AN AMERICANS WITH DISABILITIES ACT FOR EVERYONE, AND FOR THE AGES AS WELL

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INTRODUCTION

A perennial problem in understanding and implementing the Americans with Disabilities Act (ADA) is whether it is aimed at

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protecting only people with disabilities. Interpreting the statute in this way focuses attention on the problem of determining who is disabled. It also invites thinking that the statute conveys special benefits for disabled people, thereby suggesting that its effect is to privilege them—even if the privilege might stem from their disadvantage or need. Thus, this familiar but mistaken understanding of the ADA as conferring a right on one type of person can only be cast in a way that incites resentment.

In this Article, we take on this categorical view of the ADA. We argue that the statute from the beginning was meant to protect against an identified form of discrimination rather than to protect an identified group of people and, moreover, that in any case the concept of "disability" will not bear the weight the categorical view would ascribe to it. We contend as well that the ADA Amendments Act of 2008 (ADAA or Amendments Act) reaffirms this universal interpretation of the statute.

I. THE ADA: CATEGORICAL OR UNIVERSAL?

Should access to a right that protects people from being victimized by disability-based discrimination extend only to individuals to whom disablement is correctly ascribed? In calling on Congress in 1986 for notice to the nation that discrimination against people with disabilities will no longer be tolerated, the U.S. National Council on Disability (NCD),[1] the federal agency charged with reviewing the effectiveness of existing U.S. disability policy in achieving social integration for disabled people and contributing to "the independence and dignity of such individuals" was decisive in answering.[2]

The NCD said "No!" In this rejoinder, the NCD wrote "the statute should straightforwardly prohibit 'discrimination on the basis of handicap,' without establishing any eligibility classification for the coverage of the statute."[3]

Nonetheless, many courts interpreting the ADA thought the answer should be "Yes," and the Supreme Court resoundingly affirmed these court decisions in the *Sutton* trilogy and the *Williams* decisions.[4]

1 At the time called the National Council on the Handicapped.

2 Rehabilitation Program, Pub. L. No. 98-221, 98 Stat. 18-19 (1984).

3 Nat'l Council on Disability, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—with Legislative Recommendations*, NCD (Feb. 1986) [hereinafter National Council on Disability], https://ncd.gov/publications/1986/February1986.

4 The decisions commonly called the *Sutton* trilogy are *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). The Court's 2002 decision in *Toyota Motor Manufacturing., Kentucky., Inc. v. Williams*, 534 U.S. 184 (2002), further narrowed the interpretation of the ADA's definition of disability.

In ruling in these cases, the Supreme Court thought that plaintiffs were insufficiently handicapped to be classified as eligible for ADA protection, no matter how virulently and unfairly damaging to them the disability discrimination from which they sought protection might be.

Thus, twentieth century anti-discrimination jurisprudence made the idea of disablement centrally determinative in shaping the safeguarding right the ADA conferred. Ascription of disablement was the key to seeking protection against disability discrimination, on this view. Work-capable plaintiffs with one or another moderate physical or mental deficit that contributed to their being denied employment learned that, despite Congress's proclamation about disability discrimination being wrong, they possessed no civil right against being subjected to such discrimination. Individuals with functional deficits that seemed to courts to be much more severe, or who at least appeared more limited in function, were approved for inclusion in the disability classification and as a result could exercise that right. So being classified as disabled, ordinarily a mark of disadvantage, became privileging, at least for the purpose of acquiring protection against disability discrimination.

In this Article, we examine both the usefulness and the propriety of confining the right to protection against discrimination based on disability only to individuals whose disablement is not in question. These are people whose disability is beyond dispute, who have survived dispute by satisfying some vetting system, or whose condition at least does not arouse dispute about classification in the circumstances in which redress against disability discrimination is being sought. We shall show that despite the corrections in the ADAAA, courts continue to be inclined to interpret the 1990 ADA as intending inherent privilege for this subset of individuals. In doing so, we shall take issue with some commentators[5] who have thought that while reaching for a more effective and fairer model in the ADAAA, Congress's attempt to correct this misaimed jurisprudential trajectory should be viewed as continuing to address disability discrimination protection and redress in a gate-keeping rather than an inclusive mode.

Subsequently, we will consider what "disablement" is or might mean as it is the property that courts have concluded must be present in sufficient magnitude to achieve full access to the ADA's promised civil rights. Having very briefly reviewed the development of the idea of

[5] *See, e.g.*, Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205 (2012) [hereinafter *Disabling Attitudes*]; Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 HEALTH MATRIX 205 (2016); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1 (2014); Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689.

disability through its use in U.S. policy, we will contend that disablement is fundamentally a term of art, constructed to have different meanings and therefore to apply to different collections of individuals depending on the purpose of the program in which it is used. As such, instances of its use are both too narrow and too unstable to be determinative of which individuals shall or shall not be protected by civil rights statutes from disability discrimination when this latter dangerous conduct is viewed as a civil wrong.

How we resolve the role of disability ascriptions affects whether protection against discrimination based on disability is more like an entitlement derived from or dependent on membership in the disability class, or whether it is more like a universal or general right pertaining to everyone regardless of whether they qualify on some standard as being disabled. We will argue that the latter, rather than the former, is the right that the NCD urged Congress to reach and, further, that it is the right vehicle to make good claims seeking redress from disability discrimination.

II. The Back Story of the ADA

In hindsight, the classificatory tendency we reference, but reject, should not have been surprising. Just a few years before Congress adopted the ADA, the U.S. Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.* had declined to classify intellectual disablement as distinguishing a category of people who in U.S. society had been systematically wrongly disadvantaged by stereotyping, stigma, and predation.[6] Despite Justice Thurgood Marshall's vigorous dissent, focusing on how historically in the United States intellectually disabled people have been excluded and exploited, the Court's majority relied on a narrative according to which state and federal legislatures were already on the job with adequate safeguards for the populations whom disablement made vulnerable to such harms.[7] Citing this story, the Court rejected extending the standard of elevated scrutiny of governmental disparate treatment to the class of people with intellectual disabilities.

In the following year, the NCD came out in support of disability-focused civil rights legislation.[8] Contrary to the *Cleburne* Court's picture of a beneficent network of programs safeguarding the nation's disabled citizens from discrimination's harm, the Council complained that federal policy overemphasized disabled people's need for public

6 473 U.S. 432 (1985).

7 *Id.*

8 *See* National Council on Disability, *supra* note 3.

assistance income support and underemphasized initiatives to secure self-sufficiency through equal opportunity. To achieve the latter goal, the NCD's transmittal letter to the Executive and Legislative branches insisted that the many extant but unnecessary and unfair barriers to which disabled people are—often thoughtlessly—subjected must no longer block the way.

The NCD condemned the existing patchwork policy approach as insufficient because it was nowhere near as broad as laws prohibiting discrimination on the basis of race, color, sex, religion, or national origin:

> Because of their narrow coverage, handicap nondiscrimination laws fail to serve the central purpose of any human rights law-providing a strong statement of a societal imperative. An adequate equal opportunity law for persons with disabilities will seek to obtain the voluntary compliance of the great majority of law-abiding citizens by notifying them that discrimination against persons with disabilities will no longer be tolerated by our society.[9]

Further, "the statute should straightforwardly prohibit 'discrimination on the basis of handicap,' without establishing any eligibility classification for the coverage of the statute."[10] There should be specificity and standards concerning nondiscrimination and consistency in the interpretation and application of the multiplicity of federal statutes.

The ADA was introduced into Congress in 1988 and signed into law by President George H.W. Bush in 1990.[11] But the ADA has not been interpreted in accord with this mandate and not nearly as much as hoped for has changed.

