical model’s focus on limitations on bodily functioning. Because stigmatized impairments are likely to be those that most severely limit bodily functioning, the minority group approach’s inquiry risks devolving into a search for those whose functioning is most limited, that is, the so-called “truly disabled” who are “most deserving” of protection.68 The minority group approach, of course, is not the same as the “truly disabled” approach. The former covers more people because it draws lines based on the stigma, not severity, associated with impairments, and stigma can persist regardless of severity.69 But by drawing lines—any lines—the minority group approach functions much like the “truly disabled” approach. While the two are not the same, they are close.

Second, the minority group approach is bound to be underinclusive. In order for a person’s impairment to be stigmatized and to subject him or her to systematic disadvantage, the impairment must have been around long enough, and must have been observed often enough to result in widely-held prejudicial and stereotypical attitudes. However, some impairments that result in discrimination may be too new to be stigmatized.70 While science may recognize the impairment that causes a person to look or act differently from the norm, society may not. Other impairments are virtually invisible.71 They may be masked by those who have them, or they may not impact physical and cognitive functioning in ways that are readily distinguishable

66. See Bagenstos, Subordination, supra note 28, at 454-55.
67. BAGENSTOS, CONTRADICTIONS, supra note 8, at 20-21.
68. See Burgdorf, Substantially Limited, supra note 40, at 536-39 (discussing cases in which courts restricted coverage to “truly disabled”).
69. See Bagenstos, Subordination, supra note 28, at 470 (“Even people whose conditions have no ongoing medical significance may experience the prejudice, stereotypes, and neglect that make up disability-based disadvantage — consider a person with a severe facial disfigurement. . . . People with stigmatized but not severe conditions are likely to need government assistance to be included in the ‘norm,’ but the ‘truly disabled’ approach leaves them out in the cold.”).
70. See Samaha, supra note 28, at 1263 (discussing “new impairments that are physically debilitating yet not an important source of stigma”).
71. See BAGENSTOS, CONTRADICTIONS, supra note 8, at 47.
from the norm. While impairments like these are no doubt the target of discrimination, they may not be well enough understood to generate stigma. As a result, the minority group approach will always be playing catch-up, and will often be too late, “keep[ing] disability discrimination law from reaching a great deal of conduct about which we ought to be concerned if we care about disability inequality.”

Consider a “high-functioning” person with Autism Spectrum Disorder (ASD). That person may exhibit “outlier” social behaviors such as the failure to hold eye contact; lack of interest in others; difficulty transitioning from one task to another; and oversensitivity to one’s environment, which often results in self-stimulation or “stimming” (e.g., rocking one’s body, hand-twisting, bouncing one’s legs, jaw-clenching, and tooth-clicking). Unlike people at the “lower-functioning” end of the autism spectrum, high-functioning people may not be severely limited in communication. Many high-functioning people with ASD do not know they have the impairment, let alone others. As a result, high-functioning people with ASD may not be labeled and subordinated by society because of their impairment. Under the minority group approach, therefore, they may not be considered “disabled.” But high-functioning people with ASD no doubt experience discrimination based on their impairment—not because they have ASD, but because they asked too many questions, they did not perform well at a job interview or annual review, or maybe their hand-twisting was just plain “annoying.”

The autism spectrum teaches that the “edges” of impairment matter.

**B. The Universal Approach**

The universal approach, on the other hand, holds that since everyone has an impairment of one sort or another, everyone is at risk of being “disabled” by society’s treatment of that impairment. Rather than locating disability in a discrete group of people with stigmatized impairments, this

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72. *Id.* at 50.

73. *Cf.* BAGENSTOS, CONTRADICTIONS, supra note 8, at 48 (“Even among people whose conditions are overt[,] neither they nor society at large may characterize their conditions as ‘disabilities.’ The inequality inheres not in the targeting or ignorance of a group but in an accumulation of incompatibilities between individuals’ abilities and institutional structures.”).

74. *See id.* at 21 (stating that, under this approach, “the disability label is arbitrary and useless” and the proper policy response is “universal design of the built environment to embrace the largest variety of potential users, as well as a general rule of flexibility to recognize that all people are different”); *see also* Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 9-10 (2008) (stating that limitations of “minority rights approach” has stimulated development of “universalist approach,” which is “based on the concept of impairment as an infinitely various but universal feature of the human condition.”); Irving Kenneth Zola, *Toward the Necessary Universalizing of a Disability Policy*, 67 MILBANK Q. 420 (1989), available at http://www.jstor.org/stable/3350151 (acknowledging “the near universality of disability and that all its dimensions (including the biomedical) are part of the social process by which the meanings of disability are negotiated”).
approach “treats ‘disability’ as inhering in each discrete decision to deny an opportunity to a person because of an . . . impairment.” According to this approach, disability rights laws ought to protect everyone who experiences discrimination based on an impairment much like the Civil Rights Act of 1964 protects everyone who experiences discrimination based on race, religion, gender, or ethnicity.

Importantly, the universal approach draws some lines. Because the social model recognizes disability as the interaction between an impairment—i.e., a physiological disorder—and society, the universal approach does not protect people treated adversely based on mere characteristics. Height, eye color, or lack of athletic prowess (absent some underlying impairment), for example, does not make one “disabled” under the social model, and thus does not trigger protection under the universal approach. Aside from this constraint, however, the universal approach is far-reaching in scope, extending protection to anyone with an impairment regardless of whether and how that impairment limits a person’s bodily functions.

An extensive discussion of the strengths and weaknesses of the universal approach is beyond the scope of this article, but a few notes are in order. The universal approach’s biggest strength is its consistency with an “orthodox account of how civil rights laws work.” That is, when civil rights laws prohibit consideration of a characteristic, they prohibit it completely, even if that means extending protection against discrimination to a large number of people who might never need it. As Professor Chai Feldblum points out:

75. Bagenstos, Subordination, supra note 28, at 475; see also Burgdorf, Substantially Limited, supra note 40, at 526 (advocating nondiscrimination protection for “any person who has been treated differently or unequally in relation to a real or perceived mental or physical impairment”).

76. See Feldblum, Definition, supra note 20, at 94 (“Under such laws, these characteristics are viewed as elements that are ordinarily irrelevant for purposes of making determinations regarding employment, housing, or the provision of goods and services.”).

77. While the term “impairment” is not without ambiguity, it is widely understood as being “sufficiently broad to ensure that no serious question of application arises in the vast range of cases . . . .” Bagenstos, Subordination, supra note 28, at 407; see, e.g., Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Educ., Labor & Pensions, 110th Cong. 25-28 (2007) (statement of Camille A. Olson, Seyfarth Shaw LLP), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:39388.pdf [hereinafter Olson, Senate Testimony].

78. Cf. 29 C.F.R. pt. 1630 app. (2010). The term “physical or mental impairment” does not include simple physical characteristics, such as blue eyes or black hair. Further, because only physical or mental impairments are included, environmental, cultural, and economic disadvantages are not in themselves covered. For example, having a prison record does not constitute having a disability. Age is not a disability, nor is homosexuality.


80. Feldblum, Definition, supra note 20, at 101.
[M]ost white people,. . . most men, [and] most heterosexuals [do not] experience discrimination on the basis of their race, gender, or sexual orientation. Nevertheless as a society, we have not passed laws that prohibit discrimination solely against those individuals whose race, or gender, or sexual orientation have historically been the object of stigma and discrimination. Rather, our civil rights laws prohibit the use of a characteristic that the legislature has decided should ordinarily be irrelevant in decision-making. Once that characteristic has been identified, no decision may be made on that basis (unless otherwise justified by the law) regardless of who possesses that characteristic.81

In this way, the universal approach to disability rights coverage is no different than other civil rights laws, which take coverage as a given and focus on adverse action.82 As Professor Bagenstos notes,

A Title VII plaintiff. . . might need to prove she that she suffered adverse action on the basis of her race or sex, but she does not have to prove that she has a race or sex (a trivial requirement if ever there was one), nor does she have to prove that she has a particular race or sex. Title VII protects everyone against discrimination on the basis of their race or sex, whatever their race or sex may be.83

By removing the focus on bodily limitations, moreover, the universal approach represents the fullest working out of the social model of disability.84 Alternative approaches (the minority group approach, or the “truly disabled” approach) put at least part of the focus on the limitation, thereby undermining a central tenet of the social model: it is society’s response to impairments—not the objective reality of how much or how little an impairment impacts a person’s bodily functions—that creates “disability.”85

While the universal approach neatly aligns impairments—*all* impairments—with race, sex, religion and other prohibited characteristics for purposes of civil rights protection, it also raises several difficult questions, particularly in the employment context. First, while there are benefits to an approach that views everyone as lying on a spectrum of

81. *Id.; see also* Burgdorf, *Substantially Limited*, supra note 40, at 423-24 (“Despite a popular misconception that civil rights laws afford protection only to certain groups, federal civil rights laws and constitutional nondiscrimination requirements generally protect all individuals from discrimination on the grounds prohibited, whether it be race, gender, national origin, age or religion.”).

82. Feldblum, *Definition*, supra note 20, at 101-02. While a person adversely treated because of an impairment would be *covered* under the universal approach, the inquiry would not end there. Rather, the analysis would move on to the issue of causation, and whether the covered entity has any defense for its actions.


84. *See id.* at 475-76.

85. *See Feldblum, Definition*, supra note 20, at 99-100; Burgdorf, *Substantially Limited*, supra note 40, at 426 (“[D]ifferentiation of a class of people . . . directly contravenes the central premises of the disability rights movement and the essential purposes of antidiscrimination laws.”).
ability, and “disability” as something anyone may experience, one might argue that there are also disadvantages. Not all impairments are stigmatized—that is, not all impairments type people as abnormal and subject people to systematic prejudice, stereotypes, and neglect. For those with stigmatized impairments, unfair treatment is not a one-time or even occasional problem—it is a fact of life. As Professor Bagenstos states, “[f]or many people with conditions society defines as ‘disabilities,’ their status as ‘people with disabilities’ has an enormous effect on their lives. To deny that point is to deny their lived reality.” One might argue that the universal approach does just that by expanding the definition of “disability” beyond stigmatized impairments.

Second, if civil rights law should protect everyone with an impairment, how much protection should it afford? Should universal protection stop at traditional nondiscrimination (that is, the prohibition of differential treatment based on prejudicial or stereotypical attitudes), or should it also include reasonable accommodation (the modification or removal of facially neutral rules and structures that function as barriers to access)? There is deep debate in the scholarship regarding whether reasonable accommodation is an expansion of, or equivalent to, nondiscrimination. But one thing seems clear: if accommodations were universalized, there would be more requests for accommodations. While many accommodations would be costless, others, such as time-off for a cold, would not be. Add to this the indirect costs of employers having to sit

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86. See Mary Crossley, The Disability Kaleidoscope, 74 NOTRE DAME L. REV. 621, 658 (1999) (“But even for disabled persons whose disadvantage can be traced primarily to the social environment, the social model may give short shrift to the lived experience of impairment itself.”).

87. See Bagenstos, Subordination, supra note 28, at 479.

88. Id. at 480; see also Arlene Mayerson, DISABILITY RIGHTS EDUC. & DEF. FUND, THE HISTORY OF THE ADA: A MOVEMENT PERSPECTIVE (1992), available at http://www.dredf.org/publications/ada_history.shtml [hereinafter Mayerson, History] (noting that this shared experience of “discrimination in employment, education and access to society . . . . has been critical in the development of the [disability rights] movement and advocacy efforts.”).

89. Bagenstos, Subordination, supra note 28, at 480.


93. See Peter Blanck, Empirical Study of Disability, Employment Policy, and the ADA, 23 MENTAL & PHYSICAL DISABILITY L. REP. 275, 276-78 (1999).

down with more employees to determine whether accommodations are required and what those accommodation ought to be, and the costs associated with universal accommodation may far exceed the costs imposed by universal nondiscrimination. While the difference between accommodation and nondiscrimination may be “one[] of degree not of kind,” it is a difference that raises difficult questions for advocates of universal accommodation.

IV. A STATUTE IN TENSION: THE AMERICANS WITH DISABILITIES ACT OF 1990 AND THE DEFINITION OF “DISABILITY”

For many disability rights advocates, the ADA represented a symbolic victory for the social model of disability and signaled long-awaited parity in civil rights protection for people discriminated against based on their impairments. Specifically, the ADA includes sweeping findings likening the ugly legacy of disability discrimination to discrimination faced by people of color, women, and others. The ADA’s procedural requirements parallel those under the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin. And the ADA’s nondiscrimination mandate broadly applies to all aspects of society, including the workplace (Title I), state and local government (Title II), and public accommodations (Title III). Significantly, the ADA defines “discrimination” to include the failure to provide reasonable accommodations.

But while the passage of the ADA was widely regarded as a victory for the social model, it turned out to be a limited one, especially in the workplace. After 18 years, the employment rate of people with
disabilities has not improved.103 In court, studies show that ADA plaintiffs lose 97% of employment discrimination claims—frequently on the grounds that they do not have a “disability.”104 Other studies show that only prisoner rights appeals fare as poorly.105 Indeed, the trail of plaintiffs found “not disabled” by lower courts includes those with amputated limbs, epilepsy, bipolar disorder, diabetes, intellectual disabilities (“mental retardation”), depression, muscular dystrophy, PTSD, multiple sclerosis, and cancer.106

The volume of scholarship analyzing the reasons why the ADA has not worked as well as Congress and disability rights advocates intended is staggering.107 For purposes of this article, I will focus on one reason: the ADA embraced the minority group approach to coverage embodied in the Rehabilitation Act and, in essence, got what it asked for—coverage of a (small) minority.108 Specifically, some argue that in crafting the ADA, disability rights advocates “made the strategic decision to subordinate the universalist view” when confronted with the Reagan administration’s objections to the breadth of a universal definition of disability.109 According to this view, disability rights advocates consciously opted for the minority group approach by adopting the Rehabilitation Act’s “protected class” approach.110

103. Id. (“Although there is some dispute over the causes, everyone now agrees that the ADA has made no headway in increasing employment levels among persons with disabilities.”); see also Bagenstos, Future, supra note 31, at 3.
104. Allbright, supra note 5, at 364-65.
105. Colker, Windfall, supra note 4, at 100.
107. Bagenstos, Future, supra note 31, at 3 & n.2 (noting “volumes of work . . . devoted to defending, criticizing, and analyzing the [ADA]”).
108. BAGENSTOS, CONTRADICTIONS, supra note 8, at 44-45; see, e.g., ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 5 (2007) (testimony of Lawrence Z. Lorber, Proskauer Rose LLP, on behalf of the U.S. Chamber of Commerce, available at http://judiciary.house.gov/hearings/pdf/Lorber071004.pdf [hereinafter Lorber, House Testimony]) (stating that early version of the ADA, which prohibited discrimination against anyone with an impairment regardless of limitation, was “rejected by the ADA drafters. Congress refused to adopt this overreaching definition because it conflicted with the then-fifteen year history of § 504 of the Rehabilitation Act of 1973, created an unworkable standard as a matter of policy, and effectively created a universal federal employment statute, rather than a statute directed at dealing with disabilities.”); Waterstone et al., supra note 16, at 162 (comments of John W. Parry) (“In enacting a law that went beyond what was prohibited by other federal civil rights statutes, certain compromises were made to placate a Republican Administration beholden to corporations and businesses.”); NCD, EQUALITY, supra note 38, at 97-98 (stating that ADA’s drafters faced challenge of “find[ing] a definition of ‘disability’ that was at once inclusive enough to cover diverse disabilities, but not so universal that anyone could claim protection by the ADA”).
109. BAGENSTOS, CONTRADICTIONS, supra note 8, at 44.
110. Id. at 45.
However, this story assumes that the Rehabilitation Act’s protected class approach, with its three-prong definition of “disability,” necessarily embraces a minority group approach. While this is a reasonable view, I believe it is an incomplete one. A strong case can be made (and, I believe, has been made by disability rights advocates in the lead-up to the passage of the ADAAA) that, while the ADA has been interpreted by the courts consistent with a minority group approach, the three-prong definition of disability in the ADA, and its predecessor, the Rehabilitation Act, have always embraced both the universal and minority group approaches. The tension inherent in the definition is evident in the text, implementing regulations, and legislative history of both laws, and in the Supreme Court’s interpretation of the Rehabilitation Act’s “regarded as” prong. In this part, I turn to the text of the ADA itself. In Part V, I discuss the evolution of the definition of disability, from its appearance in the Rehabilitation Act to its reappearance in the ADA, and its interpretation by courts and agencies along the way.

A. The ADA’s Protected Class and the “Regarded As” Prong

Some point to the ADA’s protected class as proof positive that the ADA embraces the minority group approach, protecting those whose impairments are stigmatized. This view is a reasonable one. After all, the ADA does not explicitly protect every individual from discrimination. Rather, the ADA protects only an individual with a “disability”—that is, an individual who: (1) has “a physical or mental impairment that substantially limits one or more... major life activities”; (2) has “a record of such an impairment”; or (3) is “regarded as having such an impairment.”

Unlike other civil rights laws that explicitly protect all individuals from discrimination based on a prohibited characteristic, the ADA’s “protected class” approach delineates who may invoke the protection of the statute: someone with a past, present, or perceived medical impairment that “substantially limits one or more... major life activities.” The “substantial limitation” language can serve as a proxy for stigma: impairments that “substantially limit” bodily functioning are generally the

111. See supra note 20 and accompanying text.
112. See infra notes 116-239 and accompanying text.
113. See infra notes 116-136 and accompanying text.
114. See infra notes 137-239 and accompanying text.
115. See Bagenstos, CONTRADICTIONS, supra note 8, at 50 (stating that “ADA, given its most attractive reading,” is premised on view that “society ha[s] created an identifiable class of people with disabilities by its prejudice, stereotypes, and neglect”).
kinds of impairments that distinguish people from the norm and type them as defective in body or mind; subject people to prejudice, stereotypes, and neglect; and therefore make people “disabled.”\(^\text{118}\) The ADA’s “disability” category may thus be said to “embrace[] those people who experience impairment-based stigma—that is, those people who, because of present, past, or perceived impairments, are considered outside of the ‘norm’” and, as a result, experience systematic disadvantage.\(^\text{119}\)

However, a closer examination of the statute’s third prong yields another interpretation, one that extends the definition of disability well beyond a minority of individuals perceived to have stigmatized impairments, to universal protection of any person treated adversely based on any impairment.

The third prong of the definition of disability refers to a person who is “regarded as” having “such a disability”—that is, regarded as having an impairment that substantially limits a major life activity.\(^\text{120}\) A literal reading of the third prong’s plain language fits with the minority group approach. If a person is perceived to have a substantially limiting impairment, one that stigmatizes the person by distinguishing him or her from the norm and subjects the person to systematic disadvantage, that person is “disabled.”\(^\text{121}\)

For example, if one is perceived to have PTSD (an impairment that is generally thought of as substantially limiting major life activities like sleeping and concentrating, and is therefore stigmatized), that person is “disabled.” Likewise, if one’s hand tremor is mistaken for Parkinson’s Disease (an impairment that is generally thought of as substantially limiting major life activities like talking and walking, and is therefore stigmatized), that person is also “disabled.” In both cases, the person is regarded as having an impairment that substantially limits a major life activity.

