

2010

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Recommended Citation

Paul R. Klein, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 Case W. Rsrv. L. Rev. 467 (2010)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol60/iss2/7>

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NOTES

THE ADA AMENDMENTS ACT OF 2008: THE PENDULUM SWINGS BACK

INTRODUCTION

In September 1987, Francis J. Kelly, the senior buyer in Drexel University's purchasing department, fractured his hip, leaving him with a noticeable limp.¹ Kelly's physician diagnosed him with severe post-traumatic degenerative joint disease² and protrusio acetabulum,³ both of which caused Kelly "great difficulty in walking around."⁴ Drexel later eliminated Kelly's position at the university.⁵ Kelly, sixty-eight years old at the time, filed charges of discrimination against Drexel under the Americans with Disabilities Act ("ADA").⁶ The United States Court of Appeals for the Third Circuit affirmed summary judgment in favor of Drexel, finding that Kelly did not qualify as disabled under the protections enumerated by the ADA.⁷ Although the Third Circuit found that Kelly's condition forced him to move slowly and take great care when maneuvering up and down stairs, it nonetheless held that Kelly's impairment did not

¹ Kelly v. Drexel Univ., 94 F.3d 102, 104 (3d Cir. 1996).

² Degenerative joint disease, or osteoarthritis, causes articular cartilage to grow soft or frayed as a result of trauma, leading to "pain and loss of function." Osteoarthritis most commonly affects "weight-bearing joints, [and] is more common in old people." STEDMAN'S MEDICAL DICTIONARY 1388 (28th ed. 2006) (1911).

³ The National Institutes of Health describes protrusio acetabulum as "a hip joint deformity in which the medial wall of the acetabulum invades into the pelvic cavity" Samuel Van de Velde, Ramona Fillman & Suzanne Yandow, *The Aetiology of Protrusio Acetabuli: Literature Review from 1824 to 2006*, 72 ACTA ORTHOPAEDICA BELGICA 524, 524 (2006).

⁴ Kelly, 94 F.3d at 106.

⁵ *Id.* at 104.

⁶ 42 U.S.C. §§ 12101–12213 (2000). Kelly also brought suit under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000), and the Pennsylvania Human Relations Act, 43 PA. CONST. STAT. ANN. §§ 951–963 (2008). See Kelly, 94 F.3d at 104.

⁷ Kelly, 94 F.3d at 109 ("Overall, we are satisfied that Kelly is not disabled within ADA . . . Thus, the district court properly granted Drexel summary judgment on that claim.").

“substantially limit” his ability to walk because he did not *require* a cane or other assistance in order to move around.⁸ Kelly’s physical impairment, though limiting, apparently did not reach the threshold required for ADA protection.⁹

In 1986, Abigail Guzmán-Rosario began part-time work for United Parcel Service, scanning and repositioning packages as they moved along a conveyor belt.¹⁰ In November 1997, Guzmán-Rosario noticed severe pain in her side and spent a few days in the hospital undergoing tests.¹¹ Ultimately, Guzmán-Rosario was diagnosed with ovarian cysts, which had to be surgically removed.¹² Despite successful removal, Guzmán-Rosario continued to suffer from intermittent nausea and pain.¹³ At times, her symptoms were so severe that she had to miss work and spend the day at home lying down.¹⁴ Despite medical documentation of her condition, UPS grew impatient with Guzmán-Rosario’s absences,¹⁵ and the company terminated her employment.¹⁶ In rejecting Guzmán-Rosario’s claims, the First Circuit found that the ADA did not reach those with temporary afflictions and thus could not protect Guzmán-Rosario.¹⁷

These cases illustrate the courts’ general reluctance to find plaintiffs disabled within the meaning of the ADA. The stated purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁸ Unfortunately, the statute’s definition of disability,¹⁹ in its original manifestation, provided little guidance to courts, and its application has failed to achieve the Act’s stated goal. The ADA defines a disability as: “(A) a physical or mental impairment that substantially limits one or more of the major life

⁸ *Id.* at 106 (“The district court held ‘as a matter of law that [Kelly’s] trouble climbing stairs . . . does not substantially limit his ability to walk.’ We will affirm the district court’s holding in this regard.” (alteration in original) (citation omitted)).