The NCD's 1986 report documented how integrating disabled people into the general population, and in particular into the nation's workforce, was being frustrated by disability-based discrimination. As a consequence, various expressions of disability-based discrimination were undermining federal efforts to elevate "the independence and dignity of such individuals."[12]

Congress and the President responded with the ADA. This statute, sometimes viewed as the last great achievement of the civil rights era, was signed into law by the President in July of 1990, with a ceremony that saw mobility-impaired people on crutches or walkers or in wheelchairs, some with prosthetic limbs, visually-impaired people with

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[9] *Id.*

[10] *Id.*

[11] *See, e.g.*, *Remarks of President George Bush at the Signing of the Americans with Disabilities Act*, EEOC, https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html (last visited Sept. 29, 2017).

[12] National Council on Disability, *supra* note 3.

white canes and guide dogs, and American Sign Language–signing deaf people, as well as people diagnosed as intellectually impaired, celebrating on the White House lawn.[13] Yet, to whom the newly strengthened civil rights protection reached—whether only to individuals with physical or mental limitations similar to those who were celebrating or to all citizens with unusually limiting physical or mental conditions or even more broadly to all citizens whom disability discrimination might victimize—was in no way clear.

In attempting to delineate vulnerability to disability discrimination, drafters borrowed language from preceding legislation of a different kind. The definition of disability on which the ADA was built was drawn from the Rehabilitation Act of 1973,[14] where it had not been a particular source of controversy. When reauthorization of the Rehabilitation Act arose, Congress had come around to considering that special programs for distributing resources to disabled individuals did not suffice to restore them to productive social roles. Such benefits did not reduce the societal antipathy that straitened their access to opportunity, so in 1973 anti-discrimination provisions were added to revise the Rehabilitation Act in the hope of improving the outcomes in education and employment through funding authorized by that law.[15] As components of the Rehabilitation Act, these civil rights provisions—Sections 503, 504, and 508 of the amended act—pertained to protecting not everyone, but rather the class of rehabilitation recipients, both actual and potential, from disability-based discrimination that could reduce the effectiveness of the services provided by programs that the Act supports.

Judicial decisions about whether particular individuals are eligible for protection against disability-based discrimination did not indicate how narrowly courts' construals might eventually be. In 1987, as the drafting of the ADA took shape, the Supreme Court ruled in *School Board of Nassau County v. Arline* that the plaintiff was protected by the civil rights provisions of the Rehabilitation Act because her employer had regarded her as disabled. The Court reasoned that this was disability discrimination because when Arline's tuberculosis infection was active it constituted an impairment, and when it was not active she still had a record of impairment that had resulted in the School Board firing her.[16]

The initial ADA case that reached the Supreme Court, *Bragdon v.*

[13] Bureau of Educ. & Cultural Affairs, *The Americans with Disabilities Act Signing Ceremony, July 26, 1990*, YOUTUBE (June 30, 2015), https://www.youtube.com/watch?v=dFKicqqVME8.

[14] 29 U.S.C. § 705 (2012).

[15] Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/news/publications/the-history-of-the-ada.

[16] School Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987).

Abbott, was also about classification.[17] Abbott's HIV infection was virtually asymptomatic when she sought dental treatment, but she disclosed it on a patient health questionnaire.[18] Dentist Bragdon declined to treat her in his office but offered to do so in a hospital, where the venue would have imposed additional costs on the patient. Abbott refused this special condition for treatment and sued, claiming to have been subjected to disability discrimination.[19] The Supreme Court affirmed the lower court's rulings that Abbott qualified as a disabled person "in light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease"[20] and in conjunction with the infection having "substantially limited her ability to reproduce in two independent ways."[21]

Nevertheless, at the turn of the twentieth and twenty-first century, the U.S. Supreme Court ruled in several cases that plaintiffs were insufficiently handicapped to be classified as eligible for ADA protection, no matter how virulent, unfair, and damaging to them the disability discrimination from which they sought protection might be. Late twentieth century anti-discrimination jurisprudence made the idea of disablement centrally determinative in shaping the safeguarding right the ADA conferred. On this view, ascription of disablement was the key to seeking protection against disability discrimination. Work-capable plaintiffs with one or another moderate physical or mental deficits that contributed to their being denied employment learned that, despite Congress's proclamation about disability discrimination being wrong, they possessed no civil right against being subjected to such discrimination. Individuals with functional deficits that seemed more severe did thereby gain that right, so being classified as disabled, ordinarily a mark of disadvantage, became privileging, at least for the purpose of acquiring protection against disability discrimination.

III. THE COURT-CREATED PARADOX

Early in the ADA's history, courts construing the ADA began to see it as a categorical statute: that is, a statute that provided protection against discrimination only to the subset of the population that could show that they qualified as disabled.[22] Interpreting the ADA in this way

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17 Bragdon v. Abbott, 524 U.S. 624 (1998).

18 *Id.* at 628–29.

19 *Id.*

20 *Id.* at 637.

21 *Id.* at 639.

22 *See, e.g.*, Hamm v. Runyon, 51 F.3d 721 (7th Cir. 1995) (showing that for an employer to regard an employee as disabled requires evidence that the employer knew that the employee had an impairment and that the impairment was disabling); Ennis v. Nat'l Ass'n of Bus. &

constructed it as giving special help to people with disabilities, thus potentially fostering resentment among those not eligible for the seemingly specially privileged treatment in question.[23]

During the statute's initial period of enactment, the Supreme Court deployed this interpretation to increasingly tighten the reach of the protected category. The Court's holdings included assessment of the person with a disability in her corrected state.[24] This stipulation meant that effective management of, or compensation for, a condition could disqualify people from statutory protection, even when they needed accommodation for the management to be accomplished.[25] The holdings also construed substantial limitation of a major life activity to mean that the person cannot perform basic "activities that are of central importance to [most people's] daily [lives]."[26] The paradoxical result of these decisions was that the ADA increasingly failed to provide protection even for many people originally envisioned as core to its statutory goals of inclusion.

The ADAAA sought to address this paradox. In the last Section of the next Part, we explain how it re-articulated a universalist understanding of the statute. Subsequently, we explain why amendments using a categorical interpretation cannot remediate the underlying problems that classification or eligibility criteria precipitate because of the instability of the meaning of "disability" due to its usage as a term of art.

A. *The ADAAA as Addressing Discrimination Not People*

To address the paradox created by the courts in interpreting the ADA, the ADAAA findings explained that in enacting the ADA, Congress intended "a clear and comprehensive national mandate for the

Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995) (showing that the employee's child has HIV was insufficient to show that the child has an impairment that substantially limited a major life activity); Bolton v. Scrivner Inc., 36 F.3d 939 (10th Cir. 1994) (showing that an employee's disability prevented him from performing his job was insufficient to establish substantial limitation in the major life activity of working). In these and many other cases, employees lost on summary judgment because the employer successfully maintained that the employees had not shown that they were able to meet the statutory definition of disability.

23 Or so some commentators have argued. *See*, *e.g.*, *Disabling Attitudes*, *supra* note 5.

24 *E.g.*, Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999). A typical appellate case is: Rodriguez v. ConAgra Grocery Prods. Co., 436 F.3d 468 (5th Cir. 2006) (prospective employee not actually disabled if diabetes controlled but could be regarded as disabled if employee thought it uncontrolled).

25 *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); *Murphy*, 527 U.S. 516; *Albertson's*, 527 U.S. 555.