While this is a reasonable interpretation of the third prong, there is another. Under this alternative interpretation of this prong, one is “disabled” if others’ perceptions of that person’s impairment—\textit{any} impairment, regardless of stigma—substantially limit that person in a major life activity.\(^\text{122}\) Mere perceptions alone, of course, cannot literally limit

\(^\text{118}\) Bagenstos, \textit{Contradictions}, supra note 8, at 50 (“The ‘disability’ category in the ADA is obviously an administrative proxy designed to target the statute’s protections to the intended beneficiaries.”). “At first glance,” Professor Bagenstos explains, “the phrases ‘substantially limits’ and ‘major life activities’ are ambiguous. But interpreting these phrases in light of the notions of stigma and systematic disadvantage provide significant guidance in resolving this ambiguity.” \textit{Bagenstos, Stigma, supra note} [28], at 446. According to Bagenstos, people whose impairments limit (limited, or are perceived to limit) their performance of life activities that society considers “major” are “likely to be stigmatized as deviant, to suffer prejudice, stereotypes, and neglect, and thus to experience systematic disadvantage.” \textit{Id}.

\(^\text{119}\) Bagenstos, \textit{Subordination, supra note} 28, at 444.


\(^\text{121}\) Feldblum, \textit{Definition, supra note} 20, at 157.

\(^\text{122}\) \textit{Id}.
someone in a life activity, but actions based on those perceptions can. This non-literalist reading of the “regarded as” prong therefore requires one to focus on the adverse treatment of the individual, and to extrapolate perceptions about the impairment from that adverse treatment. For example, if one is fired because of perceived dysthymia (low-grade depression), that person is “disabled” because he or she is regarded as being substantially limited in the major life activity of working. This is so even if dysthymia is not stigmatized, that is, if it is not generally thought of as substantially limiting working or other major life activities, does not type the person as abnormal in mind, and does not subject the person to systematic disadvantage. Likewise, if one is denied service at a restaurant because the person is perceived to have a broken leg, that person is “disabled” because the person is regarded as being substantially limited in the major life activity of receiving food services. This is so even if a broken leg is not generally thought of as substantially limiting eating or other major life activities, does not type the person as abnormal in body, and does not subject the person to systematic disadvantage.

Under this broad formulation of the “regarded as” prong, it is specific treatment of an individual based on an impairment, not the stigma that

123. See id. at 92 (“[W]henever an individual had been discriminated against because of an impairment, the entity engaging in the discrimination regarded that individual as being limited in the very life activity in which the person had been discriminated against. Thus . . . the third prong of the definition in the existing law was sufficiently broad to capture any individual who had been discriminated against because of any impairment.”); see also 12 Op. Off. Legal Counsel 209, 218 n.14 (1988) [hereinafter DOJ Opinion] (noting that misperceptions about impairments limit life activities not because the perception “physically preclude[s] work,” but rather because, as a result of the perception, “no work is offered”); Brief for Senators Harkin and Kennedy et al. as Amici Curiae Supporting Respondent Kirkingburg and Petitioners Sutton and Murphy at 27, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (No. 98-591), Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) (No. 97-1992), Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (No. 97-1943), 1999 WL 86500 [hereinafter Mayerson, Amicus] (“Absent contrary evidence, the rejection from the job in question must be viewed as a perception that the plaintiff is unable to perform the class of jobs of which the particular job is a part. For example, if an employer rejects an applicant for a teaching job because of an impairment, the applicant is regarded as unable to teach.”); Burgdorf, Substantially Limited, supra note 40, at 528 (stating that “expansive breadth” of third prong “afford[s] protection to any person who has been treated differently or unequally in relation to a real or perceived physical or mental impairment”); see id. (“Satisfaction of this prong focuses solely on whether a person has been singled out for different treatment, not upon whatever physical or mental characteristic the person possesses.”); Arlene B. Mayerson, Restoring Regard for the ‘Regarded As’ Prong: Giving Effect to Congressional Intent, 42 Vill. L. Rev. 587, 609 (1997) (“The ‘regarded as’ prong is supposed to be a catch-all for individuals who do not qualify as disabled according to the first and second prongs of the definition of disability, but have nevertheless been subject to an adverse disability-based employment action.”).

124. Feldblum, Definition, supra note 20, at 157 (“Any plaintiff who was denied a job because of an impairment would be able to argue that he or she was regarded as being substantially limited in working. Moreover, if the individual was denied some service or benefit other than employment, that person too would fall under the third prong of the definition, because he or she would then be viewed as being substantially limited in the major life activity of receiving whatever benefit or service he or she had been excluded from.”).
society as a whole assigns to the impairment, which creates “disability.”"  

By focusing exclusively on the limitations imposed by society’s treatment of impairments, as opposed to the limitations imposed by the impairments themselves, this formulation embraces the universal approach.  

Any person who is treated adversely based on an impairment is substantially limited in a major life activity and, therefore, “disabled”—regardless of whether that impairment is perceived to be substantially limiting and, thus, stigmatized.  

While this broad interpretation of the “regarded as” prong is concededly circular—because it is the defendant’s adverse treatment itself that creates the “disability” and coverage under the law—it is nevertheless consistent with the statute’s language and with the social model that underlies that language.  

By defining “disability” based on adverse treatment, however, the “regarded as” prong represents a departure from the other two prongs of the definition, which take a minority group approach. Rather than protect only those who have or had stigmatized impairments, the “regarded as” prong is essentially a “catch-all” or “safety valve” that includes among the “disabled” anyone who is denied a job, a benefit, or some other service based on an impairment.  

Given this broad conception of the “regarded as” prong, the ADA’s and Rehabilitation Act’s definition of disability should not be understood to embrace only the minority group approach. Instead, the definition embodies a tension between the minority group approach (in its first and second prongs) and the universal approach (in its “regarded as” prong).  

B. The ADA’s Findings  

The ADA’s findings also evidence a tension between the minority group and universal approaches. On the one hand, the findings appear consistent with the minority group approach by describing “people with disabilities” as a “discrete and insular minority,” and referring to a finite  

125. Compare Bagenstos, Subordination, supra note 28, at 445 (discussing stigma), with Feldblum, Definition, supra note 20, at 157 (discussing adverse treatment).  

126. Feldblum, Definition, supra note 20, at 158 (describing “non-literalist view of third prong” as “sweep[ing] within the ambit of the law anyone who was treated adversely because of an impairment. Such an approach would clearly dissolve the line between ‘the disabled’ and ‘the rest of us.’”).  

127. Id. For a fascinating discussion of why the “regarded-as” prong should be read broadly even under a literal interpretation of that prong, see Jill C. Anderson, Just Semantics: The Lost Readings of the Americans with Disabilities Act, 117 YALE L.J. 992, 1006-07 (2008) (arguing that “regarded-as” prong, read literally, is ambiguous. . . [and a]cknowledging this ambiguity would . . . undoubtedly favor a broadened interpretation”).  

128. Feldblum, Definition, supra note 20 at 157.  

129. Mayerson, Restoring, supra note 123, at 609.  

130. Feldblum, Definition, supra note 20, at 157.  

131. Id.
number of people with disabilities: “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”\textsuperscript{132} The findings further state that “[h]istorically, society has tended to isolate and segregate people with disabilities,” and that, according to “census data, national polls, and other studies . . . people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.”\textsuperscript{133}

On the other hand, the findings’ alignment of disability with other universally-prohibited characteristics like race and sex lends itself to a universal reading.\textsuperscript{134} Congress’s 43 million-member class is also not so clear-cut. As Professor Ruth Colker points out, this figure “does not even apply to cases brought under the ‘record of’ or ‘regarded as’ prongs. The 43 million figure was an estimate of people who were actually disabled. The other two prongs should broaden statutory coverage beyond that figure,” particularly the “regarded as” prong, which Professor Colker notes, “potentially covers any individual, because any of us could be treated stereotypically based on an impairment we do not possess.”\textsuperscript{135}

\section*{V. Roots of Tension: The Definition of Disability’s Evolution}

The roots of the tension between the minority group approach (as embodied in the first and second prongs of the definition of disability) and the universal approach (as embodied in its “regarded as” prong) lay beyond the ADA’s text and findings. They can be found in the legislative history of the ADA’s predecessor, the Rehabilitation Act, as well as in the regulations, court decisions, and agency opinions interpreting that law.\textsuperscript{136} Because the definition of disability’s path from the Rehabilitation Act to the ADA is well trod in legal scholarship,\textsuperscript{137} I will not retrace each step here. Instead, I will focus on several important turns that expose the tension embodied in the definition.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{133}] 42 U.S.C. § 12101(a)(2), (6); see Bagenstos, Subordination, supra note 28, at 419-20.
\item[\textsuperscript{134}] 42 U.S.C. § 12101(a)(2)-(5).
\item[\textsuperscript{135}] Ruth Colker, The Mythic 43 Million Americans with Disabilities, 49 WM. & MARY L. REV. 1, 51 (2007) [hereinafter Colker, 43 Million].
\item[\textsuperscript{136}] See infra notes 138-239 and accompanying text.
\item[\textsuperscript{137}] See, e.g., Ruth Colker, The ADA’s Journey Through Congress, 39 WAKE FOREST L. REV. 1 (2004) [hereinafter Colker, ADA’s Journey]; Feldblum, Definition, supra note 20; Burgdorf, Substantially Limited, supra note 40.
\end{itemize}
\end{footnotesize}
A. From Vanik’s and Humphrey’s Bills to Section 504

In December 1971, Representative Charles Vanik introduced a bill that would have amended Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs based on race, color, and national origin, to include the words “physical or mental handicap” in its list of prohibited grounds of discrimination.138 In 1972, Senator Humphrey introduced a companion bill in the Senate.139 No hearings were held on either bill and both died in committee.140 That same year, Representative Vanik introduced a bill adding “physical or mental handicap” to the list of prohibited grounds under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin.141 That bill also died in committee.142

Significantly, none of these bills required a “substantially limiting” impairment or otherwise required that the person fit within a minority of people with stigmatized impairments.143 Instead, these bills were universal in scope, prohibiting discrimination against any person because of disability.144 Floor statements demonstrated the bills’ intent to cover those discriminated against based on any impairment, regardless of whether and how an impairment limited the person’s major life activities. Representative Vanik noted the exclusion of a child with cerebral palsy from school, not because the child was a physical threat or academically challenged, but because the teacher claimed that the child’s physical appearance “produced a nauseating effect” on his classmates. Representative Mondale similarly noted that a woman “crippled by arthritis” was denied employment not because she could not perform the job but rather because “college trustees [thought] ‘normal students shouldn’t see her.”145

In August 1972, several Senate staff members met to discuss a bill, the “Rehabilitation Act,” which increased federal support for vocational

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139. Id. at 417-18 (citing S. 3044, 92d Cong., 2d Sess. (1972)).
140. Id. at 418.
144. Burgdorf, Substantially Limited, supra note 40, at 417.
rehabilitation programs. In a move “shrouded in some mystery,” the staff agreed to add a new section to the bill modeled on Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex or blindness in any federally funded education program). Section 504 of the Rehabilitation Act prohibited discrimination on the basis of disability in “any program or activity receiving Federal financial assistance.” Rather than prohibiting discrimination against any person “because of a physical or mental handicap” like Humphrey’s and Vanik’s bills, Section 504 of the Rehabilitation Act prohibited discrimination against a protected class of “handicapped” individuals, that is, those whose impairments satisfied the now familiar three-pronged definition of disability: “(1) a physical or mental impairment which substantially limits one or more . . . major life activities; (2) . . . a record of such an impairment; or (3) . . . regarded as having such an impairment.”

By confining coverage to a protected class of people with substantially limiting impairments under Section 504, Congress appeared to have deliberately moved away from the universal approach. But Section 504’s

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146. Feldblum, Definition, supra note 20, at 98; Burgdorf, Substantially Limited, supra note 40, at 419-20. According to the National Council on Disability:

No suggestion for [Section 504] was made at the hearings, and the provision was not in the original draft of the [Rehabilitation Act]. Staff added the section late in the deliberative process without any statement of congressional intent or appropriations to finance it. Not a single member of Congress mentioned the section during floor debate, and President Nixon made no reference to it as grounds for his veto. The section apparently developed out of a fear that persons receiving vocational rehabilitation would later be blocked from employment, thus negating the rehabilitative benefits. It was a way to add an element of civil rights language without the danger of amending the Civil Rights Act.

NCD, QUALITY, supra note 38, at 13-14.


149. 29 U.S.C. § 705(20)(B) (2006). The Rehabilitation Act originally defined “handicap” to mean “a physical or mental impairment which for such individual constitutes or results in a substantial handicap to employment and can reasonably be expected to benefit in terms of employability from vocational rehabilitation services.” Rehabilitation Act of 1973 § 504. While the definition’s focus on employability was a good fit for those provisions of the Rehabilitation Act pertaining to vocational rehabilitation services, it was ill-suited for those provisions prohibiting discrimination (Sections 501, 503, and 504) and requiring affirmative action (Sections 501 and 503). In 1974, one year after passage of the Rehabilitation Act, Congress recognized this inconsistency and amended the Act to include the three-prong definition of handicap for purposes of Sections 501, 503, and 504, among others. 29 U.S.C. § 705(20)(B) (2006).

150. See Center & Imparato, supra note 143, at 332-33 (distinguishing between Humphrey bill and Section 504); cf. Feldblum, Definition, supra note 20, at 102 (stating that Congress “could . . . have decided that the term ‘disability’ fails to capture the true range of individuals in our society, because all
legislative history suggests a more nuanced explanation.\textsuperscript{151} Although Congress did not adopt Senator Humphrey’s and Representative Vanik’s explicitly universal approach in the Rehabilitation Act, Congress nevertheless intended Section 504’s definition of disability to be broad.\textsuperscript{152} In floor statements at the time of the Rehabilitation Act’s passage, Representative Vanik and Senator Humphrey confirmed the breadth of the bill’s coverage by testifying that Section 504 carried forward the broad intent of their predecessor bills.\textsuperscript{153} According to the Senate Labor and Public Welfare Committee, the “regarded as” prong accomplished this feat by

\begin{quote}
cluding those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority.\textsuperscript{154}
\end{quote}

By contrast, the more restrictive first prong of the definition of disability was included, at least in part, as a means of preventing the erosion of affirmative action requirements elsewhere in the Rehabilitation Act.\textsuperscript{155} Rather than allow federal agencies and contractors to fulfill their affirmative action obligations “by the expediency of hiring or limiting services to . . . persons ‘regarded as’ handicapped,”\textsuperscript{156} Congress added a more restrictive first prong to ensure the hiring, placement, and advancement of those with substantially limiting (and, therefore, stigmatized) impairments.\textsuperscript{157}

people actually lie along a spectrum of impairments, some more limiting than others,” and instead prohibited discrimination based on “any physical or mental impairment” — but did not do so).

\textsuperscript{151}. See Burgdorf, \textit{Substantially Limited}, supra note 40, at 430 (“The protected-class phrasing of the provision is merely incidental to the primary goal of such wording, which was to make absolutely clear that the statute did not contemplate that exclusions of unqualified and unsafe persons would constitute unlawful acts of discrimination.”).

\textsuperscript{152}. S. REP. No. 93-1297 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6413 (stating that the three-pronged definition “would provide sufficient latitude (but still not be totally open ended), particularly for the nondiscrimination programs carried out under sections 501, 503 and 504”). While the legislative history is not clear on this point, Congress arguably decided not to make the definition’s first prong “totally open ended” in order to prevent abuse of the Rehabilitation Act’s affirmative action requirements. \textit{See infra} notes 154-56 and accompanying text.


\textsuperscript{154}. S. REP. No. 93-1297 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6389; \textit{see id.} at 6414 (stating that individual regarded as having substantially limiting impairment includes “a person with some kind of visible physical impairment which in fact does not substantially limit that person’s functioning”).

\textsuperscript{155}. See Burgdorf, \textit{Substantially Limited}, supra note 40, at 432-33.


\textsuperscript{157}. See Burgdorf, \textit{Substantially Limited}, supra note 40, at 432-33 (“It does not stretch credulity too far to imagine an employer who says: ‘I have a perfect affirmative action program under section 503; I regard all my employees as impaired.’”).
As this legislative history demonstrates, Congress’s decision to adopt a three-pronged definition of disability under the Rehabilitation Act did not mean rejection of the universal approach. While the “cleanest legal approach” to universalism would have been for Congress to prohibit discrimination based on any physical or mental impairment, Congress did not abandon the universal approach by introducing a three-pronged definition of disability. Rather, the three prongs of that definition served different purposes. Since the inception of the three-pronged definition, a tension has therefore existed between the definition’s more restrictive first and second prongs, which support the minority group approach, and its broad “regarded as” prong, which favors a universal approach.

B. HEW’s Implementing Regulations

Agency regulations interpreting the Rehabilitation Act underscored the breadth of the third prong in contrast to the other prongs, and further opened the door to a universal interpretation of the statute’s “regarded as” prong. According to the Department of Health, Education, and Welfare (HEW), the first agency to issue regulations implementing the Rehabilitation Act, being “regarded as” having a substantially limiting impairment meant that one:

- (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 [defined] impairments but is treated... as having such an impairment.

While the lines separating these three categories “are not always sharp,” their boundaries can be roughly sketched. The third category protects those with no impairment who are treated as having an impairment that substantially limits a major life activity. For example, a worker is told, “I am terminating your truck-driving position because I believe you have

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158. Feldblum, Definition, supra note 20, at 102.
159. Burgdorf, Substantially Limited, supra note 40, at 432 (stating that explanation for “restrictive” first prong and “expansive” third prong lay “in the dual purposes that Congress framed th[e] definition to serve” — affirmative action on the one hand, and nondiscrimination on the other).
160. See id. at 434 (noting that third prong “move[d] beyond... narrow constraints” of protecting “select group of people”).
161. School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987) (“[T]hese regulations were drafted with the oversight and approval of Congress... [and] provide an important source of guidance on the meaning of § 504.”) (internal quotation marks omitted).
epilepsy” (when the person fired does not, in fact, have epilepsy).164 This category is consistent with the minority group approach because it protects based on the perception of a stigmatized impairment—one that limits the performance of everyday activities, types people as abnormal, and results in systematic disadvantage.165

The first and second categories, on the other hand, protect those who have impairments that do not substantially limit a major life activity.166 The difference between the two is the type of negative reaction to which they apply.167 The first category has to do with a stereotypical overreaction to a limitation, where a person is mistakenly treated as if his or her minor impairment is substantially limiting when in fact it is not. For example, an employee is told “Because you have arthritis in one hand, I believe you are incapable of driving a truck.”168 This category, too, is consistent with the minority group approach, because it protects those with stigmatized impairments, that is, those whose impairments are believed to be far more limiting and beyond the “norm” than they in fact are.169

The second category has to do with attitudes about a particular impairment, where a person is treated negatively not because of mistaken notions about his or her limitations, but merely because he or she is “different.” For example, an employee is told “Even though you are capable of driving a truck, I will not hire you because I think your arthritis is unsightly” or because “I believe people with arthritis are less likely to come to work.”170 According to HEW, persons “who might not ordinarily be considered handicapped, such as persons with disfiguring scars” would be covered under this category.171

This second category is an important one, and is arguably the most expansive of the three. Categories one and three, consistent with the minority group approach, target protection to those perceived as having stigmatized impairments, that is, impairments that substantially limit major life activities, distinguish people from the “norm,” and result in systematic

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164. 45 C.F.R. § 84.3(j)(2)(iv)(C); cf. Mayerson, Restoring, supra note 123, at 595 (discussing EEOC regulations).
165. Cf. Bagenstos, Subordination, supra note 28, at 447 (“[I]f the defendant is wrong about the nature or limiting effects of the plaintiff’s impairment[,] it seems quite likely that the misperception rests on the kind of ‘stereotypic assumptions’ that are characteristic of stigma.”).
166. 45 C.F.R. § 84.3(j)(2)(iv)(A)—(B).
168. Id.
169. Id.
disadvantage.\footnote{Cf. Bagenstos, \textit{Subordination}, supra note 28, at 447.} Category two, however, can be understood to embrace the universal approach: it is people’s negative treatment of impairments, not the stigma associated with those impairments, which substantially limits life activities and makes one “disabled.”\footnote{See Burgdorf, \textit{Substantially Limited}, supra note 40, at 435 (stating that HEW’s rendering of “regarded as” prong “focuses on how individuals are treated rather than upon technical distinctions about how much impairment makes a person disabled. Thus, it focuses on the existence of discrimination, not upon the characteristics of the person upon whom discrimination is visited.”).} Assuming one has an impairment (as most, if not all of us, do), all one need arguably show to be covered under category two’s rendering of the “regarded as” prong is an adverse action—such as discharge from employment or denial of benefits or services—based on that impairment.