⁹ For ADA protection under both the 1990 and 2009 standards, a plaintiff must demonstrate that his impairment “*substantially limits* one or more major life activities.” 42 U.S.C. § 12102(1)(A) (2006) (emphasis added); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (preserving the original statutory language).

¹⁰ *Guzmán-Rosario v. United Parcel Serv., Inc.*, 397 F.3d 6, 8 (1st Cir. 2005).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ UPS argued that it had lawful reasons for terminating Guzmán-Rosario, including alleged “theft of time,” due to Guzmán-Rosario’s telephone use. *Id.* at 8–9. An arbitrator later found that the termination was unjustified on those grounds. *Id.* at 9.

¹⁶ *Id.* at 8–9.

¹⁷ *See id.* at 10 (“[T]he ADA is not a medical leave act nor a requirement of accommodation for common conditions that are short-term or can be promptly remedied.”).

¹⁸ 42 U.S.C. § 12101(b) (2006).

¹⁹ *Id.* § 12102(2).

activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”²⁰ As interpreted, however, “a surprising number of people who one might assume would benefit from the ADA are left outside its protections,”²¹ typically because of the courts’ strict construction of the statute’s vague definitional boundaries.²² Frequently, disabled individuals like Kelly or Guzmán-Rosario find their lawsuits dismissed “because their impairments are not considered *limiting enough* to qualify as disabilities” under the ADA.²³

In several respects, courts’ interpretational difficulties stem from the original ADA’s ambiguous language.²⁴ The judiciary has had trouble deciphering how broadly or narrowly to construe “major life activity,” despite administrative guidance from the Equal Employment Opportunity Commission (“EEOC”).²⁵ Further, the courts have created a paradox in interpreting the substantially limits prong of the ADA, often finding plaintiffs at once too disabled and not disabled enough.²⁶ As a result, the courts’ strict approach to the ADA’s definitional boundaries has created serious impediments to meritorious disability cases.²⁷

Although the ADA was originally passed in 1990, by 1996 the judicial climate had already chilled to ADA claims. Courts had “summarily dismissed numerous cases of alleged disability discrimination on the ground that the plaintiffs were not disabled,

²⁰ *Id.*

²¹ Michelle T. Friedland, Note, *Not Disabled Enough: The ADA’s “Major Life Activity” Definition of Disability*, 52 STAN. L. REV. 171, 171–72 (1999).

²² See *id.* at 172; see also, e.g., *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996) (holding that an employee with breast cancer was not substantially limited in the major life activity of working).

²³ Friedland, *supra* note 21, at 172 (emphasis added).

²⁴ See, e.g., Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 370 (2000) (noting that the Supreme Court’s rulings in several ADA cases have “seriously undermine[d] the purposes and goals of the ADA . . . and permit[ted] covered entities to discriminate at will against persons whom Congress clearly intended to be protected under the Act”).

²⁵ See 29 C.F.R. § 1630.2(i) (2009) (“*Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”).

²⁶ See Tucker, *supra* note 24, at 333 (noting that the Supreme Court has allowed defendants to treat plaintiffs as “too disabled for the job, but not sufficiently disabled to warrant protection under the ADA”); see also *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (finding that monocular vision was a disability insufficient to meet the requirements of a protected disability, but sufficient to impair plaintiff’s ability to work, and thus permitted the employer to discharge the plaintiff).