26 Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

elimination of discrimination against individuals with disabilities."[27] This clarification indicates the congressional goal of eliminating a particular type of discrimination—discrimination against people with disabilities—rather than a goal of providing special protections for a particular type of individual. Thus construed, the amendments clarify that the ADA is an anti-discrimination statute. Nonetheless, commentators have remained concerned that several provisions of the ADAAA invite interpreting the statute as categorically limited. Three aspects of the ADAAA have been of particular concern: the change in the definition of the "regarded as" prong of the disability definition, the removal of the accommodation remedy for plaintiffs regarded as disabled, and the prohibition of reverse discrimination suits under the ADA.[28]

If the commentators are correct, this conceptualization could threaten to reintroduce the paradox of the *Sutton* trilogy and *Toyota*.[29] There are indeed some suggestions in lower court decisions that this process may be taking place. Nicole Porter, for example, details how plaintiffs, even when they can prove the disability element in their case, are increasingly facing difficulties addressing contentions that they were not qualified to perform the essential functions of the job or that suggested accommodations were unreasonable.[30] Michelle Travis explains how claims that a case should be dismissed on summary judgment because the individual is not disabled have been replaced by claims that the case should similarly be dismissed because the individual is not qualified.[31] Debbie Kaminer describes the particular difficulties faced by plaintiffs with mental illness in establishing their qualifications or defending accommodations.[32] Professors Stein, Silvers, Areheart, and Francis show how plaintiffs who meet the expanded definition of disability nonetheless find their cases resolved on summary judgment because courts conclude that they have failed to put into question the other aspects of their prima facie case: that they were qualified for the jobs in question and that they were treated differently on the basis of disability.[33]

Nonetheless, to construe the ADA as amended in this categorical way, we contend, is in error. In what follows, we address each of the supposedly concerning provisions and show why they do not impose a categorical understanding on the amended ADA. We shall do so in a

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[27] 42 U.S.C. § 12101(b)(1) (2012).

[28] *See Disabling Attitudes*, *supra* note 5.

[29] *See* cases cited *supra* notes 25–26 and accompanying text.

[30] *See* Porter, *supra* note 5.

[31] *See* Travis, *supra* note 5.

[32] *See* Kaminer, *supra* note 5.

[33] Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Francis, *Accommodating Every Body*, 89 U. CHI. L. REV. 689 (2014).

way that maintains the distinction between discrimination on the basis of disability and discrimination on other prohibited bases such as race, sex, religion, or age over forty. We also do so in a manner that distinguishes discrimination on the basis of disability from differential treatment that is not prohibited at all, such as exclusion of people who are judged to be unattractive or too pushy, who dress unprofessionally, or who have eccentric political views. These may be wrongs to employees, but they are not discrimination on the basis of disability.

B. *Defining "Regarded as"*

The original ADA definition of disability provided that disability included "being regarded as having such an impairment," that is, an impairment that substantially limits a major life activity.[34] Such plaintiffs are characterized as coming under the "regarded as" prong of the disability definition, or as "regarded as" plaintiffs, but this characterization is misleading if it is taken to be categorical. Instead, these plaintiffs should be characterized as claiming discrimination based on how they are regarded, or so we shall contend in the remainder of this Section.

Courts interpreting the "regarded as" prong construed it as embedded in employer beliefs (what philosophers would call "intensionally"[35]), requiring that the employer not only believe that the individual have the disability but also believe that the disability substantially affects a major life activity.[36] Thus, a plaintiff would find her case dismissed on summary judgment if the employer successfully alleged that she did not know that the individual had a disability or did not believe that the individual's known condition substantially affected her life activities. As an example, an employee with Asperger's disease was fired by an employer who believed he was untrustworthy because he failed to make eye contact—but he could not show he was "regarded as" disabled by the employer without evidence that the employer believed the inability to make eye contact was a symptom of Asperger's.[37] And an employee who told his employer about his Hepatitis B, and whose employer was concerned that the condition might be contagious, could not contend to be "regarded as" disabled unless he could cite the major

[34] 42 U.S.C. § 12102(2) (2008) (amended 2009).

[35] Melvin Fitting, *Intensional Logic*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (Apr. 2, 2015), https://plato.stanford.edu/archives/sum2015/entries/logic-intensional.

[36] *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). For a discussion of the semantic confusions in the courts' approaches, see Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008).

[37] Merrill v. Burke E. Porter Mach. Co., 159 F. App'x 676 (6th Cir. 2005).

life activity that his employer believed was substantially limited.[38]

The ADAAA abrogated the requirement that "regarded as" plaintiffs must show, as part of their disability discrimination case, that the employer perceived that the employee had a condition that substantially limited a major life activity. Under the current statute, the "regarded as" prong is met if the individual shows that she has been subjected to a prohibited action under the ADA "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."[39] However, this possibility does not apply to impairments "that are transitory and minor" in the sense that they have "an actual or expected duration of 6 months or less."[40]

This "transitory and minor" limitation may be taken to indicate that the statutory amendment was intended to define the "regarded as" prong as including only those whose impairments are not transitory and minor. Hence, this limitation might suggest that the ADA, as amended, is limited to the category of people with comparatively significant disabilities. As an example, in *Bush v. Donahoe*,[41] the court determined that an employee who had an ankle sprain requiring her to wear an open-toed boot for five months could not qualify as suffering discrimination under the "regarded as" prong because the condition was minor and lasted for less than six months—even though she alleged that she had been fired because of her need to wear the boot. In its reasoning, the court used an objective standard regarding the condition—that is, whether it was in fact minor and less than six months in duration—but also stated that it would have reached the same conclusion applying a standard resting on the employer's subjective beliefs.[42]

Such a reading limiting the coverage of the "regarded as" prong holds that, whatever the employer perceives, employees with health conditions that are minor and that last less than six months cannot claim discrimination on the basis that they have been regarded as disabled. Influenza, sprained ankles, and uncomplicated fractures are illustrations. If these individuals cannot argue that they are actually disabled or have a disability history, their anti-discrimination claims will fail. A more expansive reading would argue that if the employer perceives that the health condition is not transitory and minor and acts on this perception, the individual can show "regarded as" discrimination regardless of the severity or time frame of the actual condition in question.

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[38] Amadio v. Ford Motor Co., 238 F.3d 919 (7th Cir. 2001).
[39] 42 U.S.C. § 12102(3)(A).
[40] 42 U.S.C. § 12102(3)(B).
[41] 964 F. Supp. 2d 401 (W.D. Pa. 2013).
[42] *See id.*

On this reading, it can be disability discrimination to misperceive the seriousness of a condition and treat the employee adversely as a result. But this is not the reading that has been prevailing in the courts (e.g., *Bush v. Donahoe*).[43] The ironic result is that people with transitory and minor conditions who are misperceived by their employers will fare worse than people with no impairments at all who are misperceived. Such a constrained reading is at odds with the legislative history that indicates the "regarded as" prong was meant to cover the cases in which the employer believed erroneously that the individual with a minor health condition had a more serious one, as well as the cases in which the individual had no disability but was erroneously believed to have one.[44]

Indeed, the inclusion of the "transitory and minor" language may have been a holdover from an earlier version of what became the ADAAA. In 2006, Representatives Hoyer and Sensenbrenner introduced what was titled the Americans with Disabilities Act Restoration Act of 2006. The proposal removed the requirement that an impairment substantially limit a major life activity from the statute's definition of disability. This approach was met by considerable opposition from industry representatives who were concerned about a flood of litigation claiming disability discrimination for conditions such as "poor eyesight correctible by wearing glasses."[45] The compromise result was the ultimate language of the ADAAA. About discrimination on the basis of actual disability, the compromise continued the requirement for substantial limit of a major life activity, while providing for broad construction of this requirement. About discrimination based on regarding someone as disabled, the compromise eliminated the requirement to prove employer perceptions about the limiting nature of the employee's condition but incorporated the "transitory and minor" language.[46] The result was confusion and inconsistency, especially because of the possibility that employees with transitory and minor conditions might be judged not to have suffered disability

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43 *See id.*

44 CONG. REC. 8842 (Sept. 16, 2008) [hereinafter Statement of Senate Managers] (statement of Senate Managers of the ADAAA) ("We intend and believe that the fact that an individual was discriminated against because of a perceived or actual impairment is sufficient. Thus, the bill clarifies that contrary to Sutton, an individual who is 'regarded as having such an impairment' is not subject to a functional test. If an individual establishes that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment—whether the person actually has the impairment or whether the impairment constitutes a disability—then the individual will qualify for protection under the Act.").