\textbf{C. Arline and the Universal Approach}

In the years after passage of the Rehabilitation Act and HEW’s issuance of implementing regulations, most lower courts gave the definition of disability an expansive reading.\footnote{Burgdorf, \textit{Restoring}, supra note 32, at 256 & n. 66 (“[A]fter ten years’ experience with the Rehabilitation Act definition, only one court found a Section 504 plaintiff not to have a ‘handicap.’” (quoting Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984))).} With a few exceptions, courts considered anyone alleging discrimination based on an impairment to be “disabled” and focused instead on whether the adverse action was taken “because of” the impairment, and whether the person was qualified to do the job.\footnote{As Professor Feldblum notes, the minority of cases in which courts scrutinized “disability” were of two types. The first consisted of those in which the alleged impairment was in fact a physical characteristic, such as left-handedness, muscular build, or transitory illness. Feldblum, \textit{Definition}, supra note 20, at 108. The second consisted of those in which courts required plaintiffs to show they were unable to work in a range of jobs (vs. simply one job) for purposes of showing “disability,” based on a misreading of the Rehabilitation Act’s definition of disability and application of the Department of Labor’s regulations, which focused on the inability to work. For an in-depth discussion of the range-of-job line of cases under Section 504, see id. at 109-12; see also Burgdorf, \textit{Substantially Limited}, supra note 40, at 439-46.} As Professor Feldblum explains:

A striking feature of these cases, particularly when contrasted with cases brought under the ADA, is that courts rarely analyzed whether the plaintiff in the case was, indeed, a ‘handicapped individual.’ Just as courts hearing employment discrimination cases under Title VII never analyzed whether the plaintiff in a case was ‘really a woman,’ or ‘really black,’ courts hearing
Section 504 cases rarely tarried long on the question of whether a plaintiff was ‘really a handicapped individual.’\textsuperscript{176}

Under Section 504, plaintiffs with a wide range of physical and mental impairments—including epilepsy, diabetes, intellectual disabilities (“mental retardation”), multiple sclerosis, bipolar disorder, hardness of hearing, limited vision, post-traumatic stress disorder, heart disease, depression, HIV infection, asthma, asbestosis, and back injuries—were found “disabled” under the first prong.\textsuperscript{177} Limitation, and the stigma flowing from such limitation, one might argue, was simply assumed by the courts. While far fewer cases turned on the “regarded as” prong,\textsuperscript{178} courts generally interpreted this prong expansively as well.\textsuperscript{179}

In 1987, in \textit{School Board of Nassau County v. Arline}, the Supreme Court further articulated the reaches of the Rehabilitation Act’s “regarded as” prong.\textsuperscript{180} In that case, the Court concluded with little analysis that a school teacher who was discharged from her job as a result of a recurrence of her tuberculosis was “disabled” because she had a “record of” of a substantially limiting impairment.\textsuperscript{181} The Court next responded to the school district’s argument that Ms. Arline’s “record of tuberculosis” should not be considered a “handicap” because her impairment did not result in any actual or perceived limitation on her functioning.\textsuperscript{182} According to the school district, Ms. Arline was discharged not because of the impact that her impairment had on \textit{her}, but rather because of its impact on others (i.e., the threat of contagion).\textsuperscript{183} Therefore, the school argued, she was not protected by the Rehabilitation Act.\textsuperscript{184}

\begin{enumerate}
\item[176.] Feldblum, \textit{Definition}, supra note 20, at 106.
\item[177.] See \textit{Consortium for Citizens with Disabilities, People Covered Under Section 504 of the Rehabilitation Act 1} (2007), http://www.c-c-d.org/task_forces/rights/Rehab%20Act%20v%20ADA.pdf (also on file with author) (citing cases).
\item[178.] See \textit{Cook v. State of R.I., Dep’t of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 22} (1st Cir. 1993) (“Up to this point in time, however, few ‘perceived disability’ cases have been litigated and, consequently, decisional law involving the interplay of perceived disabilities and section 504 is hen’s-teeth rare.”).
\item[179.] See Burgdorf, \textit{Substantially Limited}, supra note 40, at 439 & nn.147, 195; Dale Larson, Comment, \textit{Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-as Prong of the Americans with Disabilities Act}, 56 UCLA L. REV. 451, 458 (2008) (“When [the ‘regarded as’ prong] was applied . . . courts interpreted the prong expansively and kept an eye on the actions of the defendant employers.”).
\item[181.] \textit{Id.} at 281.
\item[182.] \textit{Id.}
\item[183.] \textit{Id.}
\item[184.] \textit{Id.} at 281 n.6. (“[T]he concept of a ‘handicap’ [should be limited] to physical and mental conditions which result in either a real or perceived diminution of an individual’s capabilities. . . . [A]n individual suffering from a contagious disease may not necessarily suffer from any physical or mental impairments affecting his ability to perform the job in question.”).
Rejecting this argument, the Court pointed to the Rehabilitation Act’s legislative history, particularly the inclusion of the “regarded as” prong, as “demonstrat[ing] that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual.”\textsuperscript{185} According to the Court, the basic purpose of Section 504, as underscored by the “regarded as” prong, was to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of ‘handicapped individual’ to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.\textsuperscript{186}

Echoing category 2 of HEW’s regulatory interpretation of the “regarded as” prong, the Court noted that although an impairment—such as a cosmetic disfigurement—“does not substantially limit [a] person’s functioning,” it might nevertheless render a person “disabled” if it “substantially limit[s] that person’s ability to work as a result of the negative reactions of others to the impairment.”\textsuperscript{187} Therefore, the Court held, the fact that Ms. Arline’s discharge was motivated by fears about her impairment’s impact on others—not by fears about her impairment’s impact on her ability to do the job—“does not suffice to remove [her] from coverage.”\textsuperscript{188}

The Supreme Court’s decision in \textit{Arline} was significant because of its elaboration of the “regarded as” prong and ringing endorsement of HEW’s broad interpretation of that prong.\textsuperscript{189} \textit{Arline} made clear that the focus of “disability” is not whether an impairment limits a person’s bodily functioning, but rather whether society’s negative reactions to an impairment limit a person’s life.\textsuperscript{190} Under the Court’s reasoning, “disability” is not confined to past or present impairments that limit a person’s functioning (the first and second prongs of the definition of disability), nor is it confined to impairments that are \textit{perceived} to limit a person’s functioning (categories 1 and 3 of HEW’s regulations interpreting the “regarded as” prong). According to \textit{Arline}, “disability” includes negative reactions to others’ impairments (HEW’s category 2).\textsuperscript{191} These

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\begin{itemize}
  \item \textsuperscript{185} \textit{Id.} at 282.
  \item \textsuperscript{186} \textit{Id.} at 284.
  \item \textsuperscript{187} \textit{Id.} at 282-83.
  \item \textsuperscript{188} \textit{Id.} at 286.
  \item \textsuperscript{189} \textit{Id.} at 282-84.
  \item \textsuperscript{190} \textit{Id.} at 282-83.
  \item \textsuperscript{191} \textit{Id.} at 283-84.
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negative reactions themselves “make” people “disabled” and create coverage—real or perceived functional limitations are beside the point.\footnote{\textit{Id.}; see Feldblum, \textit{Definition}, \textit{supra} note 20, at 128.} \textit{Arlene}’s broad interpretation of the “regarded as” prong thus confirmed the universal approach: everyone who experiences discrimination because of an impairment is substantially limited in a major life activity and thus “disabled.”\footnote{\textit{Id.}; see Feldblum, \textit{Definition}, \textit{supra} note 20, at 128; see, \textit{e.g.}, Doe v. Centinela Hosp., No. CV 87-2514 PAR (PX), 1988 WL 81776, at *6 (C.D. Cal. Jun. 30, 1988) (holding that, pursuant to \textit{Arlene}, person with HIV who was excluded from drug rehabilitation program because of others’ fear of infection was regarded as being substantially limited in major life activity of “learn[ing] how to deal with a dependency problem in the [drug rehabilitation] program.”).}

In 1988, the Reagan administration reaffirmed \textit{Arlene}’s universalist conception of the “regarded as” prong. In response to a request from the President’s Counsel, the U.S. Department of Justice (DOJ) issued a memo endorsing coverage of people with AIDS and HIV infection under both the first and third prongs of the Rehabilitation Act.\footnote{\textit{DOJ Opinion, supra} note 123, at 216-18.} The DOJ explained that, even if a person with asymptomatic HIV infection was not considered substantially limited in the major life activity of procreation (“fulfillment of the desire to conceive and bear healthy children”) or of engaging in sexual relations under the first prong, that person could still be considered substantially limited in a major life activity under the “regarded as” prong, as interpreted by the Supreme Court in \textit{Arlene}.\footnote{\textit{Id.} For an in-depth discussion of this opinion, see Feldblum, \textit{Definition, supra} note 20, at 122-26.}

Citing the Supreme Court’s determination that “the negative reactions of others to [an] impairment” may substantially limit a person in a major life activity, the DOJ noted that \textit{Arlene} provided an “alternative rationale for finding a life activity limitation based on the reaction of others to the infection.”\footnote{\textit{DOJ Opinion, supra} note 123, at 217 (quoting \textit{Arlene}, 480 U.S. at 283).} Under \textit{Arlene}, the DOJ explained, “the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misperceptions of others, of limiting a life activity (in \textit{Arlene}, the activity of working).”\footnote{\textit{Id.} at 218.}

The DOJ acknowledged that the \textit{Arlene} Court’s broad interpretation of the “regarded as” prong was not a literal reading of the “regarded as” prong: “[the Court] appears not to accept the distinction between being perceived as having an impairment that itself limits a major life activity (the literal reading of the statutory language) and having a condition the misperception of which results in limitation of a life activity.”\footnote{\textit{Id.} at 218 n.14.} Nevertheless, the DOJ
explained, the Court’s departure from the literal words of the “regarded as”
prong found support in the Rehabilitation Act’s legislative history,
which does indicate that at least some members of Congress believed that
the perception of a physical disability by others does not have to include the
belief that the perceived condition results in a limitation of major life
activities, but simply that the perception of the condition by others in itself
has that effect. 199

D. The Americans with Disabilities Act of 1988: A Return to First
Principles

By the mid-1980s, the disability rights movement had its sights set on
comprehensive civil rights protections for the disability community. 200 In
1986, the National Council on Disability (NCD), an independent body
composed of fifteen members appointed by President Ronald Reagan and
confirmed by the Senate, called on Congress to enact a comprehensive law
extending Section 504’s nondiscrimination mandate beyond federal
agencies, federal contractors, and the recipients of federal funds—to the
private sector. 201 In its Report entitled, “Toward Independence,” NCD
advocated “expand[ing] coverage of equal opportunity law for people with
disabilities” to private employment, state and local government, housing,
and public accommodations, among others, thereby “mak[ing] it
commensurate with the coverage of other types of nondiscrimination
laws. . . .” 202

Instead of adopting Section 504’s three-pronged definition of
“disability,” however, NCD advocated an explicitly universal approach
consistent with Senator Humphrey’s and Representative Vanik’s bills:
The [proposed law] should straightforwardly prohibit “discrimination on the
basis of handicap,” without establishing any eligibility classification for the
coverage of the statute. Discrimination on the basis of handicap should be
broadly construed to apply the requirements of the statute to all situations in
which a person is subjected to unfair or unnecessary exclusion or

199. Id. (citing Arline, 480 U.S. at 282 n.9); see id. at 218 n.15 (“Arline, . . .support[s] a finding that
the reaction of others to the contagiousness of an HIV-infected individual in itself may constitute a
limitation on a major life activity.”) (discussing Doe v. Centinela Hosp., No. CV 87-2514 PAR (PX),

200. NCD, EQUALITY, supra note 38, at 38 (“While the 1970s witnessed the creation of the
disability rights movement, the 1980s experienced its blossoming, which came with a flurry of grass
roots activism.”).

201. Burgdorf, Restoring, supra note 32, at 245; see also NCD, RIGHTING THE ADA, supra note 41, at 99.

202. NAT’L COUNCIL ON DISABILITY, TOWARD S INDEPENDENCE, 11-12 (1986), available at
disadvantage because of some mental or physical impairment, perceived impairment, or history of impairment.\textsuperscript{203}

In its 1988 follow-up report, “On the Threshold of Independence,” NCD offered a draft bill, “the Americans with Disabilities Act of 1988.”\textsuperscript{204} That bill, with some changes, was introduced in the Senate by Senator Lowell Weicker (S. 2345), and in the House by Representative Tony Coelho (H.R. 4498) that same year.\textsuperscript{205}

The 1988 version of the ADA, like Senator Humphrey’s and Representative Vanik’s bills before it, was explicitly universalist, prohibiting discrimination against any person “because of a physical or mental impairment, perceived impairment, or record of impairment.”\textsuperscript{206} Unlike Section 504, no “substantial limitation” of a “major life activity” was required to establish coverage.\textsuperscript{207} A “physical or mental impairment,” moreover, was broadly defined to mean any “physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body,” or “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”\textsuperscript{208} Likening its protections to the universal coverage afforded under other civil rights laws, the 1988 ADA listed among its purposes the “prohibition of discrimination against persons with disabilities parallel in scope of coverage with that afforded to persons on the basis of race, sex, national origin, and religion.”\textsuperscript{209}

While there was a good deal of support for the 1988 bill in Congress and “cautious” support within the Reagan administration, the bill ultimately met the same fate as Humphrey’s and Vanik’s bills and died in committee when the 100\textsuperscript{th} Congress came to a close that year.\textsuperscript{210} As several commentators have noted, the bill’s failure to gain passage was due in no small part to the bill’s “departure[] from the framework used for nearly

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\item \textsuperscript{203} Id. at 12; Center & Imparato, supra note 143, at 333 (“[NCD’s] approach constituted an unambiguous endorsement of Hubert Humphrey’s original approach to federal disability nondiscrimination, and a rejection of the approach adopted in section 504 of the Rehabilitation Act.”).
\item \textsuperscript{205} See Burgdorf, Restoring, supra note 32, at 245.
\item \textsuperscript{206} Americans with Disabilities Act of 1988, S. 2345, 100th Cong. § 3(1) (1988); see Center & Imparato, supra note 143, at 333.
\item \textsuperscript{207} See S. 2345, § 3; see Colker, ADA’s Journey, supra note 137, at 7 (“[T]he definition of ‘disability’ (which was then termed ‘on the basis of handicap’) was much broader than had existed under any previous federal (or state) law.”).
\item \textsuperscript{208} S. 2345, § 3(2)(A)-(B).
\item \textsuperscript{209} Id. § 2(b)(2).
\item \textsuperscript{210} See Colker, ADA’s Journey, supra note 137, at 8-10.
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thirty years under Section 504 by failing to embody its basic definition of disability.”


At the start of the 101st Congress in January 1989, Senator Harkin’s and Kennedy’s staffs, with input from the disability community, began work on a new version of the ADA that hued more closely to Section 504 and its implementing regulations. Among other changes, the definition of disability was changed to parallel the three-prong definition used under Section 504. As NCD states, by “building the ADA securely on the foundation of earlier legislation... proponents could therefore argue that the bill was an application of tested principles, not a new creation.”

The Americans with Disabilities Act of 1989 was introduced in the Senate by Senators Harkin and Kennedy (S. 933) and in the House by Congressman Steny Hoyer (H.R. 2273). After seventeen congressional hearings, five committee markups, sixty-three public forums around the nation, and 8,000 pages of transcripts and oral and written testimony from a variety of distinguished experts, the ADA was voted upon. This time the ADA, with its three-prong definition of “disability,” passed both houses, and was signed into law by President George H.W. Bush on July 26, 1990.

Some commentators have pointed to the decision to adopt the Rehabilitation Act’s three-prong definition over NCD’s language as a rejection of the universal approach. But this argument does not adequately account for the legal precedent at the time. When Congress was considering the ADA, the Rehabilitation Act’s legislative history and

211. Id. at 10; see also NCD, EQUALITY, supra note 38, at 82-83 (stating that members of Reagan administration, such as then EEOC Commissioner, Evan Kemp, “objected to the ADA’s novel definition[ of ‘handicap’]”). While the 1988 version of the ADA ultimately did not pass, that bill was hardly a “failure” from NCD’s perspective. By putting the ADA on the legislative agenda; focusing grass roots, congressional, and media attention on the need for such legislation; forcing disability organizations to take a position on their support for such a law; and providing a concrete version of what such a statute could look like, “[the 1988] version of the ADA provided the basis for revised ADA bills that were introduced in the 101st Congress in May 1989 and enacted in 1990.” Burgdorf, Restoring, supra note 32, at 245.

212. Feldblum, Medical Examinations, supra note 99, at 526.

213. Feldblum, Definition, supra note 20, at 128.

214. NCD, EQUALITY, supra note 38, at 96.


218. See supra notes 108-110 and accompanying text.
implementing regulations with respect to the “regarded as” prong, together with the Supreme Court’s expansive interpretation of that prong in *Arline* and the affirmation of that interpretation by the Reagan administration’s DOJ, all pointed toward a universalist view of the “regarded as” prong.219

The choice between the Rehabilitation Act’s three-prong definition of disability and NCD’s language was not a choice between the minority group approach on the one hand and the universal approach on the other, because both incorporated the universal approach. NCD’s definition was more clearly universalist but that language was new and, as Professor Feldblum notes, “any change in the law would be viewed as radical, unnecessary, and complicated.”220 The Rehabilitation Act’s three-prong definition of disability (which incorporated the universal approach via the “regarded as” prong) was more complex but had the advantage of being law for over fifteen years.221 The decision to borrow the Rehabilitation Act’s definition was therefore a choice of political expediency—

[not a] considered, deliberate decision to narrow the class of covered individuals from the wide-ranging group of individuals who had been covered under Section 504. Indeed, whether to use the Section 504 definition of disability was hardly a topic of conversation in negotiations on the ADA. Rather, the decision was arrived at by a small group of individuals, early in the process of drafting the ADA, who made the legal judgment that the existing definition would cover most people with impairments along the spectrum of physical and mental impairments, and the political judgment that using any other definition would unnecessarily slow down passage of the bill.222

219. See Burgdorf, Restoring, supra note 32, at 256-57 (stating that “[w]hen Congress was considering the ADA, the Supreme Court’s decision in *Arline* was the leading legal precedent on the definition of disability,” and that “the [Arline] Court took an expansive and nontechnical view of the definition”); see also Feldblum, *Definition*, supra note 20, at 128 (“[T]he Supreme Court’s decision in *Arline*, with its expansive interpretation of the third prong of the definition of ‘handicap,’ seemed to ensure that any person who had been discriminated against because of any condition would automatically be covered under that prong of the definition. . . . Indeed, the [DOJ] Opinion had clearly explained how this interpretation of the third prong, while possibly inconsistent with a literalist reading of the statutory text, was nonetheless the interpretation adopted by the Court in *Arline*.”). But see Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 Geo. Wash. L. Rev. 522, 538-40 (2002) (stating that “the experience under the Rehab Act should have offered caution, rather than unbridled optimism, about the future course of disabilities law,” and that “in 1988-1989 when the ADA was debated in Congress, there was no reason to see the Supreme Court as sympathetic to any aspect of civil rights”).