²⁷ See Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1434 (1999) (noting that “cases decided under the ADA have found diseases as serious as hemophilia, diabetes, and cancer not to satisfy the statutory elements of a disability”).

even though the plaintiffs bringing these cases suffered from disorders as severe as cancer and hemophilia.”²⁸ The trend continued into the second decade of ADA interpretation. A recent survey found that of 272 ADA claims in 2006, employers won in 97.2% of the cases, while employees won only 2.8%.²⁹

Recognizing that the ADA inadequately protected the disabled, Congress passed the ADA Amendments Act of 2008 (“ADAAA”),³⁰ which President George W. Bush signed into law on Thursday, September 25, 2008.³¹ The ADAAA took effect on January 1, 2009, and creates several expanded protections that likely would have provided relief to both Francis Kelly and Abigail Guzmán-Rosario.³² While disability advocates may initially embrace these changes, some concern exists that the amendments sweep too broadly.³³ Three amended sections pose the most significant threat to protection consistent with the legislative intent of the ADA. First, the ADAAA’s definition of major life activities incorporates activities that are difficult to observe, such as concentrating, thinking, and communicating.³⁴ Including activities like “communicating” can generate more questions than answers regarding how broadly the ADA should reach, as communication is immensely difficult to understand, and occurs across a variety of cognitive, affective and reflexive responses.³⁵

The second indication that the ADAAA sweeps too broadly stems from its inclusion of “the operation of a major bodily function” as a major life activity.³⁶ Such broad inclusion extends ADA protection to

²⁸ *Id.* at 1407 (footnotes omitted).

²⁹ Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I—Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (2007). It should be noted that only 218 of those cases were resolved. Thus, 212 of the resolved cases were employer wins and only 6 were employee victories. *Id.*

³⁰ Pub. L. No. 110-325, 122 Stat. 3553 (2008).

³¹ See JacksonLewis.com, President Bush Signs Landmark Amendments to the Americans with Disabilities Act (Sept. 25, 2008), <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1507>.

³² See ADAAA § 4(a), 122 Stat. at 3556 (“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity *when active*.” (emphasis added)).

³³ See, e.g., Gary J. Oberstein & Jeffrey B. Gilbreth, *Significant Changes to the Americans with Disabilities Act – Many More Employees to Enjoy Protections*, EMP. L. ALERT (Nixon Peabody L.L.P., Boston, Mass.), Oct. 9, 2008, at 3, http://www.nixonpeabody.com/linked_media/publications/ELA_Alert_10_09_2008.pdf (predicting that employers will face more requests for leaves of absence and other accommodations, as well as increased ADA litigation and costs associated with litigation and settlement).

³⁴ ADAAA § 4(a), 122 Stat. at 3555.

³⁵ See generally Leslie A. Baxter & Dawn O. Braithwaite, *Introduction: Meta-Theory and Theory in Interpersonal Communication Research*, in ENGAGING THEORIES IN INTERPERSONAL COMMUNICATION 1, 4 (2008) (Leslie A. Baxter & Dawn O. Braithwaite eds., 2008).

³⁶ ADAAA § 4(a), 122 Stat. at 3555 (stating that “major bodily functions” include

many employees whose impairments fall outside the spirit of the statute.³⁷ Under the 1990 ADA, an employee often could not establish a claim based on something as serious as cancer,³⁸ yet under the ADAAA, the definition of a major life activity seems relatively limitless. The third concern with the ADAAA stems from its suggested construction of the substantially limits prong,³⁹ which attempts to dilute the language in favor of offering “broad coverage of individuals under [the Act].”⁴⁰ Expansion of the substantially limits prong of the ADA was, presumably, one of the principal reasons behind the push for amending the ADA. The drafters, however, failed to alter the statutory language, placing the courts in the awkward position of interpreting the same language differently.

While many areas of the ADAAA will generate fascinating debate over the breadth of protection for the disabled, the purpose of this Note is to explore the three changes highlighted above, and to examine their anticipated effects on both employers and employees. Part I briefly discusses the history of the ADA and the ADAAA, and further elaborates on the evolution of the legislative purpose behind the law. Part II explores three serious concerns with the ADAAA and illustrates the likely outcomes for ADA plaintiffs and defendants under the ADAAA. Finally, Part III proposes a moderate position that seems to have been missed by the ADAAA—a position that would better maintain the balance of protecting both disabled American workers and the businesses that employ them.