45 Letter from R. Bruce Josten, Exec. Vice President, U.S. Chamber of Commerce, to Members of the U.S. House of Representatives (Aug. 22, 2007), https://www.law.georgetown.edu/archiveada/documents/1ChamberLetter_000.pdf.

46 154 CONG. REC. 6058, 6067 (2008) (Joint Statement of Rep. Hoyer and Rep. Sensenbrenner).

discrimination when their employers perceived their conditions to be far worse than they were. It is hardly confirmatory of the view that the ADA as amended was meant as a statute with limited eligibility for inclusion.

C. *Removing Accommodation Remedies for "Regarded As" Plaintiffs*

Before adoption of the ADAAA, courts and commentators were divided on whether people suffering discrimination because they were regarded by employers as disabled should be able to receive accommodations as a remedy. Some argued that they should be: that there were many situations in which employees had conditions that their employers regarded as disabling and that required accommodations, even when the conditions did not rise to the very constrained standards for actual disability. Others argued that the accommodation remedy was unnecessary for at least some people who were not actually disabled in the limited ADA sense—whatever their employer might have believed—and that to give this remedy to them would be to provide them with a windfall benefit.[47]

More nuanced versions of the discussion about accommodation remedies for "regarded as" plaintiffs recognized that these plaintiffs came in many different varieties. These varieties included plaintiffs who contended that their employers' discrimination took the form of believing them to have a condition that they did not in fact have, employers believing that their condition was more disabling than it actually was, and employers being fearful of the consequences of the condition the employee was regarded as having for workplace safety or costs. Some of these commentators defended caution about the accommodation remedy based on a case-by-case analysis of what would be needed to eliminate disability-based discrimination.[48] Some divided "regarded as" plaintiffs between those with actual impairments and those with no impairments at all, arguing that the latter should not be entitled to an accommodation remedy.[49] Others made the point that people who were subject to discrimination only because of how they were viewed, not because of what they actually were, should not need

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47 *See infra* text accompanying note 48.

48 *See* Timothy J. McFarlin, *If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees "Regarded As" Disabled*, 49 ST. LOUIS U. L.J. 927 (2005); Sarah J. Parrot, Note, *The ADA and Reasonable Accommodation of Employees Regarded as Disabled: Statutory Fact or Bizarre Fiction?*, 67 OHIO ST. L.J. 1495 (2006).

49 Kristopher J. Ring, Note, *Disabling the Split: Should Reasonable Accommodations Be Provided to "Regarded As" Disabled Individuals Under the Americans with Disabilities Act (ADA)?*, 20 WASH. U. J.L. & POL'Y 311 (2006).

accommodations.[50]

Still others contended that accommodations should not be available to "regarded as" plaintiffs in case they could be an undeserved windfall because they were not needed to respond to the claimed discrimination.[51] At least one court thought that to accord accommodations as a remedy for "regarded as" discrimination was a form of special privileging not available to others not so regarded. This court wrote: "The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees."[52] When the ADA amendments were under consideration, the circuit courts were split,[53] but the issue had not been resolved by the Supreme Court.

The ADAAA resolved the controversy by specifying that people claiming discrimination based on how they were regarded would not be entitled to accommodations.[54] Elizabeth Emens argues that this "carves up" the category of disability in a manner that cuts against the social model of disability—that is, the view that locates disability in social conditions rather than the medical condition of the individual. Her point is that denying accommodations to individuals regarded as disabled denies the disabling impact of attitudes. In support of this view, she considers several different types of "regarded as" plaintiffs who may need accommodations. First, there are plaintiffs with disabilities that are not sufficiently severe to bring them within the category of actual disability; with the more encompassing rules of construction for actual disability adopted in the ADAAA, this group may be expected to shrink but not disappear altogether.[55] Second, there are plaintiffs who are both actually disabled and "regarded as" disabled, but who would prefer to advance their claims only under the "regarded as" label, perhaps because they do not want to have to bring before courts evidence of their actual impairments.[56] And some plaintiffs may have conditions that primarily affect their lives because of the attitudes of others; Emens's example is a

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50 *E.g.*, *id.*

51 *See* Cheryl L. Anderson, *What Is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323 (2006).

52 Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999).

53 *E.g.*, Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751 (3d Cir. 2004); Kaplan v. City of N. Las Vegas, 323 F.3d 1226 (9th Cir. 2003).

54 42 U.S.C. § 12201(h) (2012) (stating that "a covered entity . . . need not provide a reasonable accommodation" to an individual "who meets the definition of disability" solely under the "regarded as" prong of the disability definition).

55 *Disabling Attitudes*, *supra* note 5, at 216.

56 *Id.* at 216–17.

chipped tooth that has primarily aesthetic implications for the individual but that leads others to turn away and is thus a source of disadvantage.[57]

Emens is surely correct that under the ADAAA there will be plaintiffs contending disability discrimination based on how they are regarded by their employers who will not be able to receive accommodations and who might have received accommodations under the ADA before it was amended. But it is not clear that the conclusion to be drawn is that the ADA as amended is therefore a statute that provides protection to only a limited group of people. Instead, the proper conclusion may be that the ADAAA imposed some limitations on what counts as discrimination that may be problematic. To see this, we begin with the most unlikely but clearest case of "regarded as" discrimination: a plaintiff who is thought to have a condition that she does not have at all. We then consider its implications for Emens's three groupings of plaintiffs claiming "regarded as" discrimination and who might need accommodation remedies.

Suppose that an employee is ordered to take a drug test, but the results are erroneously reported.[58] It is very difficult to find reported disability discrimination cases in which the employer treated the employee differently because of a condition that the employee did not have at all. The far more likely case is one in which the employer is mistaken about the seriousness or risks of a condition that the employee actually has. This contrasts with cases in which the employee claims discrimination on the basis of race or religion but loses because the employer erroneously believed that the employee came within the group in question.[59] The employer allegedly acts on the erroneous report to treat the employee disadvantageously. If the allegations are true, the employer would have discriminated against the individual based on beliefs about disability that were in error. But the discrimination would not involve the failure to provide accommodations for the condition that does not exist at all.

Thus, the situation does not give rise to the inference that the employee is classified differently from others claiming the need for accommodation. Rather, it demonstrates that the employee is subject to a kind of discrimination, but one that does not involve the lack of accommodations. This would be a disability discrimination suit, to be sure, but not one based on the failure to accommodate the plaintiff's actual condition.

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57 *Id.* at 217.

58 This example is based on *Warshaw v. Concentra Health Servs.*, 719 F. Supp. 2d 484 (E.D. Pa. 2010).

59 Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 119 n.116 (2017) (collecting cases).

Further, whether someone who alleges disability discrimination is seriously impaired or not, employers are not required to offer accommodation that fails to be effective. When we recall that an accommodation is a particular aid or alteration, such as providing a stool for a barista to stand on when pouring water into the top of the coffee machine, and compare an individual with dwarfism and one of average height, we can note that both parties, equally, can be denied the aid of a stool if the stool fails to enable them to execute a necessary task they otherwise cannot do.