220. Feldblum, *Definition*, supra note 20, at 92; see id. (noting that several disability advocates viewed NCD’s definition of “disability” in original version of ADA as “politically unwise and legally unnecessary”).

221. Burgdorf, Restoring, supra note 32, at 256 (noting that Congress “played it safe” by adopting in the ADA the Rehabilitation Act’s definition of disability, which the Supreme Court had made “abundantly clear . . . was very broad”); see also Feldblum, *Definition*, supra note 20, at 128.

222. Feldblum, *Definition*, supra note 20, at 129. According to Professor Feldblum, disability rights advocates met with members of NCD and asked:
The ADA’s legislative history underscores Congress’s intent that the “regarded as” prong be construed broadly, consistent with the universal approach. Relying on, among other things, HEW’s regulations\(^{223}\) and \textit{Arline}’s expansive interpretation of the “regarded as” prong under the Rehabilitation Act,\(^ {224}\) the Senate Committee on Labor and Human Resources stated that:

the third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning. . . “but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.”\(^ {225}\)

\ldots

A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity’s negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person’s physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the “negative reactions” of others to the individual. . . that person would be covered under the third prong.\(^ {226}\)

The House Judiciary Committee likewise noted that adverse action based on an impairment was sufficient to trigger coverage under the “regarded-as” prong, regardless of whether the employer’s negative reactions to the impairment were shared or purely idiosyncratic. According to the Judiciary Committee:

\hspace{1cm}[W]hy are you using different language? We [understand] . . . that anyone who has a physical or mental impairment and is discriminated against on that basis should . . . be able to bring a claim. If that is what you are trying to achieve, we said, you don’t need to use those words. We have words that have been in place for fifteen years. We have lots and lots of cases. And under those cases, everyone with a range of impairments has been covered. . . . [W]hat you are trying to achieve with this language, we can achieve with language that has been used for fifteen years. \textit{That is} why the language in the bill from 1988 was not accepted, and instead we went to the language of section 504.

\textit{Hearing on H.R. 3195, the “ADA Restoration Act of 2007” Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary, 110th Cong. 62 (2007) (oral testimony of Chai R. Feldblum, Professor, Georgetown University Law Center) (emphasis added); cf. Colker, ADA’s Journey, supra note 137, at 48 (“Both the proponents and opponents of the ADA understood the [Section 504] definition of disability to have a very broad scope.”).}

\(^{223}\) S. REP. NO. 101-116, at 21 (1989) (“It is the Committee's intent that the analysis of the term ‘individual with handicaps’ by the Department of Health, Education, and Welfare of the regulations implementing section 504 . . . apply to the definition of the term ‘disability’ included in this legislation.”).

\(^{224}\) Id. at 23 (“The rationale for this third prong was clearly articulated by the U.S. Supreme Court in School Board of Nassau County v. Arline.”).

\(^{225}\) Id. at 23 (quoting \textit{Arline}, 480 U.S. at 283); see, e.g., H.R. REP. NO. 101-485, pt. 3, at 30 (1990) (quoting \textit{Arline}’s holding that “negative reactions” may, themselves, substantially limit person’s ability to work).

[A] person who is rejected from a job because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer’s perception was shared by others in the field and whether or not the person’s physical or mental condition would be considered a disability under the first or second part of the definition.

. . . .

. . . In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the “regarded as” test.227

Importantly, while several committee reports stated that “minor, trivial impairments, such as a simple infected finger” should not be considered substantially limiting impairments under the first prong of the definition, the “regarded as” prong was not similarly constrained.228

F. The ADA’s Implementing Regulations

The EEOC’s regulations and guidance implementing the ADA’s third prong further supported a broad interpretation of that prong.229 Relying on the ADA’s legislative history, the EEOC noted that “common attitudinal barriers”—such as “concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers’ compensation costs, and acceptance by coworkers and customers”—frequently result in employers excluding certain individuals.230 According to the EEOC, the “regarded as” prong, as broadly construed in Arline, acknowledges that these accumulated myths, fears, and stereotypes “are as handicapping as are the physical limitations that flow from actual impairment.”231 The “regarded as” prong, therefore, protects any person

227. H.R. REP. NO. 101-485 pt. 3, at 30-31; see also H.R. REP. NO. 101-485, pt. 2, at 53 (“A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity’s negative attitudes toward that person’s impairment is treated as having a disability.”).
228. E.g., S. REP. NO. 101-116, at 23; see also NCD, EQUALITY, supra note 38, at 98 (stating that congressional staff “used the Section 504 standard and restricted the first prong to ‘a physical or mental impairment that substantially limits one or more of the major life activities’ — such as seeing, walking, self-care, and learning. This meant that a physical impairment such as an infected finger would not constitute a disability.”) (emphasis added).
229. See Burgdorf, Substantially Limited, supra note 40, at 454-55; see also Mayerson, Restoring, supra note 123, at 591-92 (discussing EEOC’s “broad definition” of “regarded as” prong).
231. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, COMPLIANCE MANUAL, SECTION 902 DEFINITION OF THE TERM DISABILITY, at § 902.8(a), available at http://www.eeoc.gov/policy/docs/902cm.html (quoting Arline, 480 U.S. at 284). One could argue that by “myths, fears, and stereotypes,” the EEOC intended to limit coverage under category 2 to stigmatized conditions only — i.e., those subject to “widespread prejudice” or “widespread attitudinal barriers.” See supra note 150 (discussing narrow interpretation of HEW regulations). Nevertheless, since category 2 refers to attitudes only, not widespread attitudes, and since the EEOC cites Arline, which does not require that the “myths and fears”
“rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities. . . .”

Paralleling HEW’s regulations implementing the Rehabilitation Act, the EEOC’s regulations defined “three different ways in which an individual may satisfy the definition of ‘being regarded as having a disability.” Like HEW’s category two, the EEOC regulations included a broad second category for those whose impairments were “only substantially limiting because of the attitudes of others toward the impairment.” According to the EEOC, this category included a person with “a condition that periodically causes an involuntary jerk of the head but does not limit the individual’s major life activities,” who is nevertheless discriminated against by an employer “because of the negative reactions of customers.” Such a person would be regarded as substantially limited in working.

Like the EEOC, the DOJ relied on HEW’s regulations, Arline, and the ADA’s legislative history in support of a broad construction of the “regarded as” prong, one that focused on how attitudes, not impairments, limit life activities. For example, the DOJ explained, “persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under [the ‘regarded as’ prong] based on the attitudes of others towards the impairment. . . .”

G. A Question of Coherence

Commentators are correct to say that the ADA’s definition of disability embraces the minority group approach. Under the definition’s first and second prongs, a person is “disabled” only if her present or past limitations on bodily functioning put her in a class of people that are stigmatized. But this interpretation is incomplete. By including the “regarded as” prong, the ADA included in the definition of disability a catch-all intended to bring within the scope of protection anyone treated unfairly because of an

be widespread, category 2 can be reasonably interpreted to include those subject to adverse treatment based on any impairment.

232. 29 C.F.R. pt. 1630, app. (“If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of ‘myth, fear or stereotype’ can be drawn.”).

233. Id.
234. Id.
235. Id.
236. Id.
238. Id.
239. See supra notes 117-118 and accompanying text.
240. See id.
impairment.\textsuperscript{241} It is therefore more accurate to say that the ADA’s definition of disability embodied a tension between the minority group approach, protecting those who are functionally limited and therefore stigmatized, on the one hand, and the universal approach, protecting everyone who is discriminated against—regardless of whether and how functionally limited they are—on the other.

But this gives rise to a question of coherence: if the definition of disability’s first two prongs protect only some, and its “regarded as” prong protects all, then what are the first two prongs doing in the statute?\textsuperscript{242} One possible answer is that the first two prongs are merely illustrative of the catch-all third prong. But this answer misses its mark. A person whose impairment substantially limits his or her bodily functioning, and therefore puts him or her in a covered class of people stigmatized by their impairments, has not made out a prima facie case under the ADA. He or she must still show causation—that is, unfair treatment based on that impairment.\textsuperscript{243} Under a broad reading of the “regarded as” prong, however, causation subsumes coverage—the unfair treatment, itself, creates the coverage.\textsuperscript{244} As a result, that same person need only show unfair treatment based on an impairment.\textsuperscript{245} If the first two prongs are merely illustrative, why do they require so much more, and different, proof? The ADA does not answer this question.\textsuperscript{246}

\textsuperscript{241} See supra notes 124-130 and accompanying text.


\textsuperscript{243} For example, in a disparate treatment case under the ADA, causation may be demonstrated directly (e.g., “My employer said I was fired because I was ‘crippled.’”) or indirectly under the McDonnell Douglas burden-shifting framework (e.g., Plaintiff was qualified for the job, Plaintiff suffered an adverse job action, and the adverse action occurred under circumstances giving rise to an inference of discrimination). See Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); see also H.R. REP. NO. 110-730, pt. 1, at 16-17 (2008) (discussing disparate treatment under Title I of the ADA); Leonard, supra note 28, at 18-25 (same).

\textsuperscript{244} See supra notes 124-126 and accompanying text.

\textsuperscript{245} See Mayerson, Amicus, supra note 123, at 24 (“[I]n most cases, a rejection based on a medical condition raises, at a minimum, a material issue of fact as to whether the employer ‘regarded’ the individual as ‘disabled’ within the meaning of the ADA.”).

\textsuperscript{246} Another reason for the distinction between the first and second prongs and the third prong might be that, under the Rehabilitation Act, the first and second prongs were intended to guide the application of affirmative action requirements under Sections 501 and 503, whereas the third prong was intended to apply broadly to the nondiscrimination requirement under Section 504. See supra notes [154-162] and accompanying text. While this reasoning may help to explain why the first and second prongs differed from the third prong for purposes of the Rehabilitation Act, it does not explain why the ADA—which has no affirmative action requirement—carried this distinction forward.
VI.
THE SUPREME COURT AND THE MINORITY GROUP APPROACH: TOYOTA AND THE SUTTON TRILOGY

In the years immediately after passage of the ADA, courts tended to interpret the definition of disability as broadly as they had under the Rehabilitation Act. As time went on, however, lower courts began to read the ADA’s definition of disability more restrictively. In 1999 and 2002, respectively, the Supreme Court weighed in with decisions narrowly construing the ADA’s scope of coverage. While extensive discussion of the Court’s narrowing of coverage under the ADA is beyond the scope of this Article, some background on the relevant Supreme Court cases is instructive.

A. Consideration of Mitigating Measures

In a now well-known trio of decisions in 1999, the Supreme Court held that people who successfully mitigate the functional limitations caused by their impairments through the use of medication, prosthetics, hearing aids, auxiliary devices, diet and exercise, or any other treatment, are not “disabled” under the first prong of the ADA. Specifically, in Sutton, the Court held that two airline pilots who were denied pilot jobs because of severe myopia were not disabled because they mitigated the impact of their impairments with eyeglasses and, therefore, were not substantially limited in any major life activity. In Murphy, the Court held that a UPS mechanic who was fired because of high blood pressure was not “disabled” because he controlled his high blood pressure with medication and, therefore, was not substantially limited in any major life activity. And in Kirkingburg, the Court held that a truckdriver who was fired because of monocular vision was not “disabled” because he compensated for his weakened vision in one eye by making subconscious adjustments in his other eye and, therefore, was not substantially limited in any major life activity.

247. See Burgdorf, Restoring, supra note 32, at 258 (“[I]t is the rare case when the matter of whether an individual has a disability is even disputed.”) (quoting Morrow v. City of Jacksonville, 941 F. Supp. 816, 823 n.3 (E.D. Ark. 1996)).
248. Id.
249. See infra notes 249-288 and accompanying text.
251. Sutton, 527 U.S. at 488-89.
252. Murphy, 527 U.S. at 521.
The Court’s holdings, which directly contradicted the reasoning of two congressional committees, eight circuit courts, and three agencies,\textsuperscript{254} were disastrous for would-be plaintiffs, creating an unintended and tragic paradox under the ADA. According to these decisions, the better a person managed his or her medical condition, the less likely that person would be protected from discrimination.\textsuperscript{255}

Lower court decisions denying coverage to people with a wide range of mitigated impairments soon followed. The courts ruled against an electrician with muscular dystrophy whose conditional job offer was revoked, in part, because he needed to use a ladder to reach items above his head; a shelf-stocking clerk who was fired several months after experiencing a seizure at work; a pharmacist who was denied a half-hour uninterrupted lunch break to manage his diabetes; the CEO of an insurance brokerage firm who was demoted after being hospitalized because of heart disease; a railroad employee who was fired, in part, because she wore a hearing aid; and a law enforcement officer who was fired after an examining physician determined that his depression disqualified him from his job.\textsuperscript{256} In each case, the court determined that the individual was not “disabled” because each individual was able to mitigate the impact of his or her impairment.\textsuperscript{257}

Putting the impacts of the \textit{Sutton} trilogy aside, however, the results reached in the trio of cases make sense under the minority group approach.\textsuperscript{258} Since the limitations caused by impairments like myopia, high blood pressure, and monocular vision can be largely overcome thanks to eyeglasses, medication, or bodily adaptations, these impairments are generally not stigmatized (nor are the measures used to overcome these impairments).\textsuperscript{259} As Justice Ginsburg stated in her concurring opinion,

\begin{quote}
[P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination. . . . Congress’ use of the phrase [‘discrete and insular minority’] . . . is a telling indication of its intent to restrict the ADA’s coverage to a confined, and historically disadvantaged, class.\textsuperscript{260}
\end{quote}

\begin{small}
\begin{itemize}
\item \textsuperscript{254} \textit{Sutton}, 527 U.S. at 496 (Stevens, J., dissenting).
\item \textsuperscript{255} Feldblum et al., \textit{Amendments}, supra note 20, at 211.
\item \textsuperscript{256} \textit{Id.} at 218-21 (citing cases).
\item \textsuperscript{257} \textit{Id.}
\item \textsuperscript{258} Bagenstos, \textit{Contradictions}, supra note 8, at 41-42.
\item \textsuperscript{259} \textit{Id.}
\end{itemize}
\end{small}
Viewed in light of the minority group approach, it made sense for the Court to exclude these non-stigmatized conditions from coverage under the first prong of the definition.261

B. The “Broad Class of Jobs” Problem

While the Sutton trilogy’s plaintiffs could not overcome the minority group approach reflected in the first prong, the universalist interpretation of the “regarded as” prong ought to have provided them with an alternative route to coverage under the ADA.262 After all, each plaintiff was either fired or not hired because of an impairment (regardless of whether that impairment was stigmatized), and thus was regarded as substantially limited in working.263 But this broad interpretation of the “regarded as” prong never caught on in the lower courts.264 Relying on a dubious line of Section 504 cases and an erroneous reading of the EEOC regulations citing those cases, lower courts instead began requiring plaintiffs claiming coverage under the “regarded as” prong to show that they were regarded as being unable to perform not the one job at issue, but rather a “broad class of jobs.”265

By the time of the Sutton trilogy, therefore, “the parties in the cases before it did not even argue for the broad interpretation that advocates who worked on the ADA had always assumed was inherent in the third prong.”266 Instead, the plaintiffs in Sutton and Murphy argued that they were regarded as being unable to perform a broad class of jobs.267 The Supreme Court disagreed.

Notwithstanding Arline’s broad interpretation of the “regarded as” prong and the DOJ Opinion championing that interpretation, together with the ADA’s legislative history and EEOC regulations citing Arline, the

261. See BAGENSTOS, CONTRADICTIONS, supra note 8, at 41-42.
262. See Feldblum, Definition, supra note 20, at 159.
263. See supra notes 121-126 and accompanying text.
264. Feldblum, Definition, supra note 20, at 141 (“[T]he assumption that the third prong of the disability definition would protect individuals with a range of impairments who are not covered under the first and second prongs never materialized in ADA cases. To the contrary, the literalist reading of the third prong of the definition that the DOJ concluded the Arline Court had rejected . . . reappeared with vigor in lower court decisions interpreting the ADA.”); see also NATIONAL COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, NO. 15, THE SUPREME COURT’S DECISIONS DISCUSSING THE “REGARDED AS” PRONG OF THE ADA DEFINITION OF DISABILITY, 11 (2003), available at http://www.ncd.gov/newsroom/publications/pdf/regardedas.pdf (“The lower courts had generally not accorded the third prong of the definition the broad scope the regulatory language calls for.”).
265. See Feldblum et al., Amendments, supra note 106, at 206-07.
266. Feldblum, Definition, supra note 20, at 159.
267. See Sutton, 527 U.S. at 476; Murphy, 527 U.S. at 521-22. Because the defendant in Kirkingburg did not challenge the Ninth Circuit’s determination that the plaintiff was “regarded as” disabled, the Kirkingburg Court did not reach this issue. See 527 U.S. at 563 n.9.
Supreme Court concluded that an employer’s decision to deny an individual a given job based on an impairment was not sufficient to establish that the employer regarded the individual as substantially limited in the major life activity of working. 268 “When the major life activity under consideration is that of working,” the Court stated, “the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.” 269 Because the Sutton plaintiffs failed to show that United perceived them as being unable to perform a broad class of jobs beyond the single job of pilot, and because Mr. Murphy failed to show that his employer perceived him as being unable to perform a broad class of jobs beyond mechanic jobs that require driving commercial motor vehicles, the Court held that they were not “disabled” under the “regarded as” prong. 270

The impact of the Court’s decisions was immediate and far-reaching, largely foreclosing coverage under the “regarded as” prong by requiring that an individual “essentially both divine and prove an employer’s subjective state of mind.” 271 But, once again, the Court’s decision arguably makes sense in light of the minority group approach. Working, after all, is a major part of being ‘normal’ in our society. Those who cannot work (or are perceived as not being able to work) because of their impairments are stigmatized. 272 By focusing on the perceived inability to work in a broad class of jobs, the Supreme Court, in effect, rejected Arline’s universalist interpretation of the “regarded as” prong in favor of the minority group approach. 273 After the Sutton trilogy, only those perceived to have stigmatized impairments, that is, impairments widely regarded as rendering people unable to work, would be covered under the “regarded as” prong. 274

C. A Demanding Standard for Qualifying as “Disabled”

In 2002, the Supreme Court, in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, held that the lower court erred in finding an assembly line worker at a car manufacturing plant, who was denied a

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268. See Sutton, 527 U.S. at 490-91.
269. Id. at 491. Interestingly, in summarizing the ways in which a person may be covered under EEOC’s rendering of the “regarded as” prong, the Court neglected the second — and, arguably, the broadest — category: “an impairment which is only substantially limiting because of the attitudes of others toward the impairment . . . .” 29 C.F.R. pt. 1630, app. (2010); see Sutton, 527 U.S. at 489 (“There are two apparent ways in which individuals may fall within this statutory definition.”); see also Emens, supra note 170, at 467 (discussing Court’s omission of EEOC’s “other’s-attitudes” interpretation of “regarded-as” prong).
270. Sutton, 527 U.S. at 492-93; see Murphy, 527 U.S. at 523-24.
271. Feldblum et al., Amendments, supra note 106, at 214.
273. See Feldblum, Definition, supra note 20, at 141 (stating that Sutton Court required that “employer regard . . . the individual as unable to work in a range of jobs . . . with no recognition or analysis of how that position conflicted with its prior opinion in Arline.”).
274. See Sutton, 527 U.S. at 490-91.
reasonable accommodation for carpal tunnel and related medical conditions, “disabled” under the first prong of the definition of disability.  