I. HISTORICAL PERSPECTIVE—THE EVOLUTION OF PROTECTION FOR DISABLED WORKERS

In October 1987, Professor Robert L. Burgdorf, Jr. drafted the first version of the Americans with Disabilities Act while working as a staff member at the National Council of the Handicapped.⁴¹ After extensive research on the pervasiveness of discrimination against the disabled, the Council worked with a small committee to create a

functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions). The list is not exhaustive and allows recognition of other bodily systems, although one would have difficulty articulating any bodily systems not accounted for within the statute.

³⁷ For example, an employee could find herself with a viable ADA claim after being fired because her menstrual cramps caused her to miss work a few times.

³⁸ See *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996).

³⁹ ADAAA § 4(a), 122 Stat. at 3555–56.

⁴⁰ *Id.* § 4(a), 122 Stat. at 3555.

⁴¹ Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View From the Inside*, 64 TEMP. L. REV. 521, 523 (1991).

model ADA bill,⁴² based in large measure on section 504 of the Rehabilitation Act of 1973.⁴³ Congress adopted the Rehabilitation Act “to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.”⁴⁴ However, the Rehabilitation Act applies only to entities receiving federal funds;⁴⁵ thus, a large number of disabled Americans are left outside its protections.

Driven in part by the disability rights activist movement,⁴⁶ a number of congressional members, including House Representative Tony Coelho and Senator Tom Harkin, expressed interest in the model ADA bill.⁴⁷ Members of Congress studied the model bill and, over the course of about six months from October 1987 to April 1988, drafted the first ADA.⁴⁸ Unfortunately, the 100th Congress ended and the ADA died on the floor.⁴⁹ During the first year of the next session, Senators Harkin and the late Edward Kennedy devoted themselves to writing a new version of the ADA and generating support for its passage.⁵⁰ After undergoing another period of refinement at the request of the business community, a final version appeared in early 1990.⁵¹

Interestingly, support for the ADA was not primarily driven by equitable social considerations.⁵² Although congressional leaders recognized that disability discrimination created an unnecessary bar to the disabled from fully participating in society,⁵³ they also realized that the country was spending billions of dollars a year on disabled individuals’ added dependency on the welfare rolls.⁵⁴ As Representative Coelho noted, society as a whole “bears the economic burdens of this prejudice: dependency is expensive. It increases

⁴² See *id.* at 523–24.

⁴³ See Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. § 794 (2006)).

⁴⁴ 29 U.S.C. § 701(b)(1).

⁴⁵ Eichhorn, *supra* note 27, at 1421.

⁴⁶ See *id.* at 1421–23 (noting activists’ significant lobbying efforts, shaping the passage of the ADA).

⁴⁷ See Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1281 (2006).

⁴⁸ Feldblum, *supra* note 41, at 525.

⁴⁹ *Id.* at 526.

⁵⁰ *Id.*

⁵¹ *Id.* at 530.

⁵² See Winegar, *supra* note 47, at 1281 (noting legislators’ concerns that individuals with disabilities, precluded from working due to discrimination, were largely forced to remain on welfare).

⁵³ *Id.*

⁵⁴ See *id.* (noting Senator Harkin’s observation that disability discrimination creates “an unnecessary dependency costing taxpayers and private employers billions of dollars on an annual basis” (quoting 134 CONG. REC. 9382 (statement of Sen. Harkin))).

benefit entitlements and decreases productive capacity sorely needed by the American economy.”⁵⁵ As a result of congressional “belief that the [ADA] would substantially relieve [economic] dependency on the government,” the ADA passed with little opposition.⁵⁶ The final bill passed the House by a vote of 377–28, and the Senate by a vote of 91–6.⁵⁷

The ADA as passed in 1990 purported to significantly extend the provisions of the Rehabilitation Act.⁵⁸ At the time of its passage, lawmakers and disability advocates alike saw the ADA as a potent mechanism for decisively eradicating disability discrimination, as well as a way to transform employment law.⁵⁹ Many hailed the ADA as “the greatest single achievement of the disability rights movement to date.”⁶⁰ President George H.W. Bush, upon signing the ADA into law, stated that “every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”⁶¹