Now, consider this reasoning as applied to Emens's three classifications of "regarded as" plaintiffs. The last—the plaintiff with a chipped tooth that is the subject of disabling attitudes but that does not otherwise affect his life—is claiming discrimination based solely on his exposure to the attitudes of others. In such cases, the employee does not need the kinds of changes listed as reasonable accommodations under the ADA: making facilities readily accessible, restructuring job responsibilities, providing training, providing communication assistance, or other similar changes.[60] Rather, what is impeding the employee on the job is the attitudes of others. This is surely a form of discrimination based on disability—and it would be found to be so under existing law. But it is questionable whether the discrimination is a failure to accommodate. To consider absence of accommodation as discrimination in this type of case—perhaps due to not reassigning the worker to a position in which others do not observe the chipped tooth and thus are not offended by it—would be akin to involuntary reassignment of African American or female workers to positions in which their presence is cloaked from members of the public who do not like to encounter them, a strategy that has been considered to be discriminatory in itself.[61] Considering this kind of fact situation not as about whether the plaintiff comes within a particular category but as about what counts as the kind of discrimination alleged makes the target for resolving the problem clear.

A similar point might be made about the second of Emens's categories: that of an employee who does not wish to provide evidence of her actual disability, even at the cost of not being entitled to an accommodation remedy. The ADA is structured to provide employees with choice about accommodations: employees do not have to reveal disabilities and it is up to them whether to request accommodations.[62]

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60 42 U.S.C. § 12111(9) (2012).

61 *See* Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981); 29 C.F.R. § 1604.2 (2017).

62 42 U.S.C. § 12112(b)(5)(A) (2012) (defining discrimination to include the failure to provide reasonable accommodations); *see also Enforcement Guidance: Reasonable Accommodations and Undue Hardship Under the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html.

Accommodations are not to be forced on employees, even by employers who are trying to be well-meaning. Indeed, to require employees to accept accommodations might be discriminatory paternalism, just as it might be discriminatory to require employees to employ mitigating measures for their disabilities.[63] This structure is problematic in the sense that it places the burden on the employee to reveal a disability and request accommodation. That employees do not do so does not mean that workplace problems are not real and that employers are not engaging in conduct that is unjustified.

Rather, refraining from such impositions respects the choices of people with disabilities who may confront a set of undesirable options: reveal a disability and risk discrimination that will be difficult to prove, or conceal a disability and risk problems with job performance or stressful demands that make continuing in the employment untenable without accommodations. It also represents the anti-paternalism thrust of the ADA: that employers should not substitute their judgments for the employees' judgments of what is most effective or best for them.[64] That is, instead of being construed as a categorical limit on who can claim the protections of the statute, the denial of accommodations to individuals who choose not to bring evidence of their actual disabilities could be seen as a policy choice or guidance about how the law ought to respond to the challenge of redressing discriminatory conduct.

The third of Emens's categories, employees with actual disabilities that do not come within even the expanded construction of actual disability mandated by the ADAAA, might seem the most sympathetic to her view that the denial of the accommodation remedy for "regarded as" plaintiffs suggests a categorical approach. Yet in this kind of situation, too, it can be seen as a controversial choice about what ought to be considered discrimination. The ADAAA was a compromise between perceived business interests and disability-related rights.

A persistent theme in business reactions to the ADA is the cost of accommodation rights, despite analyses debunking charges of overregulation and economic burden.[65] As described above, business representatives objected to dropping the requirement of a substantial limit on a major life activity from the definition of actual disability. They remained concerned, however, about the adoption of rules of broad construction in the determination of whether someone met the standard of disability required as part of their proof of disability discrimination. The "regarded as" prong was a particular locus of concern. To avoid

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63 *E.g.*, Sarah Shaw, Comment, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 CAL. L. REV. 1981 (2002).

64 For a general discussion rejecting paternalism in anti-discrimination law, see Jessica L. Roberts, *Rethinking Employment Discrimination Harms*, 91 IND. L.J. 393 (2016).

65 *E.g.*, J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903 (2003).

accommodation remedies for these plaintiffs, employers contended that people who were really disabled would qualify under the actual disability standard—so other plaintiffs would not need accommodations.[66] At the same time, insistence on the denial of accommodations to plaintiffs falling short of even the relaxed standard for actual disability discrimination was one way to address cost concerns. On this reasoning, the justification for removing the accommodation claim from plaintiffs alleging discrimination because of how they are regarded by their employer would not be that these employees fall outside of the scope of statutory protections, but that what counts in delineating remediable discrimination should take costs into account. Such reasoning might be prompted by exaggerated estimates about costs, or it might represent some nonmonetary approach to the proprieties of redressing discrimination, but it would not demonstrate that the ADA overall should be viewed as a categorical rather than a universal statute.

D. *Denying Reverse Discrimination Litigation*

A third addition to the ADA in the Amendments Act is the prohibition on reverse discrimination lawsuits. The ADA now provides: "Nothing in this [Act] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability."[67] The ADA is thus asymmetrical in a way that Title VII of the Civil Rights Act's prohibitions on discrimination on the basis of race or sex is not.[68]

Emens argues that this is the clearest way in which the ADAAA reveals itself as falling on the anti-classificationist side of anti-discrimination law.[69] The distinction here lies between anti-subordination and anti-classificationist approaches. On the former, anti-discrimination law is aimed to end practices that have subordinated identifiable groups; it is thus permissible to take group membership into account in addressing discrimination. On the latter, anti-discrimination law takes aim at the very use of general characteristics such as race or sex, whatever the purpose of the categorization.

Impulses toward anti-categorization are driven by the idea that the use of categories privileges those who fall within them. For example, equal protection objections to the use of race as a counter to "last hired, first fired" rubrics that would result in a disproportional loss of

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66 Statement of Senate Managers, *supra* note 44.

67 42 U.S.C. § 12201(g) (2012).

68 *See Disabling Attitudes*, *supra* note 5, at 226.

69 *See id.*

employment for black school teachers relied on the contention that such protections operated at the expense of more senior white school teachers.[70] On this view, the use of categories in any way, whether benign or malign, is problematic because of how it accords benefits. This logic may go in reverse, as well, Emens argues: the impulse to prohibit use of a category fades when the use does not serve to privilege.[71] Thus, the ADAAA prohibition on "reverse discrimination": if the ADA's protections for people with disabilities do not privilege, but only provide compensation for certain types of disadvantage, then there is no need for reverse discrimination suits, either. But the disadvantages must be significant to warrant the compensation, and so the prohibition on reverse discrimination suits threatens once again to curtail the reach of the ADA, or so Emens and others concerned about the significance of this new provision contend.

But what does the prohibition of so-called reverse discrimination lawsuits signify? In our judgment, it represents a determination of what counts as legally prohibited discrimination, not a determination of who can be victimized by discrimination. Notice the language of the provision: it does not say that non-disabled people cannot sue under the amended ADA. Rather, it states that the ADA does not "provide the basis for a claim" by a nondisabled individual "that the individual was subject to discrimination because of the individual's lack of disability."[72] That is, it limits what can count as discrimination on the basis of disability to exclude situations in which a nondisabled person claims that his lack of disability was the basis for disadvantageous treatment.

This limitation makes sense in light of the ADA's provision that a failure to make accommodations can be discriminatory. Accommodation requests may have no immediate consequences for other employees except the fact that one employee has the accommodation and the other does not. An example would be purchase of a screen reader for an employee with visual impairments. Other requests, such as reassignment to a vacant position or to changes in work schedules or to upper echelon management's close parking spot may involve scarce goods.[73] These cases are subject to the employer's defense of an undue hardship, which may involve costly litigation. If any employees who believe that they have been disadvantaged by accommodation requests—whether or not these requests involve scarce goods—could advance discrimination claims, the result might be a great deal of litigation even in cases in which the employee has not made an accommodation request at all, but the employer has made some kind of

70 Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

71 *See Disabling Attitudes*, *supra* note 5, at 231–32.