Relying on the ADA’s finding that 43 million people have disabilities, the Court ruled that the words “substantially limits” and “major life activities” in the definition of disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled.” After all, the Court stated, “[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher.” Although the plaintiff could not hold her hands and arms at shoulder level for several hours as required by her job, the Court found that she could perform other tasks of central importance to most people’s daily lives, such as brushing her teeth and doing laundry. As a result, the Court held that she had not established that she was substantially limited in a major life activity.

As a result of the Toyota decision, people alleging discrimination had to show that their impairments “prevent[ed] or severely restrict[ed]” them from doing activities that were of central importance to most people’s daily lives. Given this “demanding standard,” lower courts ruled against people with a wide range of impairments, including a woman with an amputated arm, a man with a traumatic brain injury, and a woman with stage III breast cancer, all of whom were fired from their jobs, as well as a woman with epilepsy and a young man with intellectual disabilities (“mental retardation”), both of whom were denied reasonable accommodations. In each case, the court determined that the individual was not “disabled” because each individual was not prevented or severely restricted from performing major life activities like eating, drinking, and the like.

As many commentators have noted, the Toyota Court’s holding is inconsistent with various statements in the ADA’s legislative history indicating a broad interpretation of the definition of disability; with cases

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276. Id. at 197-98.

277. Id. at 197.

278. Id. at 202.

279. Id.

280. Id. at 198.

281. See Feldblum et al., Amendments, supra note 106, at 221-24 (citing cases).

282. See id.

283. See, e.g., NCD, RIGHTING THE ADA, supra note 41 (“The [Toyota] Court’s position that the definition of disability is to be construed narrowly . . . ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a ‘comprehensive’ prohibition of
decided under the Rehabilitation Act, in which courts tended to decide questions of coverage without extensive analysis;\textsuperscript{284} and with other civil rights statutes, such as the Civil Rights Act of 1964, upon which the ADA was modeled and which courts have also interpreted broadly.\textsuperscript{285} But like the Sutton trilogy, the Toyota decision accords with the minority group approach: if only stigmatized impairments are to be protected under the ADA, impairments must be scrutinized and the gatekeeper must be formidable.\textsuperscript{286} Because impairments like carpel tunnel syndrome are generally not the kind of impairments that are stigmatized, they fall outside of the first and second prongs.\textsuperscript{287}

D. Universal Approach Down

The Sutton trilogy and Toyota suggest that the tension in the ADA’s definition of disability between the minority group and universal approaches has been resolved, at best, consistent with the minority group approach.\textsuperscript{288} Despite the breadth of the “regarded as” prong as reflected in the Rehabilitation Act’s legislative history, HEW’s implementing regulations, Arline, and the DOJ Opinion, together with the ADA’s legislative history and implementing regulations, the minority group approach embodied in the plain language of the ADA’s first and second prongs and in several of its findings have proven too strong. They have overshadowed the universal approach embodied in the third prong.\textsuperscript{289}

At worst, the pendulum may be said to have swung away from the social model altogether, with lower courts adopting the medical model and protecting only those who are “truly disabled.”\textsuperscript{290} No matter what the approach—minority group or “truly disabled”—the Sutton trilogy and Toyota made clear that, absent a legislative change, hope for a universal conception of disability under the ADA’s “regarded as” prong was lost.
VII. RESTORING THE ADA: THE MARCH TOWARD UNIVERSALISM

A. The Call for Restoration: NCD and the “ADA Restoration Act”

A concerted legislative effort to restore the ADA in the wake of the Sutton trilogy and Toyota began in much the same way as the effort to pass the original ADA—with an NCD report. In its 2004 report entitled “Righting the ADA,” NCD criticized the Supreme Court’s and lower courts’ narrow interpretation of the definition of disability under the ADA, and offered a draft bill, the “ADA Restoration Act,” to “restore” the ADA’s intended scope of coverage.

NCD’s draft bill, like the 1988 version of the ADA, eliminated the tension in the ADA’s definition of disability by explicitly embracing the universal approach, defining disability as: “(i) a physical or mental impairment; (ii) a record of a physical or mental impairment; or (iii) a perceived physical or mental impairment.”

The draft bill’s “Purposes” section underscored this shift to universal coverage, stating that “ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived impairment.”

Consistent with the universal approach, NCD’s bill included a provision requiring courts to construe the definition of disability broadly to encompass “all persons who are subjected to discrimination on the basis of disability.” The draft bill also proposed amending the ADA’s employment nondiscrimination provision so it paralleled the broad

291. See NCD, RIGHTING THE ADA, supra note 41, at 1; see also Feldblum et al., Amendments, supra note 106, at 195 (“The issuance of the NCD Report in 2004 helped jumpstart significant activity in Washington, within the CCD Rights Task Force and outside of it.”).

292. See NCD, RIGHTING THE ADA, supra note 41, at 1. In addition to restoring the ADA’s intended scope of coverage, NCD’s draft bill also sought to “restore certain previously available remedies to successful ADA claimants” and “repudiate or curtail certain inappropriate and harmful defenses that have been grafted onto the carefully crafted standards of the ADA” (i.e., the expansion of the “direct threat” defense and limitation of the reasonable accommodation standard). Given the political difficulties associated with a broad legislative fix, disability rights advocates determined early on that the ADA restoration effort ought to focus on what they believed was the biggest problem — the ADA’s scope of coverage. CONSORTIUM FOR CITIZENS WITH DISABILITIES, CHRONOLOGY OF THE ADA RESTORATION ACT 4 (2007), available at http://www.c-c-d.org/task_forces/rights/ada/Chron.pdf (“Once a resolution to the definition problems has occurred, Congress [should] take up the other issues in the NCD draft bill at a later date.”).

293. NCD, RIGHTING THE ADA, supra note 41, at 21.

294. Id. at 18; see id. at 110 (“This approach would afford statutory coverage to every person who is subjected to discrimination on the basis of a physical or mental impairment whether real or not, consistent with congressional understanding reflected in ADA committee reports during the process of its enactment.”).

295. Id. at 25.
coverage embodied in the Civil Rights Act of 1964. Specifically, NCD recommended replacing references to discrimination “against individuals with disabilities” with references to discrimination “on the basis of disability,” thereby focusing on whether the alleged discrimination was based on a personal characteristic (impairment), not on whether the characteristic existed to a sufficient degree.²⁹⁶

Interestingly, NCD’s proposed bill also included a “Secondary Option for Repairing the Definition of Disability—Restoring the Section 504 Approach.”²⁹⁷ If an explicitly universal definition of disability proved impossible for political or other reasons, NCD recommended alternative language that preserved the “substantially limits” language in the three-prong definition, but expanded that definition’s scope in two significant ways.²⁹⁸ First, NCD’s Secondary Option would expand the class of people protected under the first and second prongs by, among other things, defining “substantially limits” to mean “limits... in more than a minor way” and by defining “major life activities” to include a broad range of activities.²⁹⁹ Second, this Option would make the “regarded as” prong the vehicle for universal coverage by including anyone treated adversely based on an impairment.³⁰⁰ Under this Option,

Whenever a covered entity directs any type of negative action toward a person because of that person’s actual or perceived physical or mental impairment, then the covered entity should be deemed to have regarded the person as having a disability. . . . The essence of this approach would be to give the concept ‘regarded as having a disability’ a broad meaning that would make it roughly equivalent to ‘treating an individual less well than others because of a physical or mental impairment, whether real or perceived.’³⁰¹

The ADA Restoration effort switched into high-gear in the summer of 2006, when House Judiciary Committee Chair, Representative Jim Sensenbrenner (R-WI), indicated his desire to introduce legislation restoring congressional intent under the ADA.³⁰² On September 13, Representative Sensenbrenner held an oversight hearing on the ADA in the House Judiciary Committee.³⁰³ About two weeks later, on September 29, Representative Sensenbrenner, together with Representatives John Conyers (D-MI) and Steny Hoyer (D-MD), introduced the “ADA Restoration Act of

²⁹⁶ Id. at 19.
²⁹⁷ Id. at 110-14.
²⁹⁸ Id. at 110.
²⁹⁹ Id. at 113-14.
³⁰⁰ Id. at 111.
³⁰¹ NCD, RIGHTING THE ADA, supra note 41, at 111.
³⁰² Feldblum et al., Amendments, supra note 106, at 195.
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2006” (H.R. 6258).\textsuperscript{304} That bill incorporated NCD’s explicitly universal definition of disability (i.e., eliminating “substantially limits” a “major life activity[]”), its changes to the ADA’s employment nondiscrimination provision, its mitigating measures fix, and a rule of construction directing courts to construe the provisions of the ADA “broadly... to advance their remedial purpose.”\textsuperscript{305} With a lame-duck Congress and approximately two months to go, H.R. 6258 died in committee as the 109\textsuperscript{th} Congress came to a close.\textsuperscript{306}

In January 2007, disability rights advocates began work on proposed legislative language for a new bill, “The ADA Restoration Act of 2007.”\textsuperscript{307} Behind the scenes, many disability rights advocates believed that, as a political matter, a universal definition of disability stood little chance of success without some exception for at least “transitory and minor” impairments.\textsuperscript{308} Nevertheless, they believed that, as a legal matter, the definition of disability ought to cover anyone with an impairment, and maintained that position in meetings with congressional staff. On July 26, 2007, the fourteenth anniversary of the ADA’s passage, Senators Tom Harkin (D-IA) and Arlen Specter (R-PA) and Representatives Hoyer and Sensenbrenner introduced companion Restoration Act bills.\textsuperscript{309} Like H.R. 6258, the Restoration Act’s definition of disability remained explicitly universalist and also included several new provisions drawn from NCD’s draft bill.\textsuperscript{310} Among them, the Restoration Act deleted the ADA’s “43,000,000 Americans” and “discrete and insular minority” findings, which had been used by the Sutton and Toyota courts to support a narrow reading of “disability.”\textsuperscript{311}

In their advocacy efforts, the disability rights community pushed back against the dominant minority group approach by adopting an explicitly universal approach. While efforts to pass the original ADA focused on advancing the independence and economic self-sufficiency of those with actual impairments, ADA Restoration advocacy efforts focused on congressional intent to protect everyone discriminated against on the basis of an actual or perceived impairment, and judicial backlash against that

\textsuperscript{305} Id. §§ 3, 6.
\textsuperscript{307} Feldblum et al., Amendments, supra note 106, at 197-98.
\textsuperscript{308} Kevin Barry, Personal Notes on ADA Amendments Act Advocacy Effort [hereinafter Barry, Personal Notes].
\textsuperscript{310} S. 1881 § 4; H.R. 3195 § 4.
\textsuperscript{311} S. 1881 § 3; H.R. 3195 § 3.
invoking Arline’s broad interpretation of the “regarded as” prong and civil rights laws’ protection of all people based on forbidden characteristics, disability rights advocates emphasized that society can make anyone of us “disabled” and so the ADA ought to cover everyone.313

According to the Consortium for Citizens with Disabilities (CCD), a coalition of over 100 disability rights organizations and leader in the ADA Restoration effort:

When Congress passed the ADA, when President George H. W. Bush signed the law, and when Attorney General Dick Thornburgh promulgated regulations to implement the law, the intent of the ADA was crystal clear—the law was intended to apply to everyone who experienced discrimination on the basis of disability, not just those with severe disabilities. By extending protection to individuals who were not actually disabled but who were instead “regarded as” disabled by their employers, Congress tried to make clear that the ADA protected everyone who experienced disability-based discrimination, even those who may not have considered themselves to have a disability or who may not have actually had any disability. Thus, even individuals with relatively minor impairments were intended to be covered under the ADA if they were discriminated against for no other reason than because of such an impairment.314

By fall 2007, the ADA Restoration effort had momentum in Congress. On October 4, 2007, the House Judiciary Committee’s Subcommittee on Constitution, Civil Rights, and Civil Liberties held a hearing on the ADA Restoration Act.315 With over 200 cosponsors on the House bill (H.R. 3195), the business lobbying organizations took note, and volleyed back. At that hearing and in other communications directed at Members of Congress, the business community argued that the ADA Restoration bills’ universal definition of disability was not a “restoration” but rather an

312. Compare BAGENSTOS, CONTRADICTIONS, supra note 8, at 28 (stating that opposition to extension of civil rights policies in 1980’s led “[d]isability rights leaders [to] . . . couch[] their demands in terms of the elimination of dependency and the promotion of independence”), with ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the H. Comm. on Educ. & Labor, 110th Cong. 11 (2008) (statement of Andrew J. Imparato, President and Chief Executive Officer, American Association of People with Disabilities), available at http://edlabor.house.gov/testimony/2008-01-29-AndrewImparato.pdf [hereinafter Imparato, House Testimony] (“[H.R. 3195] will restore civil rights protections for people with epilepsy, diabetes, cancer, depression, amputations, and a whole host of physical and mental disabilities who have been denied their day in court because of activist judicial rulings that ignore legislative history and Congressional intent.”).


314. Id. at 3.

“expansion” of the stigmatized minority group whom Congress intended to protect in 1990.316 According to the U.S. Chamber of Commerce:

The definition of “disability” in H.R. 3195 undermines the original intent of the ADA in that it entitles anyone with a “physical or mental impairment” to the protection of the ADA. Individuals with temporary or minor physical or mental “impairments” have not been the subject of such discrimination, nor have they been subject to prejudicial myths and stereotypes about their employability. Changing the definition to provide ADA protection to individuals with commonplace impairments would cast the ADA’s net too wide and diffuse protections afforded to the truly disabled.317

At a hearing before the Senate HELP Committee one month later, on November 15, 2007, the tension between the minority group and universal approaches took center-stage as witnesses for the business and disability rights communities staked out their positions.318 According to Attorney Camille Olson, testifying on behalf of the business community, “the ADA’s overarching goal was to bring into the fold of mainstream society a ‘discrete and insular minority’ of disabled individuals.”319 The ADA Restoration Act, Olson explained, would disturb the delicate balance Congress struck between a minority of people with disabilities and the rest of us with impairments, thereby “diluting the definition of disability to such an extent that persons who are truly disabled, such as those who are deaf or blind or unable to walk, will find themselves in a long line of plaintiffs.”320 Professor Feldblum responded with a ringing endorsement of the universal approach:

This [hearing] room is filled with people with disabilities who want Congress to pass S. 1881. They don’t believe this bill sets back their cause. Why not? Because there is no set of “truly disabled” people and then all the rest of us.

We all exist along a spectrum of abilities. It is true that many of us might never experience discrimination because of our physical or mental impairments, while others of us may experience significant discrimination.

316. Feldblum et al., Amendments, supra note 106, at 229 n.162.
317. Lorber, House Testimony, supra note 108, at 5; Letter from R. Bruce Josten, Executive Vice President Government Affairs, Chamber of Commerce of the United States of America to Members of the U.S. House of Representatives 1 (Aug. 22, 2007), http://www.law.georgetown.edu/archiveada/documents/dojadaraposition_000.pdf (“H.R. 3195 is not a simple tweak of the ADA, but rather a wholesale rewriting of it. For example, the bill would change the definition of ‘disability’ so that any individual with an impairment—such as poor eyesight correctible by wearing glasses—would be considered disabled and would trigger the employer’s duty to accommodate. By contrast, the ADA’s current definition requires individuals to have an impairment that ‘substantially limits one or more of the major life activities.’ By rewriting th[e] definition [of disability], virtually all of the entire working population in the United States could be covered by the law.”).
319. Olson, Senate Testimony, supra note 77, at 28 (quoting ADA finding).
320. Id. at 32.
But that is not because some of us are truly disabled and others are not. It is because of the type of discrimination that some of us will suffer, and others of us will not.

There is no “us” and “them.” There is simply a vision of equality and justice. It is time for Congress to restore the ADA and have it fulfill its true promise. 321

B. Prelude to Negotiations

While the large number of co-sponsors of H.R. 3195 had “caused the [business community] some heartburn” 322 and forced them to respond to the ADA Restoration bills, the disability rights community had concerns of its own. While there was some Republican support for the bill, 323 it was a far cry from the remarkable bipartisanship that defined the ADA’s passage in 1990. 324 Disability rights advocates knew that bipartisan support was crucial, especially in the Senate, which had only one Republican cosponsor. 325 These concerns on the part of the business and disability rights communities prompted both sides to sit down with each other to explore the possibility for a legislative compromise.

At meetings in December 2007 and January 2008, there was general agreement that many people whom Congress intended to cover under the ADA—specifically, those who used mitigating measures (other than eyeglasses)—had not been covered under courts’ interpretations of the ADA. 326 Not surprisingly, the disagreement was over how many people to cover, and highlighted the tension between the universal and minority group approaches. 327

Disability rights advocates believed that the problems with the ADA’s definition went beyond Sutton’s holding requiring consideration of mitigating measures. Even in cases where mitigating measures were not at issue, disability rights advocates pointed out, people with conditions such as

321. Feldblum et al., Amendments, supra note 106, at 228.
322. Id. at 229.
324. See Feldblum et al., Amendments, supra note 106, at 191 (stating that “final conference report [on ADA] was agreed upon and passed by the House of Representatives by a vote of 377-28 and by the Senate by a vote of 91-6”).
326. See Barry, Personal Notes, supra note 308. Subsequent descriptions in subsections B and C of the negotiations of the ADA Restoration Act are drawn from the author’s personal notes and supplemented with citations to additional documents that also informed the negotiations.
327. During the course of these preliminary conversations, a third hearing was held on the ADA Restoration Act on January 28, 2008, before the House Committee on Education and Labor. See ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the H. Comm. on Educ. & Labor, 110th Cong. (2008).
“mental retardation” were being found not “disabled” because of the Supreme Court’s requirement in *Toyota* that courts “construe the ADA’s language strictly,” creating a “high threshold for qualifying as disabled.” 328 Congressional intent, they argued, could be fulfilled only by universalizing disability, that is, defining disability to mean any physical or mental impairment without regard to limitation. Since all people have, have had, or may be perceived to have an impairment, and since disability results from the interaction between impairments and society’s treatment of impairments, disability rights advocates argued, the only fail-safe way to prohibit disability-based discrimination was to cover everyone. Advocates pointed out that the ADA’s “regarded as” prong and its legislative history, citing *Arlene’s* interpretation of that prong, were consistent with universal coverage, as were other civil rights laws that did not restrict protection to the “lucky” few. 329

Line-drawing, disability rights advocates emphasized, was inappropriate in the civil rights context. In the first place, because we all have impairments, and any one of us could be disabled by others’ treatment of that impairment, it is impossible to say who should fall on the deserving side of the line and who should not. Trying to do so in the course of litigation, moreover, results in fishing expeditions into peoples’ private lives to turn up intimate details about bodily functions that have little or nothing to do with the underlying discriminatory action.330 It also results in courts raising the bar in order to maintain the line between “in” and “out.” Most importantly, line-drawing forces people into a “Catch-22:” the more limited you are in bodily functioning, the more likely you are to be considered disabled but the less likely you are to be qualified for a job (e.g., the person with severe intellectual disabilities).331 Likewise, the less limited you are, the more likely you are to be qualified but the less likely you are to be considered “disabled” (e.g., the person with epilepsy who controls her seizures through medication).