Given the long deliberation that went into crafting the ADA, one might expect the specificity of the statutory language to supply identifiable contours for judicial interpretation. Unfortunately, language that many thought would provide broad protection for the disabled⁶² has instead generated disappointment and confusion.⁶³ From the outset, the business community had “a number of concerns with the bill that they articulated in a series of Senate hearings on the ADA.”⁶⁴ President George H.W. Bush addressed those concerns in his signing statement, indicating that his “administration and the United States Congress [had] carefully crafted [the] Act . . . to ensure that it gives flexibility . . . and contain[s] the costs that may be

⁵⁵ 134 CONG. REC. 9605 (1988) (statement of Rep. Coelho).

⁵⁶ Winegar, *supra* note 47, at 1281.

⁵⁷ Feldblum, *supra* note 41, at 531.

⁵⁸ See Eichhorn, *supra* note 27, at 1421 (noting that although the ADA’s “general prohibitions echo the language of section 504 [of the Rehabilitation Act], its provisions proceed to map out relative rights and obligations with much greater specificity” (footnote omitted)).

⁵⁹ See *id.* (noting that the ADA has been called a “second-generation” civil rights statute).

⁶⁰ *Id.* at 1423 (quoting FRED PELKA, *THE DISABILITY RIGHTS MOVEMENT* 18 (1997)).

⁶¹ President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), available at <http://www.ceec.gov/ada/bushspeech.html> [hereinafter Bush Remarks].

⁶² See, e.g., NANCY L. EIESLAND, *THE DISABLED GOD: TOWARD A LIBERATORY THEOLOGY OF DISABILITY* 19 (1994) (stating that the ADA represents an “emancipation proclamation” for the disabled); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 140 (1993) (describing the ADA as “an earthshaking event” for the disabled).

⁶³ See Eichhorn, *supra* note 27, at 1423 (noting that the language of the ADA “has prevented it from fulfilling its purpose of allowing people with disabilities full participation in society”).

⁶⁴ See Feldblum, *supra* note 41, at 527.

incurred.”⁶⁵ Unfortunately, President Bush’s reassurances have not materialized. The disabled have not enjoyed wide protection; in fact, one could accurately argue that the ADA provided barely *any* protection for the disabled. Courts have consistently found that individuals with severely debilitating conditions were not disabled for the purposes of the ADA,⁶⁶ directly undermining the Act’s purpose.

In three noteworthy cases, the Supreme Court attempted to clarify its interpretation of the ADA. All three cases solidified the Court’s restrictive approach to ADA claims. In *Sutton v. United Air Lines*,⁶⁷ the Court held that two airline pilot applicants with severe myopia did not fulfill the substantially limits prong of the ADA because their condition could be fully corrected through mitigating measures.⁶⁸ The Court held that “[a] ‘disability’ exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.”⁶⁹ The Court’s stance regarding the substantially limits prong dealt a blow to the disabled, many of whom had significantly quelled their limitations through medication or other mitigating measures. On the same day as it decided *Sutton*, the Court held in both *Albertson’s, Inc. v. Kirkingburg*⁷⁰ and *Murphy v. United Parcel Service, Inc.*⁷¹ that mitigating factors played a crucial role in the analysis of whether one’s infirmities create a substantial limitation to a major life activity.⁷² With its restrictive approach to the substantially limits requirement of the ADA, the Court crafted an enormous obstacle to recovery for disabled employees who could mitigate their conditions.

The courts’ approach to the ADA finally prompted congressional action.⁷³ In September 2006, Representatives F. James Sensenbrenner, Jr. and Steny Hoyer introduced the ADA Restoration

⁶⁵ Bush Remarks, *supra* note 61.

⁶⁶ For one particularly alarming decision, see *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App’x 874 (11th Cir. 2007) (per curiam) (holding that a mentally retarded applicant was not substantially limited in the major life activities of learning or thinking, solely because he had graduated from a special school for the mentally handicapped).