72 42 U.S.C. § 12201(g).

73 *E.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

adjustment that might be construed as disability-related. Once again, the statutory choice concerns what should be legally actionable discrimination, not the categorization of potential plaintiffs.

In this Part, we explained how the ADAAA attempts to recapture a universalist understanding of the statute. Next, we examine, albeit briefly, why the instability of disability due to its primary policy usage as a term of art defies interpolating classificatory or eligibility criteria into implementing the civil right the ADA and its clarifying amendments bestows.

IV. The Instability of Criteria for Being Disabled

The use of the idea of disablement to classify seemingly biologically deficient people is comparatively recent, having emerged toward the end of the eighteenth century,[74] and continuing in the nineteenth and early twentieth centuries in aid of various efforts to advance human society by reorganizing human interactions in some supposedly scientific way. Positing biological failure as the cause of individuals' physical or mental dysfunction naturalized disadvantages from which they might be perceived to suffer. Thus, categorizing people with diverse physical or mental anomalies that undercut their ability to function in areas of important social endeavor, or at least to function successfully in the standard ways, as deficient by nature was an initial step in separating them from access to civic or commercial activity where their presence might be burdensome. Because their disadvantage was thought of as natural, no social justice imperative urged forestalling the burdens these individuals' lives were envisioned as imposing on themselves, their families, and the community. Instead, a melioristic allegiance to scientific progress fueled pursuit of scientific remedies, including eugenics initiatives for which ascriptions of disability permitting eliminating individuals so described, or at least their progeny.[75]

With increasing momentum in the nineteenth century, biological data were interpreted statistically to try to portray the average human individual; such mathematical understandings of human beings were employed then, as they still sometimes are today, in preventative and therapeutic medicine to aid in distinguishing between health and illness in living organisms. Initially grounded in the presumption that humans

74 Lennard J. Davis, *Dr. Johnson, Amelia, and the Discourse of Disability in the Eighteenth Century*, *in* "DEFECTS": ENGENDERING THE MODERN BODY 56–57 (Helen Deutch & Felicity Nussbaum eds., Univ. of Mich. Press 2000).

75 Anita Silvers, *Meliorism at the Millennium: Positive Molecular Eugenics and the Promise of Progress Without Excess*, *in* MUTATING CONCEPTS, EVOLVING DISCIPLINES: GENETICS, MEDICINE, AND SOCIETY 215–34 (Rachel Ankeny & Lisa Parker eds., Kluwer Academic Publishers 2002).

have proven to be successful as species go, the method still calls for inferring that modes of functioning typical for our species are species norms as well. The improbability that a species whose members are mostly unsound could survive was thought to underwrite equating the most frequently seen kinds of humans with healthy ones, while anomalous individuals were subjected to suspicion about their impact on social stability and continued species success.[76]

"A generalized characterization of persons with disabilities as functionally abnormal enabled them to be addressed collectively [as policies were developed]."[77] On the one hand, persons with such anomalies could be subjected to denial of access to common services or by segregating them into the institutions that were being widely developed during the nineteenth century for persons with sensory or mental impairments.[78] On the other hand, aggregation of kinds of biological dysfunction due to war injuries enabled the positive development of income-related benefits to individuals with impairments who, due to their past or potential social contribution, were judged deserving.

Caring for wounded veterans played a major role in the development of pensions in the United States, especially after the Civil War.[79] Later, more encompassing assistance programs such as the 1920 Civil Vocational Rehabilitation Act were devised to return citizens with the potential to overcome their functional disabilities to the workforce, regardless of how the disability was acquired.[80] By the 1980s, arising from mixed experience of success of rehabilitation and other assistance programs meant for injured veterans and similar programs for the general population of people classified with disabilities, concern about the effectiveness of programs such as these prompted Congress to charge the NCD to assess their contribution to disabled people's independence and dignity, as discussed in the Introduction and Part I.

With many government programs serving disabled people, both currently and in the past, one might suppose agreement to have been

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76 Anita Silvers, *Disability and Normalcy*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF MEDICINE 36–47 (Miriam Solomon, Jeremy Simon & Harold Kincaid eds., 2017).

77 An earlier version of some of the material in this Section was published in Leslie Francis and Anita Silvers, *Perspectives on the Meaning of "Disability,"* 18 AM. MED. ASS'N J. MED. ETHICS 1025 (2016).

78 The presence of "Asylum Street" in downtown Hartford, Connecticut is an ever-present reminder of the early presence of institutions such as the Asylum for the Education of Deaf and Dumb Persons. *See*, *e.g.*, JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES (Univ. of Ca. Press, Ltd. 1994); *Asylum Hill*, LIVEHARTFORD, http://www.livehartford.org/neighborhoods/asylumhill.aspx (last visited Aug. 24, 2017).

79 BERNARD ROSTKER, PROVIDING FOR THE CASUALTIES OF WAR: THE AMERICAN EXPERIENCE THROUGH WORLD WAR II (Rand Corp. 2013).

80 Civil Vocational Rehabilitation Act of 1920, Pub. L. No. 66-236, 41 Stat 735 (1920).

reached about identifying the population with disabilities, so that consistency across public programs was obtained. Nevertheless, a 2012 United States Census Bureau report of findings of the 2010 census survey observed that disablement was ascribed by self-report, or report of head of household, to one out of every five Americans.[81] This somewhat surprising account of the disabled population's size might be explained by supposing that the multiple purposes and different versions of the expression "is disabled" all are used consistently. But the report noted that the aims of different programs affect usage so as to qualify the expression's meaning, and therefore different applications of the expression do not refer to the same thing.

Because health professionals, advocates, and other individuals use the same term for different purposes in different contexts, disability does not often refer to a single definition. Medical models view disability as an extension of a physiological condition requiring treatment or therapy. In contrast, social models view disability as the result of societal forces on impairment and suggest that changes to social norms and practices would reduce functional restrictions. As a demographic category, disability is an attribute with which individuals may broadly identify, similar to race or gender. In contrast, certain federal programs narrowly define disability as the impairment or limitation that leads to the need for the program's benefit—such as the Social Security Disability Insurance (SSDI) program's income support for individuals who are not able "to engage in any substantial gainful activity."[82] As a report for Census Bureau describes, "[t]he agencies and organizations that provide benefits to, advocate for, or study these populations, each refer to their targeted group as people with disabilities; but because of the differences in definitions, an individual may be considered to have a disability under one set of criteria but not by another."[83]

Of the four meanings of disability mentioned in this report, the narrow Social Security Administration (SSA) definition of disability as the inability to engage in any substantial gainful activity probably has the highest profile in the United States. We suggest the possibility that this may be attributable to publicity generated by attorneys aiming to represent applicants in navigating the complicated, sometimes adversarial, SSDI process.

Between 1954 and 1964, a series of amendments to the 1935 Social

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81 *Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html.

82 *Disability Evaluation Under Social Security*, SOC. SECURITY ADMIN., https://www.ssa.gov/disability/professionals/bluebook/general-info.htm (last visited Sept. 29, 2017).

83 Matthew W. Brault, *Americans with Disabilities: 2010*, U.S. CENSUS BUREAU (July 2012), https://www2.census.gov/library/publications/2012/demo/p70-131.pdf.