The business community argued that Congress never intended to cover everyone, and emphasized the need for line-drawing consistent with the minority group approach. According to the business community, in 1990, Congress drew the line at 43 million and courts had interpreted that line too

328. *See* *Toyota Motor Mfg., Ky., Inc.*, v. Williams, 534 U.S. 184, 197 (2002); Littleton v. Wal-Mart Stores, Inc., 231 F. A’ppx 874, 877-78 (11th Cir. 2007).
330. *Cf.* Imparato, *House Testimony, supra* note 312, at 5 (“At a minimum, I could expect to be subjected to a battery of questions probing into the intimate details of my life and disability that are entirely irrelevant to my ability to perform the job. Throughout the country, this has become not the exception but the norm for victims of employment discrimination on the basis of disability who attempt to have their day in court.”).
331. *Cf.* Colker, *43 Million, supra* note 135, at 7 (discussing “individuals typically being so disabled that they are not qualified to work even with reasonable accommodations”).
restrictively. Fulfilling Congress’s intent was therefore a matter of moving the line closer to center, not removing the line altogether. After all, the business community argued, the words “substantially limits” a “major life activit[y]” were drawn from the ADA’s predecessor, the Rehabilitation Act, and represented a legitimate delineation of who was to be covered. The ADA’s legislative history, they argued, made this clear. In discussing the meaning of “substantially limits” a “major life activit[y]” under the first prong, Congress expressly recognized that a “broken finger” does not suffice; it was not the kind of stigmatized impairment that Congress had in mind when it passed the ADA.

Deletion of the words “substantially limits” a “major life activit[y],” the business community argued, was therefore not a restoration but rather an expansion of the ADA to cover anyone with an impairment, or virtually every American. After all, they pointed out, over 145 million people wore eyeglasses. Such an expansion not only eviscerated the employment-at-will doctrine, but also undermined the original purposes of the ADA and “diluted” the protections to be afforded the “truly disabled.” Universal coverage, they argued, would, in effect, turn the Americans “with Disabilities” Act into The Americans “with Impairments” Act, which was inconsistent with congressional intent, especially given how broadly “impairment” had been defined under the law.

In addition to being inconsistent with congressional intent, the business community argued that the universal approach was also impossible as a political matter. Covering everyone would mean more frivolous lawsuits as a result of “lowering the bar” for prima facie claims, more expensive defenses by eliminating the chief means of disposing of cases on summary judgment, and more accommodations from employers with limited resources who would not want to risk the vagaries of trial. The last point

332. Cf. Olson, Senate Testimony, supra note 77, at 35.


334. Cf. id. at 3-4.


336. Cf. id. at 11.

337. Cf. id. at 9.

338. Cf. Olson, Senate Testimony, supra note 77, at 34 & n.62.

339. Cf. id. at 32 (“[T]hese amendments will have the effect of diluting the definition of disability to such an extent that persons who are truly disabled, such as those who are deaf or blind or unable to walk, will find themselves in a long line of plaintiffs.”).


341. Cf. Olson, Senate Testimony, supra note 77, at 27 (“Employers will find themselves addressing potential accommodation requests from individuals with high cholesterol, back and knee strains, colds, the flu, poison ivy, sprained ankles, stomach aches, the occasional headache, a toothache,
was a major one for the business community: reluctance to go to trial would mean accommodating everyone, and, the business community argued, most employers have only limited resources with which to do so. Their constituents and their allies in Congress would never agree to a universal definition of disability, or if they did, the business community noted, their constituencies would demand significant concessions elsewhere in the statute.

Furthermore, as a policy matter, the business community argued that a universal accommodation mandate would subsume protections under the FMLA. That statute requires employers to grant up to twelve weeks of medical leave to employees with “serious health conditions.” By the same token, requires employers to provide reasonable accommodations—including medical leave—to people whose impairments “substantially limit” a “major life activity.” By eliminating the words “substantially limits” a “major life activity,” the business community argued, the ADAAA would open the floodgates to unlimited leave for any impairment, in effect, swallowing the FMLA.

While acknowledging the preliminary nature of these meetings, and emphasizing that no agreement could or would be made at that time, some creative ideas were floated for the sake of discussion. In the interest of expanding certainty of coverage for both employers and employees, the business community raised the option of adding a finite list of disabilities to the ADA that would be “presumed” covered absent evidence to the contrary. There was also discussion of several state-modeled fixes, including New Jersey’s definition of disability, which required that impairments be “demonstrable” but was otherwise universal in scope—requiring no limitation of bodily functions, substantial or otherwise.

and a myriad of other minor medical conditions that go far beyond any reasonable concept of disability.”


344. Cf. Lorber, House Testimony, supra note 108, at 9 (“Every employee who wants leave (full day, half day, intermittent) for a cold, a headache, seasonal allergy, or a bad back could be entitled to such leave. There is no twelve-week cap on leave as there is for FMLA; for many employers it will be impossible to show undue hardship even when intermittent leave for such conditions is over twelve weeks.”). H.R. 3195 would have broadened the number of people eligible for leave in another way: the FMLA requires employers with 50 or more employees to provide sick leave — the ADA applies to employers with just 15 or more. See EEOC, FMLA, supra note 342.

345. See N.J. STAT. ANN. § 10:5-5(q) (West 2010) (defining disability as a “physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness . . . or any mental, psychological or developmental disability . . . resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental
state of Washington’s definition of disability, which incorporated both the universal and minority group approaches, was discussed as well. This “hybrid” approach required no limitation of bodily functions except where a person was seeking a reasonable accommodation.346

Based on these promising preliminary conversations, and with the blessing of their allies in Congress, both sides agreed to convene a series of negotiation sessions.347

C. Negotiating the ADA Restoration Act: “A Deal in Three Movements”

The “ADA Amendments Act of 2008”, as it came to be called, was largely the product of a series of negotiations between the disability rights and business communities. For the first half of 2008, negotiators from these communities debated, analyzed, and agreed to proposed revisions to the ADA Restoration Act of 2007; met with their respective communities to solicit feedback on those proposed revisions; and informed their respective allies in Congress of their progress.348 In May 2008, these negotiations culminated in proposed legislative language amending the ADA.349 While proposed legislative language is merely that—language provided to interested members of Congress to consider as the basis for legislation350—and while negotiations are no substitute for legislative history, negotiations over the ADA Restoration Act explain much about the shape of the

346. See WASH. REV. CODE ANN. § 49.60.040(7) (West 2010) (defining “disability” as “the presence of a sensory, mental, or physical impairment that . . . [i]s medically cognizable or diagnosable,” but requiring that, in order to qualify for a reasonable accommodation, the impairment “must be known or shown through an interactive process to exist in fact” and: (i) “must have a substantially limiting effect upon the individual’s ability to perform his or her job” (“a limitation is not substantial if it has only a trivial effect”); or (ii) “[t]he employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.”).

347. See Feldblum et al., Amendments, supra note 106, at 229-30 (noting that business community and disability rights community met at urging of Majority Leader Steny Hoyer and Congressman Jim Sensenbrenner, and with support of committee staff).

348. See Feldblum et al., Amendments, supra note 106, at 229-30. Democratic staff from the House Judiciary and House Education and Labor Committees, under the leadership of Chairmen John Conyers and George Miller, met regularly with negotiators from the disability community and played a critical role in helping disability negotiators craft proposed legislative language. At weekly meetings, these staff members revised and rejected various proposals that were unacceptable to Chairmen Conyers and Miller and put pressure on negotiators to move the deal along at various points so that mark-ups would proceed on schedule in the respective committees.

349. See id. at 230.

350. See Feldblum, Medical Examinations, supra note 99, at 524.
ADAAA, especially the tension between its minority group and universal approaches.\(^{351}\)

1. Movement I: The Minority Group Approach Expanded—The Prohibition on Consideration of Mitigating Measures

When negotiations began in February 2008, conversation resumed over the ADA’s intended scope of coverage, with debate and compromise centering on the strengths and weaknesses of the universal and minority group approaches.\(^{352}\) Business negotiators would not agree to the elimination of the words “substantially limits one or more major life activities,” which they saw as going beyond a “restoration” of original Congressional intent. Disability rights negotiators, on the other hand, adamantly opposed keeping those words in the statute because of the narrow interpretation given them by courts.

With no agreement on the central question of whether the definition of disability should require some limitation of a bodily function (the minority group approach) or no limitation at all (the universal approach), negotiators temporarily shelved that issue. Instead, they concentrated on an aspect of the ADA Restoration Act where they hoped to find more consensus: the “mitigating measures” problem. Assuming the definition of disability were to require some sort of limitation on bodily functions, negotiators agreed that, as a general matter, mitigating measures should not be considered.\(^{353}\) The one exception, negotiators agreed, was for eyeglasses and contact lenses.\(^{354}\)

This agreement was significant because it acknowledged that, under the minority group approach, people who overcome limitations on their

\(^{351}\) Given the unique process of negotiations by which disability rights and business negotiators continuously updated congressional staff on proposed language and agreed to defend that language against changes during the legislative process, see Feldblum et al., Amendments, supra note 106, at 229, the negotiated “deal” was (not surprisingly) nearly identical to the language that became the ADAAA.

\(^{352}\) Interestingly, the debate among disability and business negotiators over the minority group and universal approaches had much in common with the debate among State delegations to the UN Convention on the Rights of Persons with Disabilities, which was adopted in December 2006. See Kayess & French, supra note 75, at 23 (stating that “[t]he questions of a definition of ‘disability’ and ‘persons with disabilities’ were among the most controversial dealt with by the Ad Hoc Committee and ultimately could not be resolved,” and noting that while some States “were determined to ensure that the convention applied to . . . all impairment groups . . . [a] large number of States were concerned that this would ‘open the floodgates’ compelling them to recognise in domestic implementation efforts a large number of impairment groups not traditionally understood as persons with disability within their societies.”).


\(^{354}\) See 42 U.S.C.A. § 12102(4)(E)(ii) (“The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.”).
bodily functions (thanks to medication or other measures) may still be stigmatized and therefore “disabled.” For example, a person fired from her job because of epilepsy is “disabled” whether or not she takes anti-seizure medication.355 This agreement was also significant because it recognized that stigma has boundaries: correctable poor vision is not stigmatized and, therefore, eyeglasses and contacts lenses should be considered in determining “disability.”

355. Cf. BAGENSTOS, CONTRADICTIONS, supra note 8, at 42 (“People with epilepsy, diabetes, or schizophrenia may take medications that control their symptoms, but they are still considered disabled by many people in society at large. People who use prosthetic legs for mobility or hearing aids to enhance their auditory sense are also considered disabled by many, even if they can perform any activity.”).

356. While agreeing to permit courts to consider the mitigating effects of eyeglasses and contact lenses, disability rights negotiators did not believe that correctable vision should be written out of the ADA entirely. People with correctable vision (like the Sutton plaintiffs), disability rights negotiators argued, ought to be able to challenge qualification standards that screened them out. See 42 U.S.C.A § 12113(c) (“[A] covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.”).

357. Negotiators also reached agreement on several ancillary issues, including the authority of enforcement agencies to issue regulations concerning the definition of disability and the treatment of impairments that are episodic or in remission. These provisions are beyond the scope of this Article. For further discussion of these provisions, see Stephen F. Befort, Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the ‘Regarded As’ Prong of the Statutory Definition of Disability, UTAH L. REV. (forthcoming 2010); Emily A. Benfer, Am. Const. Soc’y for Law & Pol’y, The ADA Amendments Act: An Overview of Recent Changes to the Americans with Disabilities Act 9-11 (2009), available at http://www.acslaw.org/files/Benfer%20ADAAA_0.pdf.

358. This example closely approximates the hypothetical person with disfiguring scars discussed in the HEW regulations and Arline, and in the ADA’s legislative history and implementing regulations. See supra notes 170, 186, 237 and accompanying text.
believed he ought to be able to challenge that denial. The logical extension of this hypothetical, negotiators agreed, was that nondiscrimination under the ADA should be universal; no showing of limitation should be required. This was, after all, consistent with the Civil Rights Acts of 1964, which, among other things, protects all people from discrimination in employment and public accommodations based on prohibited characteristics such as race, religion, and sex.

But business negotiators did not believe that this man should necessarily be entitled to a reasonable accommodation. While it was one thing to afford nondiscrimination protection to everyone (like the Civil Rights Act of 1964), it was quite another to provide universal accommodation (something not guaranteed under the Civil Rights Act of 1964). The business negotiators’ arguments were more pragmatic than theoretical. They reiterated that universal accommodation, such as providing sick leave for sprained ankles and the common cold, was never intended under the ADA; would not be politically feasible without significant concessions in the reasonable accommodation context; and would be bad policy because it would swallow FMLA protection. In order to qualify for a reasonable accommodation, the business negotiators argued, the man with the growth on his head should have to show some functional limitation that needed to be accommodated.

Significantly, disability rights negotiators, after discussions with the broader disability community, accepted this framework. There was no conversation about whether the failure to reasonably accommodate was fundamentally the same or different from nondiscrimination. Instead, disability rights negotiators’ agreement was based largely on the ADA’s plain language and political realities. The ADA’s text, which prohibits an employer from “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee,” arguably anticipates some form of limitation on bodily functions to trigger the accommodation requirement.

A person without such a limitation, one might reasonably argue, has nothing to accommodate. Therefore, it made sense under the ADA’s plain language to restrict accommodations to those with limitations.

360. Cf. Colker, 43 Million, supra note 135, at 13 (“‘Regarded as’ plaintiffs do not typically seek reasonable accommodations, as they are often victims of stereotypical thinking. Although they may have genuine physical or mental impairments, the only limitations imposed by those impairments may be the product of the attitudes of others.”); Miranda Oshige Mcgowan, Reconsidering the Americans with Disabilities Act, 35 Ga. L. Rev. 27, 112 (2000) (“[P]ersons ‘regarded as’ disabled . . . do not need or seek reasonable accommodations. Rather, much like race and sex discrimination under Title VII, persons ‘regarded as’ disabled . . . seek protection from disparate treatment based on their perceived . . . conditions.”).
on bodily functioning. Politically, disability rights negotiators recognized the importance of winning support among the business community and its political allies. The original ADA was the product of negotiations between the business and disability rights communities and had strong bipartisan support in Congress. Disability rights negotiators understood that without that support this time around, there would probably be no new law.

Having agreed that nondiscrimination protection should be universal while entitlement to reasonable accommodation should require demonstration of some limitation on bodily functions, negotiators looked for a way to make clear their compromise. The “regarded as” prong provided the way. Negotiators agreed that the main thrust of the “regarded as” prong, as interpreted by the Supreme Court in *Arline*, was universal coverage in the nondiscrimination context. Unlike the other two prongs, negotiators agreed that the “regarded as” prong prohibited adverse treatment based on an impairment regardless of how the impairment limited or was perceived to limit bodily functions, and regardless of whether the person had any impairment at all. This prong, they agreed, should be the avenue by which the hypothetical man with the growth on his head would challenge his termination. According to negotiators, that man was “disabled” when he was terminated based on his impairment; he was regarded by his employer as being substantially limited in the major life activity of working.

So negotiators divided the definition of disability along its universal/minority group fault line—into “regarded as” and “non-regarded as” claims. The first and second prongs, true to the minority group approach, would continue to require some yet to be agreed upon limitation on bodily functions, and would be the avenue for all reasonable accommodation claims.  

The third prong, on the other hand, consistent with the universal approach, would become the primary vehicle for discrimination claims. This prong would protect *anyone* subjected to unfair treatment “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity,” with two caveats. First, an individual covered solely under the third prong would not be entitled to a reasonable accommodation. In order to obtain a reasonable accommodation, that person would have to seek coverage under the first or second prongs and show a present or past impairment that limited bodily

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361. One could continue to bring a discrimination claim under the first and second prongs but would no longer need to do so — the “regarded as” prong would provide a clearer and surer route to coverage.

Second, people whose impairments were “transitory and minor,” such as people with a cold or the flu, would not be covered under the third prong. However, a person fired after recovering from appendicitis would be covered under the “regarded as” prong (transitory but not minor), as would a person with an injured wrist that takes more than six months to heal (minor but not transitory).

This bifurcation of the definition of disability into (nearly) universal coverage for nondiscrimination and minority group coverage for reasonable accommodations is not new to disability discrimination law. It was drawn from Washington State’s law, which establishes a higher threshold for reasonable accommodation cases. The “transitory and minor” language is also not new. It was adapted from Maine’s regulations and newly amended nondiscrimination statute superseding those regulations, and it was added to address the business community’s concerns with frivolous claims. While this language carves back the universal approach because

363. Disability rights advocates understood that by agreeing to prohibit reasonable accommodations under the “regarded as” prong, they were providing something of value to the business community, given the circuit split on the issue. See Feldblum et al., Amendments, supra note 106, at 237 (“Four circuit courts of appeal . . . have held that plaintiffs who are not covered under the first prong of the definition may nonetheless seek reasonable accommodations under the ‘regarded as’ prong.”). Nevertheless, most disability rights advocates did not believe that this concession would have significant legal consequences. In the first place, plaintiffs rarely succeed in demonstrating coverage under the “regarded as” prong — let alone an entitlement to reasonable accommodations. Furthermore, advocates believed that by lowering the bar for showing “substantial limitation” of a “major life activity” under the first and second prongs, the ADAAM would allow plaintiffs to get their accommodation under those prongs rather than having to resort to the third prong. See id. at 238 (“[I]t seems clear that the plaintiffs [entitled to reasonable accommodations under the third prong] should have been covered under the first prong of the definition of disability. Hopefully, that will be the case now under the ADA as amended by the ADA Amendments Act of 2008.”).

364. That person would most likely also be covered under the “record of” prong.

365. Even absent these two caveats, the “regarded as” prong is still not technically universal in scope because a person without an actual, past, or perceived impairment cannot bring a claim under the ADA. To avoid the potential for reverse discrimination suits, negotiators agreed to a provision prohibiting people from alleging discrimination based on the lack of an impairment (e.g., “The company refused to hire me in favor of a person who is blind”; or “My employer permitted my colleague who has multiple sclerosis to put an air conditioner in her office but denied my request to do so.”). ADA Amendments Act of 2008 § 6(a)(1), 42 U.S.C.A. § 12201(g); cf. Colker, 43 million, supra note 135, at 63 (stating that “abandon[ing] the anti-subordination approach and mak[ing] statutory protection available to anyone who faces discrimination on the basis of a physical or mental condition. . . . would provide a potential cause of action to nearly every individual in society,” but “might create the potential for ‘reverse discrimination’ lawsuits.”)

366. See supra note 346 and accompanying text; see also Michelle T. Friedland, Not Disabled Enough: The ADA’s “Major Life Activity” Definition of Disability, 52 STAN. L. REV. 171, 198 (1999) (advocating two separate definitions of disability under ADA—one broad for “pure discrimination” cases, and one narrower for accommodation cases).

it excludes certain types of impairments, disability rights advocates believed that individuals with these impairments were not likely to encounter barriers to access and therefore not likely to be “disabled.”

What was new, however, was the decision to use the “regarded as” prong as the vehicle for providing nearly universal coverage in the nondiscrimination context, and the remaining prongs for providing minority coverage in the reasonable accommodation context.368 By covering almost any person discriminated against because of an impairment, the new “regarded as” prong codified Arline’s broad interpretation of that prong so long overlooked.369 Negotiators agreed to a “Purposes” clause saying as much:

The Purposes of this Act are to... reject the Supreme Court’s reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.370

Negotiators also agreed on changes to the ADA’s employment nondiscrimination provision, which underscored the “regarded as” prong’s emphasis on whether discrimination took place, not on the threshold question of whether a person had an eligible impairment. Specifically, instead of prohibiting employment discrimination against a qualified individual “with a disability because of disability,” negotiators agreed that this provision ought to be changed to simply prohibit discrimination against any qualified individual “on the basis of disability.”371 While “disability” would still remain a threshold eligibility criterion, it would be deemphasized by “aligning the construction of the [ADA] with Title VII of the Civil Rights Act of 1964.”372

experienced by the average person in the general population or are both transitory and minor, although episodic conditions shall not be considered transitory. Conditions that fit within this exception include, but are not limited to, minor cuts or bruises, the common cold, typical flu, upset stomach, or ordinary headaches.368 The decision to use the “regarded as” prong as the vehicle for nondiscrimination claims was inspired by NCD’s Secondary Option, which used the “regarded as” prong as a vehicle for all claims — both nondiscrimination and reasonable accommodation. See supra notes 298-302 and accompanying text.