⁶⁷ 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)–(3), 122 Stat. 3553, 3554.

⁶⁸ *Id.* at 482–83. The ADAAA legislatively overrules *Sutton*’s consideration of mitigating measures. See § 2(b)(2), 122 Stat. at 3554.

⁶⁹ *Sutton*, 527 U.S. at 482.

⁷⁰ 527 U.S. 555 (1999), *superseded by statute*, ADAAA § 2(b)(2)–(3), 122 Stat. at 3554.

⁷¹ 527 U.S. 516 (1999), *superseded by statute*, ADAAA § 2(b)(2)–(3), 122 Stat. at 3554.

⁷² See *Albertson’s*, 527 U.S. at 565–66; *Murphy*, 527 U.S. at 521.

⁷³ See ADAAA § 2(a)(3), 122 Stat. at 3553 (noting in the findings that “while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled”).

Act, which was later renamed as the ADAAA.⁷⁴ As Representative George Miller noted on the House floor, “[i]n 2004, workers with disabilities lost 97 percent of the employment cases that went to trial. There has been no balance in the courts, putting [disabled] workers at a distinct disadvantage.”⁷⁵ Congress appears to have witnessed a phenomenon eloquently identified by Bradley Areheart—that the prevailing Supreme Court interpretation of the ADA “forced people with disabilities into a *Goldilocks* dilemma—they are either too disabled or not disabled enough.”⁷⁶ The trio of Supreme Court cases noted above deftly exhibited the failure of the ADA to protect the disabled, and Congress responded decisively.⁷⁷ In the House, the ADAAA passed by an overwhelming margin, with 402 voting in favor of passage and 17 voting against it.⁷⁸ The Senate followed suit, unanimously voting for its passage.⁷⁹

Although President George W. Bush signed the ADAAA into law in the autumn of 2008, the question remains: Will the courts interpret the new, theoretically more specific, language as Congress anticipated? After all, in its original form, the ADA was expected to result in enormous breakthroughs for the protection of the disabled, and instead wound up hindering that protection. Admittedly, on its face, the ADAAA appears to have addressed several of the issues that plagued judicial interpretation of the ADA over the last two decades. Upon closer scrutiny, however, the broad protections incorporated into the ADAAA may end up further frustrating disabled American workers. Despite the long and intricate legislative history of both the original ADA and the ADAAA, the amendment may result in perverse results and an equally confused judiciary.

II. DEFINING DISABLED: PROBLEMS WITH THE NEW DEFINITIONAL SCHEME

Even a cursory review of the relevant case law illustrates several inherent problems with the ADA’s original definition of disability.⁸⁰

⁷⁴ See Bradley A. Areheart, *When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 181–82 (2008).

⁷⁵ 154 CONG. REC. H6058, H6062 (daily ed. June 25, 2008) (statement of Rep. Miller).

⁷⁶ Areheart, *supra* note 74, at 181.

⁷⁷ Most notably, the ADAAA legislatively overrules major holdings in both *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). See § 2(b)(2)–(4), 122 Stat. at 3554.

⁷⁸ See 154 CONG. REC. H8286, H8288 (daily ed. Sept. 17, 2008) (statement of Rep. Nadler).

⁷⁹ See 154 CONG. REC. S8342, S8350 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin).

⁸⁰ See *Guzmán-Rosario v. United Parcel Serv., Inc.*, 397 F.3d 6, 10–11 (1st Cir. 2005) (noting that the ADA fails to state whether coverage extends to those suffering from recurring

Perhaps the most perplexing definitional deficiency stems from Congress's failure to offer an illustrative list of the types of activities that constitute major life activities under the ADA. Without a list or concrete definition, the concept of major life activity creates such an ambiguous test for disability that some have argued the vagueness of the test itself has led to judicial hostility toward ADA claims.⁸¹ One might expect that an ambiguous text would lead the courts toward a closer examination of the legislative intent behind the ADA, which, in turn, should point toward broader coverage of the disabled. Strangely, this has not happened. Instead, the courts have strictly construed the ADA's text, resulting in a body of law that frequently acts to prevent coverage of the very class the statute was enacted to protect.⁸²