Security Act added payment of benefits to persons with illness or injury too severe to work.[84] According to a United States Social Security Advisory Board report, *The Social Security Definition of Disability*, "When the Social Security Disability Insurance (DI) program was enacted in 1956, it was intended for the 'totally and permanently disabled,' a population for whom work was not an option."[85] To the SSA, persons with disabilities were people permanently unable to perform substantial gainful activity due to severe impairment. To be eligible for substitute income support, an individual ordinarily must have either a medical condition considered so severe that it is specifically listed in the SSA's disability manual or one established as being of equal severity to a listed condition.[86]

During congressional hearings on the Social Security Act amendments, controversies arose about the definition of disability and its implementation; testimony from American Medical Association leadership and many other physicians expressed their doubts that practitioners could deliver objective judgments about disability.[87] Disagreeing, Senator Walter F. George declared:

> [M]any American doctors are afraid that they cannot determine when a man or a woman is disabled, when the plain requirement is that the disability must be a medically determined physical or mental impairment. . . . . I think more of the medical profession in this country than to believe that they cannot determine when a man or a woman worker has a permanent and total disability.[88]

This debate proved prescient in regard to the persistent difficulty of such prognoses. Physicians' assessments of the same patient's disability can be surprisingly varied, indicating that the theoretical foundation of this kind of diagnosis is far from robust.[89] Furthermore, clinical judgments of the impact of physiological or psychiatric medical conditions on ability to work can be skewed by implicit bias.[90] To take

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[84] Barden-LaFollette Act of 1954, Pub. L. No. 83-565, 69 Stat. 652 (1954) (codified as amended at 29 U.S.C. § 31–42 (2012)) (repealed 1973); Social Security Act Amendments of 1956, Pub. L. No. 880, 70 Stat. 807 (1956); Social Security Act Amendments of 1958, Pub. L. No. 85-840, 72 Stat. 1013 (1958).

[85] Soc. Sec. Advisory Bd., *The Social Security Definition of Disability*, SOC. SECURITY ADVISORY BOARD (Oct. 2003), http://www.ssab.gov/portals/0/DisabilityForum/Social%20Security%20Definition%20Of%20Disability.pdf.

[86] Valarie Blake, *A Physician's Guide to Social Security Disability Determinations*, 13 AMA J. MED. ETHICS 885 (2011).

[87] *See* DEBORAH A. STONE, THE DISABLED STATE (Temple Univ. Press, 1984).

[88] 102 CONG. REC. 13,038 (1956) (statement of Sen. George).

[89] *See* Erin O'Fallon & Steven Hillson, *Brief Report: Physician Discomfort and Variability with Disability Assessments*, 20 J. GEN. INT'L MED. 852 (2005).

[90] *E.g.*, Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621 (1999); Dara E. Purvis, *A Female Disease: The Unintentional Gendering of Fibromyalgia Social Security Claims*, 21 TEX. J. WOMEN & L. 85 (2011).

one example, cystic fibrosis automatically qualifies an individual as meeting the standard for being too disabled to work, based on a physician's description of symptoms and the results of tests.[91] But of course some people with cystic fibrosis, even some who meet the diagnostic criteria for being too ill to work because of low forced expiratory volume or a designated number of respiratory incidents requiring specified physician interventions in a specified time period, nevertheless do engage in gainful employment.

Despite such disparities between medical diagnoses and actual lack of workability, the SSA program equates some specific diagnoses or diseases with disability. The social fact constituted by this SSA equation was constructed to try to streamline the administrative process for determining which SSDI applicants are deserving of disability insurance benefits to replace their income loss.[92] Given the U.S. Congress's legislative, and thereby the SSA's administrative, presumption that physicians can diagnose certain diseases and just for that reason identify their patients as too disabled to work, it is understandable, though also questionable, that some philosophers think disability cannot be a normatively neutral state.[93] Diagnosing individuals' inability to work has turned out to be much more problematic than Congress initially may have supposed.

The SSA's well-known conceptualization of disability notwithstanding, SSDI processes do not exhaust current concepts of disability, not even those relied on by other agencies of the U.S. government itself. For example, the U.S. Center for Disease Control (CDC) also links attribution of disability with diagnosis of disease, but diagnoses are made on the basis of medical history and of patients relating their symptoms, which may include reports of disability. An important difference between these two agencies' standards for determining disability arises from a disparity in the deference afforded to a patient's displaying symptoms.

The CDC is in the business of detecting threats to the population's health and must be responsive throughout various stages of making scientific progress in understanding how disabling dysfunction is connected to a purported or proven cause. Sometimes in the past,

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91 *See Disability Evaluation Under Social Security: 3.04 Cystic Fibrosis*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/3.00-Respiratory-Adult.htm (last visited Oct. 21, 2017).

92 *See* Leslie Francis & Anita Silvers, *Perspectives on the Meaning of "Disability"*, 18 AMA J. ETHICS 1025 (2016) [hereinafter *Perspectives on the Meaning of Disability*].

93 *See* Purvis, *supra* note 90, at 95 (quoting 102 CONG. REC. S.13,038 (1956) (illustrating Congress's role in constructing the social fact that is the referent of "disability" in the context of the administration and cultural impact of SSA programs)); see also *Perspectives on the Meaning of Disability*, *supra* note 92, for a sketch of how moral, social and political considerations have developed and otherwise altered the contours of that social fact over the course of almost seventy-five years.

disabling dysfunctions that the public and even members of the medical profession have taken to be diagnostic of a disease have been discounted until a medical cause for them is found. But once a causal understanding of the disease obtains, it is hard to deny that the reality of the symptoms, including the related dysfunction, must have been unexceptionable all along.

Consider the matter of what counts as definitive for chronic fatigue syndrome (CFS) diagnoses.[94] Symptomatic dysfunctions that have come to signify CFS can be acknowledged as sufficing for a CFS diagnosis, according to CDC protocol, even without the presence of a cause or mechanism that explains the disabling symptoms.[95] For the CDC, but not the SSA, disability can be acknowledged without our possessing knowledge of a medical cause or mechanism. For the SSA process, some diagnoses can entail disability, but symptoms without medical causes are insufficient to do so. For example, the CDC's diagnostic criteria for CFS, consisting as they do of symptoms, do not suffice for the SSA. The SSA instructs clinicians as follows: "In evaluating disability for persons with CFS, . . . [s]tatements merely recounting the symptoms of the applicant or providing only a diagnosis will not establish a medical impairment for purposes of Social Security benefits. We must have reports documenting your objective clinical and laboratory findings."[96]

The Census Bureau's approach to delineating disability also diverges from the SSA's. The one-fifth of Americans living outside institutions who identified as being disabled either self-reported, or were reported by the head of their household as being so.[97] For the purposes of conducting the census, a demographic program, but not for medical or benefits entitlement purposes, first person testimony about being disabled prevails in the compilation of data.

Contrary to what earlier centuries' understandings of the meaning of disablement and cognate terms, the referents of these expressions are social facts, not natural ones. As such, it seems evident that disability has not and cannot refer to a single stable group in law and public policy, given the variety of specialized purposes for which government and (subsets of) people with unusual modes of physical or mental

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94 Possible CFS biomarkers, reduced diversity of gut bacteria and inflammatory molecules in the bloodstream, have recently been identified. *See* Nicholas Bakalar, *Gut Bacteria Are Different in People with Chronic Fatigue Syndrome*, N.Y. TIMES (July 7, 2016), http://well.blogs.nytimes.com/2016/07/07/gut-bacteria-are-different-in-people-with-chronic-fatigue-syndrome/?_r=0.

95 This is true even of diagnoses based on discovery of alleles with 100% penetrance such as Huntington's Disease, as we cannot say whether in the presence of the allele the characteristic symptoms unexceptionably occur.

96 *Providing Medical Evidence to the Social Security Administration for Individuals with Chronic Fatigue Syndrome—Fact Sheet*, SOC. SECURITY ADMIN. (2001), https://www.ssa.gov/disability/professionals/cfs-pub063.htm.