368. See supra notes 189-192 and accompanying text.
369. See supra notes 189-192 and accompanying text.
372. 154 CONG. REC. S8840 (daily ed. Sept. 16, 2008) (Statement of Managers). For example, under the original ADA, a plaintiff was required to demonstrate that he or she: (1) had a past, present, or perceived substantially limiting impairment; (2) was qualified; and (3) was denied an accommodation or otherwise discriminated against because of a past, present, or perceived substantially limiting impairment. Under the ADAAA, a person need only show (2) and (3). See 154 CONG. REC. S8843 (daily ed. Sept. 16, 2008) (Statement of Managers) (“The bill amends Section 102 of the ADA to mirror the structure of nondiscrimination protection provision in Title VII of the Civil Rights Act of 1964.”)
3. Movement III: The Minority Group Approach Further Expanded—Changing the Limitation Required by the First and Second Prongs

The last major issue for negotiators was how to define the requisite degree of limitation for accommodation claims—i.e., the “outer reaches” of stigma. The business community stressed predictability. They wanted the words “substantially limits” a “major life activity[ ]” in the statute, or at least the definition given those words by either the Supreme Court (“prevents or severely restricts”) or the EEOC (“prevents” or “significantly restricts”). Courts and businesses alike knew what these words meant and how to apply them, so, they asked, why start over? New language would be a shot in the dark and good for no one except the lawyers paid to sort it out. The broad “regarded as” prong, plus the overruling of Sutton (which eliminated consideration of mitigating measures), the business negotiators argued, would give plaintiffs everything they needed—what more could they possibly want?

Negotiators from the disability community acknowledged that the “regarded as” prong and the mitigating measures fix were a step in the right direction, but emphasized the need to fix the “demanding standard” this ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.”).

373. See, e.g., Lorber, House Testimony, supra note 108, at 8 (“H.R. 3195 drastically rewrites the ADA, without providing any degree of clarity to employers, employees, or the courts in resolving the basic issues of who is covered under the ADA, except, perhaps, indicating that everyone is to be covered”).
376. Cf. The ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the H. Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the Committee on the Judiciary, 110th Cong. 10 (2007) (oral testimony of Lawrence Z. Lorber, Proskauer Rose LLP, on behalf of the U.S. Chamber of Commerce), available at http://judiciary.house.gov/hearings/hear_100407_3.html (stating that ADA Restoration Act would “toss aside” the “long experience under the Rehabilitation Act of 1973 and the ADA” and replace it with a “litigation regime” that would “place fifteen or seventeen thousand more cases into the courts, so that . . . the lawyers among us . . . can do well under this Act, but those whom the [ADA] was intended to protect simply wait at the end of a very long line.”).
377. DOJ officials at the time, along with others, also supported a mitigating measures-only fix. ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the H. Comm. on Educ. & Labor, 110th Cong. 5 (2007) (statement of David K. Fram, Esq., Director, ADA & EEO Services, National Employment Law Institute), available at http://edlabor.house.gov/testimony/2008-01-29-DavidFram.pdf (stating that the ADA ought to “require courts to analyze an individual’s disability status without regard to medication or mitigating measures,” but that “changing the definition of disability to cover everyone in America would not be ‘restoring’ the ADA”); Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legislative Affairs, to the Honorable George Miller, Chairman, Comm. on Educ. & Labor, U.S. House of Representatives 5 (Jan. 28, 2008), available at http://www.law.georgetown.edu/archiveada/documents/dojadaraposition_000.pdf (“[T]he Department could support a change to the ADA to clarify that, for purposes of coverage under the ADA, a disability must be evaluated without regard to mitigating measures, provided there was an exception for people who wear glasses.”).
required by Toyota. The Fifth Circuit, they noted, denied a young man named Charles Littleton an accommodation because his “mental retardation” did not substantially limit his ability to learn.\footnote{See supra note 282 and accompanying text.} If reasonable accommodations would continue to require some showing of limitation on bodily functions, a relaxed showing mattered. To rid the ADA of the havoc wrought by courts’ strict interpretation of the words “substantially limits one or more life activities,” disability rights negotiators reiterated that any limitation must not include the words “substantially limits” or the meaning given those words by the Supreme Court or EEOC. While these words would have to be jettisoned, disability rights negotiators were willing to consider substitute language meaning something less than “substantially limited.”

For approximately two months, negotiators worked on new limiting language that would satisfy the business community’s need for predictability and the disability community’s need for a relaxed showing of limitation. State antidiscrimination law and NCD’s Secondary Option became the laboratory for articulating this language.

The business negotiators made clear that eliminating “limits” altogether, as New Jersey had done, would not work. So negotiators looked at deleting “substantially” and defining “limits” to mean something less than substantial. Options ranged from a requirement that an impairment merely be “demonstrable” or “determinable” by clinical means;\footnote{See N.J. STAT. ANN. § 10:5-5 (West 2010); N.Y. EXEC. LAW § 292 (McKinney 2010); ILL. ADMIN. CODE tit. 65, § 2500.20(b)(2) (2010); CODE ME. R. § 3.02, superseded by MAINE REV. STAT. ANN. tit. 5, § 4553-A.} to a requirement that the impairment have more than a “trivial effect”\footnote{WASH. REV. CODE ANN. § 49.60.040(7)(e) (West 2010).} or make the achievement of life activities “difficult;”\footnote{CAL. GOV’T CODE § 12926(i)(4), (k)(4) (West 2010); WIS. STAT. ANN. § 111.32(8)(a) (West 2010).} to a requirement that the impairment

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\text{limit[} \text{an individual’s performance of an activity in more than a minor way compared with the average person in the general population, including by restricting the conditions under which, or the manner or duration in which, the individual can perform the activity—regardless of whether the impairment is temporary or of limited duration.}\footnote{See NCD, RIGHTING THE ADA, supra note 41, at 114.}\
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from Maine’s newly amended antidiscrimination statute, were defined broadly to include any impairment that had “an actual or expected duration of more than 6 months and impair[ed] health to a significant extent as compared to what is ordinarily experienced in the general population.”

Significantly, this agreement also included adding a list of impairments that would be considered *per se* disabilities—that is, impairments that would be automatically covered without any showing of limitation.

Unfortunately, this agreement did not take. Given the breadth with which negotiators agreed to define “significantly impairs physical or mental health,” the broader business community rejected the deal language.

So another attempt was made on April 14. This time, negotiators agreed that “substantially limits” would be retained, but it would be defined to mean something less than the severity demanded by the Supreme Court and EEOC. After working through a matrix of synonyms, negotiators settled on “materially restricts.” Given the potential for “substantially limits” to be read narrowly by courts once again, negotiators backstopped “materially restricts” by adding (in addition to the mitigating measures fix and several related rules of construction): a non-exhaustive list of major life activities drawn from EEOC regulations; a provision requiring that the definition of disability be construed broadly; findings and purposes explicitly disapproving the Supreme Court’s restrictive interpretations of “substantially limits one or more major life activities;” and a broad list of approximately twenty-five *per se* disabilities, loosely based on Maine’s newly amended antidiscrimination law, which would not require any showing of limitation. Consistent with the minority group approach, the *per se* list contained impairments that are generally stigmatized.

While the *per se* list would have provided automatic coverage to thousands of people with stigmatized impairments, the broader disability community expressed concern. As a legal matter, the community thought

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389. The *per se* list read as follows:
Absent, artificial or replacement limbs, hands, feet or vital organs; amyotrophic lateral sclerosis; bipolar disorder; blindness or significant vision loss (as defined in (8)); cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn's disease; cystic fibrosis; deafness or substantial abnormal hearing loss; diabetes; substantial disfigurement; epilepsy (seizure disorders); coronary heart disease or heart attacks; human immunodeficiency virus (HIV infection) or AIDS; kidney or renal diseases (excluding kidney stones); lupus; major depressive disorder; mental retardation (intellectual disabilities); multiple sclerosis; muscular dystrophy; spinal cord injury; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury.
that the list would be used by courts to ratchet up the level of severity required for non-listed impairments. For example, courts might conclude that if absent limbs and cancer were considered “disabilities” under the per se list, non-listed impairments must rise to that level of severity in order to “materially restrict.” Many also believed that a per se list would be a step backward for the disability community and the social model of disability to which it was committed. Listing “disabilities,” they argued, would divide the community by defining who was “in” and who was “out,” and would send the wrong message to courts and society at large by reinforcing the idea that disability was something wrong with some people, not something wrong with society’s treatment of people.

In the same spirit of solidarity that underlay the ADA’s passage, the disability community rejected the per se list and it was dropped from the proposed legislative language.390 If a completely universal definition of disability was impossible, and if “substantially limits” a “major life activ[ity]” had to remain in the statute, the disability community preferred that this language apply to all. No one group would get a “free pass” at the expense of others.

On May 15 and 16, a revised version of the proposed legislative language added “operation of a major bodily function” to the definition of “major life activities” under the first and second prongs.391 Disability rights negotiators deliberately crafted this list of functions—“the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”—broadly to mirror the stigmatized conditions contained in the rejected per se list.392 While, on the one hand, the “major bodily function” provision appeared to tie “disability” more closely to limitations on bodily functions, it was intended to expand the boundaries of the minority group approach by sparing plaintiffs the trouble of detailing how an impairment intimately impacts daily activities such as eating and sleeping.393 Under this provision, the restriction of a bodily function would suffice.

390. See Mayerson, History, supra note 88 (stating that, in lead-up to passage of original ADA, “the ‘class’ concept prevailed — groups representing specific disabilities and specialized issues vowed to work on all of the issues affecting all persons with disabilities. This commitment was constantly put to the test. The disability community as a whole resisted any proposals made by various members of Congress to exclude people with AIDS or mental illness or to otherwise narrow the class of people covered.”). The broader business community was not unhappy to see the per se list go. They, too, expressed concern with the per se list, fearing that it would grow dramatically through agency action and future Congresses to include non-stigmatized impairments.
393. Cf. Imparato, Testimony, supra note 312, at 11 (“The bill will refocus the courts on an employee or applicant’s qualifications and performance and away from intimate details about their disabilities that are irrelevant to the workplace.”).
With the “deal” between the disability and business communities now complete, the proposed legislative language formed the basis of the “ADA Amendments of 2008.” During House Committee mark-ups, the bill was offered as an amendment to H.R. 3195 in the nature of a substitute and passed the House by an overwhelming vote of 402-17 on June 25, 2008.

When the ADAAA reached the Senate, Members of Congress, with the support of the business and disability communities, deleted the definition of “substantially limits” (i.e., “materially restricts”). In its place, the negotiators and congressional staff added several new findings rejecting the excessively high “degree of limitation” required by the Toyota Court and the EEOC. Several new purposes clauses were also added, which required the EEOC to revise its regulations, and which conveyed Congress’s intent:

that the standard created by the Supreme Court in the case of [Toyota] for “substantially limits,” and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, . . . that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and. . . that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.

Negotiators and staff also added a new rule of construction requiring that “[t]he term ‘substantially limits’ shall be interpreted consistently with the findings and purposes” of the Act, that is, broadly and with little fanfare. By this time, the disability rights and business communities agreed that the opportunity for misinterpretation was greatest with never-before used words like “materially restricts,” as opposed to familiar words coupled with a clear directive that those words had to be interpreted broadly.

394. Feldblum et al., Amendments, supra note 106, at 230.
396. Feldblum et al., Amendments, supra note 106, at 239.
398. ADA Amendments Act of 2008 § 2(b)(5); see also id. § (6) (requiring EEOC to “revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act”).
400. See 154 Cong. Rec. S8345-46 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin) (“We have concluded that adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act. The resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination.”).
D. The ADA Amendments Act of 2008

A revised version of the ADAAA (S. 3406) was introduced in the Senate on July 31.\footnote{See The Library of Congress: THOMAS, http://thomas.loc.gov/cgi-bin/query/z?d110:S.3406: (follow “All Congressional Actions” hyperlink) (last visited Nov. 26, 2010).} The ADAAA passed unanimously in both the Senate and House of Representatives, and was signed into law by President George W. Bush on September 25, 2008.\footnote{See id.} Legislative history helped clarify the nearly universal scope of the third prong and its codification of \textit{Arlene}, as well as the reduced showing of limitation required under the first and second prongs.

1. Legislative History Concerning the “Regarded As” Prong

Various statements in the legislative history make clear that the new “regarded as” prong codifies \textit{Arlene}’s broad view of that prong, requiring no showing of limitation on bodily functions, either actual or perceived.\footnote{See infra notes 438-448 and accompanying text.} By covering anyone who is treated adversely because of an impairment, the ADAAA, for the first time, explicitly acknowledges that adverse treatment, itself, “disables.”

According to the Senate Statement of Managers, The third prong of the disability definition will apply to impairments, not only to disabilities. As such, it does not require a functional test to determine whether an impairment substantially limits a major life activity. This section of the definition of disability was meant to express our understanding that unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and our corresponding desire to prohibit discrimination founded on such perceptions. In 1990 we relied extensively on the reasoning in... \textit{Arlene} that the negative reactions of others are just as disabling as the actual impact of an impairment. This legislation restates our reliance on the broad views enunciated in that decision and we believe that courts should continue to rely on this standard.\footnote{154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of Managers); accord H.R. REP. NO. 110-730, pt. 2, at 17-18 (2008).}

The House Committee on Education and Labor stated that “clarification” of the “regarded as” prong was necessary because the third prong incorporated the “substantial limitation” requirement from the first prong by reference. While the plain language used by Congress when it passed the ADA in 1990 incorporates this requirement, Congress did not expect or intend that this would be a difficult standard to meet. On the contrary, \textit{Congress intended and believed that the fact that an individual was discriminated against because of a perceived or...
actual impairment would be sufficient: if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employment of persons with disabilities could be inferred and the plaintiff would qualify for coverage under the ‘regarded as’ test.\footnote{405}

Floor statements also make clear the nearly universal breadth of the “regarded as” prong. Senator Harkin noted how the ADAAA “revives the ‘regarded as’ prong” by enabling individuals “to seek relief if they have been fired or subjected to another adverse action” because of an impairment.\footnote{406} Senator Hatch called the reinvigorated “regarded as” prong “a significant step because individuals will no longer have to prove they have a disability or that their impairment limits them in any way.”\footnote{407} Additionally Representatives Hoyer and Sensenbrenner explained that the “regarded as” prong “is designed to restore Congress’s intent to allow individuals to establish coverage... by showing that they were treated adversely because of an impairment, without having to establish the covered entity’s beliefs concerning the severity of the impairment.”\footnote{408}

Clarifying the bifurcation of the first and second prongs, on the one hand, and third prong, on the other, Representatives Hoyer and Sensenbrenner further stated that:

An individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation or modification—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment.\footnote{409}

The ADAAA’s legislative history also clarifies the two caveats to universal coverage under the “regarded as” prong. According to the House Committee on the Judiciary, Congress excluded transitory and minor impairments, “claims at the lowest end of the spectrum of severity,” to “respond[] to concerns raised by [the employer] community regarding potential abuse of [the Act] and the misapplication of resources on individuals with minor ailments that last only a short period of time.”\footnote{410}

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\footnotetext{409}{Id. at H6068.}
\footnotetext{410}{H.R. REP. NO. 110-730, pt. 2, at 18 (2008) (“[A]bsent this exception, the third prong of the definition would have covered . . . common ailments like the cold or flu . . . .”); see also H.R. REP. NO. 110-730, pt. 1, at 14 (same). In floor statements, Representatives Nadler and Smith explained that “trivial” and “minor” impairments would also include “stomachaches,” “mild seasonal allergies,” “a

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Because few impairments are transitory and minor, the Committee on the Judiciary noted that the “transitory and minor” exception “should be construed narrowly.”

As for the prohibition on reasonable accommodations under the “regarded as” prong, the Senate Statement of Managers explains that this exception is “an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition, properly applied.” While this provision overrules “a number of courts [that] have required employers to provide reasonable accommodations for individuals who are covered solely under the ‘regarded as’ prong,” the Statement of Managers notes that the holdings in those cases stemmed from “the overly stringent manner in which the courts have been interpreting [the first prong].” The ADAAA’s legislative history makes clear that, while the ADAAA puts every person requiring an accommodation to the task of demonstrating the limitation that needs accommodating under the first (or second) prong, this task should no longer be a difficult one given changes to that prong.

2. Legislative History Concerning the First and Second Prongs

In addition to acknowledging the nearly universal scope of the “regarded as” prong, the ADAAA’s legislative history recognizes the much lower threshold for determining whether a person is “disabled” under the first and second prongs. While the ADAAA maintains the words “substantially limited in one or more major life activities” in the definition of disability, the legislative history makes clear that these words “are not meant to be a demanding standard.” Specifically, the legislative history


412. 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008) (Statement of Managers); see also 154 CONG. REC. H8290 (daily ed. Sept. 17, 2008) (statement of Rep. Nadler) (“[I]ndividuals who need accommodations will receive them because, with reduction in the burden of showing a ‘substantial limitation,’ those individuals also qualify for coverage under prongs 1 or 2 (where accommodation is still required.”).

413. 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (Statement of Managers) (“The [ADAAA] rejects the high burden required in these cases and reiterates that Congress intends that the scope of the Americans with Disabilities Act be broad and inclusive. It is the intent of the legislation to establish a degree of functional limitation [under the first and second prongs] required for an impairment to constitute a disability that is consistent with what Congress originally intended, a degree that is lower than what the courts have construed it to be.”); see also H. REP. NO. 110-730, pt. 1, at 7 (2008) (“The Committee intends to lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA, and to refocus the question on whether discrimination on the basis of disability occurred.”).
emphasizes: the ADAAA’s findings and purposes that reject the *Sutton* trilogy’s consideration of mitigating measures, *Toyota*’s demanding standard for qualifying as disabled, and the EEOC’s overly restrictive definition of “substantially limits” a “major life activit[y]”; the ADAAA’s rule of construction cross-referencing those findings and purposes when interpreting “substantially limits” a “major life activit[y]” under the first and second prongs; and its expansion of the list of major life activities to include, among other things, the operation of major bodily functions.\textsuperscript{418}

E. Proposed Regulations

On September 23, 2009, the EEOC issued proposed regulations implementing the ADAAA.\textsuperscript{419} Closely tracking the ADAAA’s legislative history, these regulations underscore the breadth of the “regarded as” prong and the lower threshold for determining “disability” under the first and second prongs. According to the EEOC, “[t]he effect of [the ADAAA’s] changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.”\textsuperscript{420}

In place of the three categories under which a person needed to demonstrate coverage under the old “regarded as” prong, the EEOC substitutes a single, straightforward rule drawn directly from the ADAAA and its legislative history.\textsuperscript{421} According to the EEOC,

Proof that the individual was subjected to a prohibited employment action, e.g., excluded from one job, because of an impairment (other than an impairment that is transitory and minor . . .) is sufficient to establish coverage under the “regarded as” definition . . . Evidence that the employer

\textsuperscript{416} See, e.g., 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (Statement of Managers) (“To be clear, the purposes section conveys our intent to clarify not only that ‘substantially limits’ should be measured by a lower standard than that used in *Toyota*, but also that the definition of disability should not be unduly used as a tool for excluding individuals from the ADA’s protections.”).