97 *See* Brault, *supra* note 83.

functioning may intersect. Presuming who is included in the category in particular contexts is unreliable, for in each such case we must turn for understanding of the term to its use in relevant programmatic missions and similar sources of guidance.

CONCLUSION: THE ADA AS UNIVERSAL AND AGELESS

This leaves us with the question: what is disability discrimination and how do we delineate it absent a prior selection of which individuals its victims may be?

One way to view the point we are making here is to be wary of confusing the matter of who can bring a lawsuit with that of what elements must be proved in a successful case. That is, the employee's prima facie case must show that the employee comes within a disability prong, that the employee was qualified, and that the employee was treated in a manner that was disadvantageous. These are elements of the prima facie case, just as a plaintiff suing for medical malpractice must show that she was a patient of the medical provider in question.

But that they are elements of a prima facie case goes to the type of discrimination being addressed, not the question of who is disabled and thus qualified to sue.[98] That is, the reason for showing that you are a person with a disability or a person regarded as having a disability or that you are associated with someone with a disability is to show that what is at issue is disability-based discrimination.

To explicate this latter view, we have advanced three main points. First, charged with investigating the effectiveness of the nation's programs in fostering the disabled minority's independence and dignity so as to integrate its members into society's mainstream, the NCD and individuals with disabilities called on Congress to fight discrimination based on disability, identified as the main cause of the inequitably attenuated opportunity disabled people endure. The NCD explicitly proposed that everyone, and not just individuals with undisputed or vetted disabilities, be recognized as potential exercisers of the civil right to protection against disability discrimination, with no additional eligibility criteria imposed. Anyone might fall victim and deserve full

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98 Several recent law review articles have made versions of this point. Jessica Clarke argues that it is a mistake to interpret civil rights statutes as "protected class gatekeeping" in the sense that only people within the class are protected. Such an interpretation, she contends, makes it more, not less, difficult to advance these statutes as furthering anti-subordination. Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 104–05 (2017). Sandra Sperino argues that the frameworks courts have used distract from consideration of whether prohibited discrimination has actually occurred. *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 70–71 (2011). We join these authors in pointing out how the shaping of the case law has misfit the ADA and the ADAAA into a categorical rather than a universal statute.

protection of the State from discrimination that is on the basis of disability.

Second, in amending the ADA to underline its inclusiveness, Congress spoke nearly unanimously against courts' straitened construal of who should be able to claim the State's full protection against disability discrimination.[99]

Third, no public consensus in favor of a particular way of distinguishing disabled from nondisabled individuals exists because the meaning of disablement shifts to suit public programs of different types. Disablement references a socially constructed, not a natural, fact and is similar to referring expressions that have been accounted to be socially constructed with respect to race or gender.[100]

These three points taken together strongly suggest that twenty-first century anti-discrimination jurisprudence should recognize the idea of disability discrimination rather than the idea of disablement as the core notion for shaping the safeguarding right the ADA confers.[101] Doing so will require developing a noncircular idea of what disability discrimination is. We make a brief excursion into this matter here by considering an illustrative scenario, guided by our conclusion that to determine whether disability discrimination has occurred, diagnosing the person must be secondary to understanding an array of components in the situation.

In an opinion piece entitled *We Have Not Yet Overcome*, disability essayist Emily Rapp Black, who has a prosthetic leg, recalls experiencing the moment described below, which she takes as evidence that in our society contemptuous treatment of people based on disability, and the threat of disability discrimination, persist:

> I was crossing the street with a friend using her wheelchair, when two people passed us and said, "What is it, like a convention for freaks?" They looked right at us as they spoke—looking through us, it seemed—as if we wouldn't understand what they were saying. What is more likely is that they simply didn't care what we thought, or how we felt.[102]

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99 42 U.S.C. § 12101 note (2012).

100 *See* ELIZABETH BARNES, THE MINORITY BODY: A THEORY OF DISABILITY (2016); Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them To Be?*, 34 NOÛS 31 (2000) (describing socially constructed facts); ASTA SVEINSDOTTIR, CATEGORIES WE LIVE BY: THE CONSTRUCTION OF GENDER, SEX, AND OTHER SOCIAL CATEGORIES (forthcoming 2018).

101 Here, the original statutory language read "because of" disability; this was changed in the ADAAA to "on the basis of" disability to avoid the implication from other case law that connection between discrimination and disability needed to be "but for" causation. 42 U.S.C. § 12112(a) (2012). For a case interpreting other civil rights statutes as requiring "but for" causation, see *Universitu of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013).

102 Emily Rapp Black, *Why Is Our Existence as Humans Still Being Denied?*, N.Y. TIMES (July 26, 2017), https://www.nytimes.com/2017/07/26/opinion/why-is-our-existence-as-humans-

Black here depicts an encounter, still all too familiar to people whose atypical physical or mental limitations are easy to perceive, in which the animus, sometimes called "ableism," was directed at herself. Ableism moves people who exaggerate the value of functioning in species-typical ways to treat anomalously functioning individuals thoughtlessly, or with active disdain, or even with hostility that can rise to the level of being life-threatening.[103]

Granted that disability discrimination does not directly make an appearance here, for the two mobility impaired protagonists have suffered no adverse action yet. But one can easily imagine how inimically our protagonists, with their minority modes of functioning, might be treated in situations where their access to social participation—whether for employment, education, health care, and other services, or just plain companionship—depended on people like these stigmatizing passers-by.

Almost as easy to consider are scenarios in which modes of functioning typical today have become rare. To illustrate, imagine a near future world in which compact solar-powered personal flight vehicles have replaced both walking and driving as the main modes of mobilizing along urban streets. Now our oppressing passers-by have turned to deprecating individuals whose acrophobia, a symptom of atypical functioning of vertical perception,[104] restricts their transporting themselves to modes that maintain physical contact with the surfaces of old-fashioned city streets. Nor will their potential victims find employment easy to acquire and keep, given fears about the impact of their restricted functioning (walking, bicycling, or driving an automobile) on fellow workers, customers, and the employer's bottom line.

Similar to other types of discrimination against which claims rooted in civil rights are appropriately deployed, potential victims of disability discrimination should include all who are, or are regarded as, or are associated with, members of a comparatively powerless minority. In the case of disability discrimination, whoever must engage in, or is regarded as engaging in, or is associated with, some sort of atypical or abnormal physical or mental functioning will be especially vulnerable to ableist attitudes and to the kinds of adverse treatment functioning in atypical, and therefore minority, modes invites. As we have seen, however, attributions of atypical or abnormal functioning refer to social, not natural, facts because the importance of different areas of

still-being-denied.html?mcubz=0.

103 *See* Joel Michael Reynolds & Anita Silvers, *Feminism and Disability*, *in* PHILOSOPHY: FEMINISM (Carol Hay ed.) (forthcoming).

104 Russell E. Jackson, *Individual Differences in Distance Perception*, 276 PROC. ROYAL SOC'Y B: BIOLOGICAL SCI. 1665 (2009).

functioning waxes and wanes as what is available and important in contemporary societies evolves.[105]

The ADA, as amended by the ADAAA, has been and continues to be a statute protecting everyone from discrimination based on disability, including all those with atypical functioning that has not previously been contemplated as having social importance, let alone classified as a disability. The interpretation of the right the ADA provides, for which we have argued in this Article, enables protecting future people with functional limitations unusual for the time and place in which they live, even if these are not called disabilities today. This then is a civil right for everyone, and for the ages, not just for those identified by a narrow and static characterization of being disabled that happens to prevail today.

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105 See Anita Silvers, *Formal Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13, 14 (Anita Silvers et al. eds., 1998), for examples of historical shifts in which functional modes have been taken as normal for or typical of humans and also for a principle for testing what kinds of maltreatment of individuals with anomalous functioning should count as disability discrimination.