\textsuperscript{417} See, e.g., 154 CONG. REC. S8841 (daily ed. Sept. 16, 2008) (Statement of Managers) (“[T]he term ‘substantially limits’ shall be construed consistently with the findings and purposes of the [ADAAA]. This rule of construction, together with the rule of construction providing that the definition of disability shall be construed in favor of broad coverage of individuals[,] sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently.”).

\textsuperscript{418} See, e.g., H.R. REP. NO. 110-730, pt. 2, at 3 (2008); see also 154 CONG. REC. S8350 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin) (“[P]eople with immune disorders or cancer or kidney disease or liver disease . . . no longer need to show what specific activity they are limited in, in order to meet the statutory definition of disability.”).

\textsuperscript{419} EEOC Proposed Rules, supra note 92, at 48,431. At the time this Article went to press, the EEOC had not issued final regulations implementing the ADAAA.

\textsuperscript{420} Id. at 48,432.

\textsuperscript{421} Id. at 48,443.
believed the individual was substantially limited in any major life activity is not required.\textsuperscript{422}

But the EEOC proposed regulations do not stop there. The regulations arguably make it easier for a person to demonstrate that he or she was treated adversely because of an impairment by prohibiting, among other things, “action[s] based on a symptom of such an impairment,”\textsuperscript{423} “even if the employer is unaware of the underlying impairment.”\textsuperscript{424} As the EEOC explains, under this interpretation, “[a]n employer that refuses to hire someone with a facial tic regards the individual as having a disability, even if the employer does not know that the facial tic is caused by Tourette’s Syndrome.”\textsuperscript{425} Lastly, in order to make perfectly clear that the “regarded as” prong requires only adverse treatment based on an impairment, and not that the employer necessarily harbor any “myths, fears, and stereotypes” relating to the impairment, the EEOC proposed regulations delete certain language pertaining to “myths, fears, and stereotypes.”\textsuperscript{426}

The EEOC proposed regulations also acknowledge the ADAAA’s broadening of coverage under the first and second prongs. The regulations contain various provisions mirroring those in the ADAAA, which ratchet down the degree of limitation required by the words “substantially limits one or more major life activities.”\textsuperscript{427} One such provision rejects the EEOC’s former construction of the term “substantially limits” by stating that “[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.”\textsuperscript{428}

Significantly, the proposed regulations also include a non-exhaustive per se list of medical impairments that “will consistently meet the definition of disability”\textsuperscript{429} as well as a list of examples of other impairments that “may

\begin{itemize}
\item \textsuperscript{422} Id. According to the EEOC, the “regarded as” prong would cover an applicant refused hire because of skin graft scars, or an employee terminated because of cancer. Id. at 48,448-49.
\item \textsuperscript{423} Id. at 48,443. The proposed regulations also prohibit actions “based on medication or any other mitigating measure used for such an impairment.” See id.
\item \textsuperscript{424} Id. at 48,449.
\item \textsuperscript{425} Id. at 48,443.
\item \textsuperscript{426} Id. at 48,449 (“Of course, evidence that an employer harbored myths, fears, and stereotypes related to an impairment may be relevant in establishing that the employer took a prohibited action based on the impairment.”).
\item \textsuperscript{427} Id. at 48,432.
\item \textsuperscript{428} Id. at 48,440 (emphasis added).
\item \textsuperscript{429} Id. at 48,441. These impairments include: deafness; blindness; intellectual disabilities (formerly termed mental retardation); partially or completely missing limbs; mobility impairments requiring the use of a wheelchair; autism; cancer; cerebral palsy; diabetes; epilepsy; HIV or AIDS; multiple sclerosis and muscular dystrophy; major depression; and bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Id.
\end{itemize}
be disabling for some individuals but not for others.\footnote{430} By providing lists of both per se and potentially substantially limiting impairments, the proposed regulations confirm the expansion of the boundaries of “substantially limits” and the recognition of stigma. With these lists, more people will be covered under the ADAAA and less proof of limitation will be required. For many impairments falling within the first and second prongs, “substantial limitation” ought to be determined “quickly and easily.”\footnote{431} Other impairments may require “somewhat more analysis,” but still “less than that required prior to the [ADAAA].”\footnote{432} These lists thus make good on Congress’s intent that “the determination of whether an individual has a disability should not demand extensive analysis.”\footnote{433}

VIII. WHAT THE ADAAA CAN AND CAN’T DO FOR DISABILITY RIGHTS

One might argue that while the reinvigorated “regarded as” prong codifies Arline’s broad interpretation of that prong, it is not “universal” because it contains two important caveats that limit its reach: it does not apply to reasonable accommodations (which are at the root of most ADA employment cases),\footnote{434} nor does it apply to all impairments.\footnote{435} One might further argue that the ADAAA does not go far enough in other ways: that by keeping intact the words “substantially limits” a “major life activity,” the ADAAA maintains reasonable accommodation protection for only a select (albeit vastly expanded) “protected class” of people.\footnote{436} While both of these arguments are right, they miss the “magic” of what the ADAAA has accomplished.

In the first place, by embracing nearly universal nondiscrimination protection under the “regarded as” prong, and leaving reasonable accommodation coverage to those with substantially limiting impairments under the first and second prongs, the ADAAA brings coherence to a

430. Id. at 48,442. These impairments include: asthma; high blood pressure; learning disabilities; back or leg impairments; psychiatric impairments such as panic disorder, anxiety disorder, and some forms of depression other than major depression; carpal tunnel syndrome; and hypothyroidism. Id.

431. Id. at 48,441 (“Because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity.”).

432. Id. at 48,447.

433. Id. at 48,432; see also Nelson D. Cary, Recent Legislative and Regulatory Developments: Employer Compliance Strategies, in THE IMPACT OF RECENT REGULATORY DEVELOPMENTS IN EMPLOYMENT LAW: LEADING LAWYERS ON ADAPTING TO CHANGING REGULATIONS, PROTECTING CLIENTS FROM LIABILITY, AND IMPLEMENTING SUCCESSFUL COMPLIANCE STRATEGIES 23, 30 (Aspatore Books ed., 2009) (“The EEOC’s listing of impairments in this fashion reveals the fundamental shift in the ADAAA’s focus away from the ‘disability’ inquiry.”).

434. See Leonard, supra note 28, at 23.

435. See supra notes 386-387 and accompanying text.

436. See supra note 385 and accompanying text.
definition of disability in tension.\textsuperscript{437} It strikes a balance between the universal and minority group approaches, turning Arline’s holding from anomaly to reality, and staunching the damage done by \textit{Sutton} and \textit{Toyota}.\textsuperscript{438} Under the ADAAA, any one of us may be subjected to discrimination based on a real or perceived impairment and, for that reason, nearly all of us should be protected.\textsuperscript{439} Likewise, only some of us have impairments that (in their active state and absent mitigating measures) are stigmatized, and only this group of us should be allowed to request reasonable accommodations.\textsuperscript{440}

The ADAAA’s reinvigorated “regarded as” prong also signals long-awaited parity between the ADA and other civil rights laws. By prohibiting discrimination based on virtually any impairment, real or perceived, the third prong harmonizes the concept of impairment with race, sex, and other protected characteristics. According to the ADAAA, the appropriate focus is on whether an adverse action was taken based on such a characteristic (the actual or perceived impairment), not on whether the protected characteristic exists to a sufficient degree.\textsuperscript{441} Prejudice, stereotypes, and neglect based on impairments are now prohibited to the same extent as they would be in the case of other protected characteristics.

The new “regarded as” prong also paves the way toward a broader conception of the social model of disability, one less likely to lapse into the medical model’s “truly disabled” approach. By defining “disability” to include just about everyone on the continuum of impairments, the “regarded as” prong “dissolves the line between ‘disabled’ and ‘the rest of us.’”\textsuperscript{442} We are all impaired in some manner. What makes us different is that some of us experience negative treatment based on impairments, while others do not. For the first time, the ADAAA makes clear that it is attitudes, not impairments themselves, that “disable.”\textsuperscript{443} Many impairments do not subject people to adverse societal action, but some impairments do, at least some of the time, and it is impossible to say for certain which will. Stigma is a poor indicator because it ignores those who have, had, or are perceived as having non-stigmatized impairments and who nevertheless experience

\begin{itemize}
\item \textsuperscript{437} ADA Amendments Act of 2008 § 4(a), 42 U.S.C.A. § 12102(3)(A) (West 2010).
\item \textsuperscript{438} \textit{See supra} notes 289-290 and accompanying text.
\item \textsuperscript{439} \textit{See ADA Amendments Act of 2008 § 4(a), 42 U.S.C.A. § 12102(3)(A) (West 2010).}
\item \textsuperscript{440} \textit{See supra} notes 437-443 and accompanying text.
\item \textsuperscript{441} \textit{See supra} notes 390-392 and accompanying text.
\item \textsuperscript{442} Feldblum, \textit{Definition, supra} note 20, at 158. As Professor Cass Sunstein has noted, there is no “sharp dichotomy” between “those who are able and those who are not. [T]here is a continuum here. . . . [T]he purpose of the ADA, rightly conceived,” he adds, “is to break down distinctions that have their current force only because of social practices that have been so taken for granted that they are often unseen as practices at all.” Cass R. Sunstein, \textit{Caste and Disability: The Moral Foundations of the ADA}, 157 U. PA. L. REV. PENNUNBRA 101, 106 (2008) (responding to Elizabeth F. Emens, \textit{Integrating Accommodation}, 156 U. PA. L. REV. 839 (2008)).
\item \textsuperscript{443} \textit{See supra} notes 390-392 and accompanying text.
\end{itemize}
adverse treatment because of them. For example, consider a “high-functioning” person with ASD who is fired because he does not interact well with others, or a person with carpal tunnel who is fired because she is considered to be a “malingering.” The new “regarded as” prong does not use stigma as a precondition for “disability.” Instead, this prong acknowledges that, in general, whenever a person is treated adversely based on an impairment, that person is “disabled” and entitled to protection under the ADA, regardless of how severe the impairment is or is thought to be.\[444\]

By erasing limitation from its “regarded as” prong and protecting virtually the entire continuum of impairments, the ADAAA forces us to think about broader normative theories. In the nondiscrimination context, “disability” is, for the most part, no longer a thing of degree. If moles on cheeks and slight limps—assuming they are not transitory—are prohibited grounds for discrimination, should nondiscrimination extend to other conduct where the protected “group” is not so well-defined? For example, are “the poor” a stigmatized group, and should we protect them from discrimination even if they aren’t?\[445\]

While the ADAAA maintains the minority group approach under its first and second prongs by retaining the words “substantially limits” a “major life activity[\textit{y}’]’, it expands that “minority” by forbidding narrow interpretations of those terms.\[446\] In so doing, the ADAAA recalibrates what sort of limitations give rise to stigma. Stigma no longer attaches only to impairments that “prevent” or “severely restrict” performance of a major life activity.\[447\] The ADAAA’s expanded first and second prongs acknowledge that stigma is more resilient than that. Under these prongs, it is enough that a person’s life activities or bodily functions are or were limited in some way.\[448\] This means that while not everyone will have a right to a reasonable accommodation, many more will. A “high-functioning” person with ASD is now probably eligible for a reasonable accommodation because he may be substantially limited in the operation of brain function, or in a major life activity like social interaction.\[449\] This is especially likely now that he must be looked at in his unmitigated state (i.e.,

\[446\] ADA Amendments Act of 2008 § 4(a), 42 U.S.C.A. § 12102(1); see supra notes 414-417, 430-432 and accompanying text.
\[448\] See ADA Amendments Act of 2008 § 2(a)(7)-(8), (b)(5)-(6).
\[449\] See 42 U.S.C.A. § 12102(2) (major life activities include seeing, hearing, speaking, communicating, and brain function); see also EEOC Proposed Rules, supra note 92, at 48,440 (major life activities include “interacting with others”).
“without regard to ameliorative effects of mitigating measures,” such as “learned behavioral or adaptive neurological interventions”). Likewise, the person with carpel tunnel is now probably eligible for a reasonable accommodation because she is substantially limited in performing manual tasks, such as typing.

Many will no doubt argue that, regardless of the ways in which the ADAAA lowers the bar for determining disability under the first and second prongs, maintenance of the words “substantially limits” a “major life activ[ity]” enshrines the medical model of disability in the ADA and threatens to erode the ADA’s protections for all but the “truly disabled.” Eligibility criteria are for social service programs and charity, this argument goes, not civil rights law— “equality for some” is an oxymoron. While this purist position is attractive in its simplicity, it misstates the social model of disability.

The social model is fundamentally about causation, not coverage. While society may “disable” people based on their impairments, it does not necessarily follow that disability rights law must protect everyone. Of course, the social model permits coverage of everyone who is treated adversely because of an impairment (the universal approach). But it also permits coverage of only some, such as those with stigmatized impairments (the minority group approach), and the ADAAA’s first and second prongs recognize this.

By requiring a much lower showing of substantial limitation in the reasonable accommodation context, the ADAAA’s first and second prongs do not advance the medical model—i.e., that reasonable accommodations ought to go to those severely limited by their impairments. Instead, they advance a particular breed of the social model, the minority group approach, which recognizes that reasonable accommodations ought to go to those limited by the stigma society attaches to their impairments. While limitations on bodily functioning are relevant to determining stigma, this is not because the impairment “disables” people and makes them eligible for accommodations. Rather, under the ADAAA’s first and second prongs, it is the stigma that “disables” and makes them eligible. Under the third prong, on the other hand, the universal approach to coverage reigns. Any adverse treatment (short of the failure to reasonably accommodate) based on almost any impairment (stigmatized or not) “disables” and entitles one to

450. See 42 U.S.C.A. § 12102(4)(E)(i)(IV) (West 2010); see also EEOC Proposed Rules, supra note 92, at 48,441 (including “autism” among impairments that “will consistently meet the definition of disability”).

451. See 42 U.S.C.A. § 12102(2)(A); see also EEOC Proposed Rules, supra note 92, at 48,442 (including “carpal tunnel syndrome” among impairments that “may be disabling for some individuals but not for others”).

452. See supra note 46-47 and accompanying text.

protection. The ADAAA’s changes to the definition of disability are therefore consistent with the social model of disability—albeit different approaches to coverage under that model.

There is, of course, much the ADAAA does not do for disability rights. It does nothing to integrate those who have difficulty getting ready for work and going to work, nor does it eliminate the disincentives to work built into Social Security and other disability benefits programs. It does not incentivize employers to hire people with known impairments or to accommodate such people after they are hired. It does not enhance the EEOC’s capacity to bring failure-to-hire claims, which are notoriously difficult to prove and seldom brought by the private bar. Nor does it change the requirement that accommodations be “reasonable” and not impose an undue hardship.

But on the elemental question of who can claim protection under the ADA—of who has a “disability”—the ADAAA does a lot. The early word is out on the ADAAA, and for disability rights advocates, the word is good.

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455. See BAGENSTOS, CONTRADICTIONS, supra note 8, at 128.
456. See id. at 140-41.
457. See id. at 137-38; see also Chai R. Feldblum, Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender, 54 Me. L. Rev. 159, 184-85 (2002).
458. BAGENSTOS, CONTRADICTIONS, supra note 8, at 127-28, 133-35.
459. NCD, RIGHTING THE ADA, supra note 41, at 118 (discussing Supreme Court’s narrowing of reasonable accommodation mandate).
460. See supra note 7 and accompanying text; see, e.g., Carmona v. Southwest Airlines Co., 604 F.3d 848, 855 (5th Cir. 2010) (stating that amendments to ADA “would be very favorable to plaintiff’s case if they are applicable, because they make it easier for a plaintiff with an episodic condition like plaintiff’s] to establish that he is an ‘individual with a disability.’”); Kania v. Potter, 358 Fed. Appx. 338, 341 n.5 (3rd Cir. 2009) (stating that ADAAA “substantially broadens the definition of ‘disability,’ and thus expands the class of employees entitled to protection under the Rehabilitation Act”); Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 566 (6th Cir. 2009) (stating that ADAAA’s change to ‘regarded as’ prong “expands the coverage of the ADA to employer actions not previously covered”); Beveridge v. HD Supply Waterworks, L.T.D., No. 7:08-CV-52 (HL), 2009 WL 4755370, at *5 n.8 (M.D. Ga. Dec. 7, 2009) (“Under this broadened definition, [the plaintiff] would likely be successful in proving he was ‘regarded as’ disabled . . . .”); Schmitz v. Louisiana, No. 07-891-SCR, 2009 WL 210497, at *2-3 (M.D. La. Jan. 27, 2009) (“Before the [ADAAA, the ‘regarded as’ prong] of the definition was interpreted to mean that an employer had to regard or perceive an individual as substantially limited in a major life activity. The ADAAA eliminates this requirement . . . . The new provision states that an individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that the employer discriminated against him because of an actual or perceived impairment, ‘whether or not the impairment limits or is perceived to limit a major life activity.’ . . . Clearly, the new ADAAA provisions related to the definition of disability create new legal consequences . . . and broaden the scope of an employer’s potential liability under the statute.”); Rudolph v. U.S. Enrichment Corp., Inc., No. 5:08-CV-00046-TBR, 2009 WL 111737, at *6 (W.D. Ky. Jan. 15, 2009) (“[B]ecause the ADA Amendments Act broadens the definition of ‘disability’ and who may have a cause of action under the ‘regarded as’ prong of the [ADA], the amended Act would potentially increase [the employer’s] liability for past conduct.”).
IX.
CONCLUSION

The social model of disability teaches that it is society’s treatment of impairments, not the impairments themselves, that limit people. But this model permits two different approaches to civil rights coverage: protect only some (the minority group approach) and protect all (the universal approach). Building on the work of others, I have tried to show three things about these dueling approaches to coverage and their relationship to the ADA.

First, the ADA’s adoption of the Rehabilitation Act’s definition of disability was not an abandonment of the universal approach to coverage. Instead, the ADA’s three-pronged definition embodied a tension between the minority group approach (in its first and second prongs) and the universal approach (in its “regarded as” prong). While the minority group approach ultimately won out in the courts, that victory was not the result of a deliberate decision on the part of disability rights advocates to subordinate the universal approach.

Second, the ADAAA, the result of negotiations between the business community and disability rights advocates, resolves this tension between covering some, on the one hand, and everyone, on the other hand. Specifically, the ADAAA brings coherence to the ADA’s definition of disability by providing nearly universal nondiscrimination protection under the “regarded as” prong, and extending reasonable accommodations under the first and second prongs to a broader but not unlimited group of people whose impairments are stigmatized. The decision to require limitation of bodily functions in the reasonable accommodation context, moreover, was not based on any fundamental difference between nondiscrimination and accommodation. Rather, the decision was a practical one, guided by the ADA’s plain language and by political realities.

Third, the resolution of this tension matters for the ADA and for disability rights more generally. The new “regarded as” prong represents a bold step forward for the social model of disability—an acknowledgment that there is no “us” and “them.” By protecting nearly everyone from discrimination based on impairments, the ADAAA’s “regarded as” prong relieves people of the need to show that they are different because of the way their impairments limit them. Now all they need show is that others limited them because of their impairments. That negative treatment, itself, brings them within the ADA’s coverage, just as negative treatment based on other characteristics brings plaintiffs within the protection of other civil rights laws. And while Congress retained the much maligned language requiring substantial limitation of a major life activity, the ADAAA greatly dilutes this language and limits its relevance to reasonable accommodations only. By greatly relaxing the “disability” standard under the first and
second prongs, the ADAAA elaborates on what it means to be stigmatized, and ensures reasonable accommodations to those who are.

The ADAAA is not a cure-all, but it is radical. By reorienting our conception of “disability,” the ADAAA changes how we think about ourselves and, ultimately, how we treat, and ought to treat, each other.