In addition, the courts have struggled with determining the scope of substantial limitation. Rather than approaching the substantial limitation prong as an individualized analysis, courts have taken a restrictive approach, consistently holding that to be substantially limited, a plaintiff must show he or she is *severely restricted* in a major life activity.⁸³ The Supreme Court, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,⁸⁴ solidified the restrictive approach by creating a demanding standard, requiring plaintiffs to demonstrate that the alleged impairment "prevents or severely restricts the individual"⁸⁵ Coupled with the *Sutton* rule—that mitigating factors must be considered in determining the severity of one's limitation⁸⁶—almost no impairment could create a substantial limitation that would satisfy the requirements of the ADA.

In some ways, the ADAAA addresses these issues.⁸⁷ In others, the amendment falls short. First, the statute retains the original definition

impairments, and describing the void of legislative guidance in determining whether or not any particular impairment constitutes a disability); *Kelly v. Drexel Univ.*, 94 F.3d 102, 105–06 (3d Cir. 1996) (describing Congress's failure to define major life activities and pointing out that to be substantially limited, one must demonstrate that he is significantly restricted).

⁸¹ See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1814–16 (2005) (noting that the nearly universal court hostility to ADA claims has led to finger-pointing by disability advocates, the EEOC, and the Department of Justice).

⁸² See, e.g., *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App'x 874, 874 (11th Cir. 2007) (per curiam) (holding that a mentally retarded applicant was not covered by the ADA).

⁸³ See *Kelly*, 94 F.3d at 106–07; *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996).

⁸⁴ 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554.

⁸⁵ *Id.* at 198.

⁸⁶ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)–(3), 122 Stat. 3553, 3554.

⁸⁷ For example, the ADAAA eliminates consideration of mitigating factors in determining if a plaintiff is disabled (by overruling *Sutton*'s controversial decision). See § 2(b)(2), 122 Stat.

of disability, including the major life activity and substantially limits language.⁸⁸ Second, although the statute codifies a list of major life activities, the list far exceeds reasonable boundaries by including a new provision that defines nearly every known bodily function as a major life activity.⁸⁹ Third, the ADAAA legislatively overrules *Toyota's* holding on substantial limitation, noting explicitly that the statute should be construed “in favor of broad coverage.”⁹⁰ The statute, however, fails to create a new definition to replace the language with which it disagrees, in effect asking the courts to interpret the same language differently. The following sections examine each of these issues in detail.

A. Defining Major Life Activities

One of the most widely criticized elements of the ADA is its failure to adequately define what exactly qualifies as a disability.⁹¹ Much of the confusion surrounds the term “major life activity,” which Congress failed to define for reasons that are unclear.⁹² Circuit courts have since split on the kinds of activities they will accept as major life activities.⁹³ Although the EEOC has attempted to provide some guidance,⁹⁴ courts have instead followed a restrictive reading of the statutory text, “significantly limiting the number of employees who can seek the protection of the ADA.”⁹⁵

at 3554. The amendment also explains that the strict approach applied to previous cases fell outside the legislative intent of the Act, and insists that courts instead interpret the new language broadly. *See id.* §2(b), 122 Stat. 3554.

⁸⁸ *See* ADAAA § 4(a), 122 Stat. at 3555.

⁸⁹ *See id.*

⁹⁰ *Id.*

⁹¹ *See, e.g.,* Friedland, *supra* note 21, at 171–72. The original language, maintained in the ADAAA, defines disability, with respect to an individual, as: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” ADAAA § 4(a), 122 Stat. at 3555.

⁹² *See* Friedland, *supra* note 21, at 184.

⁹³ *Compare, e.g.,* *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (recognizing “interacting with others” as a major life activity because it is “an essential, regular function, like walking and breathing”), *with* *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (equating “interacting with others” with the “ability to get along with others,” and refusing to recognize either as a major life activity).

⁹⁴ *See* 29 C.F.R. § 1630.2(i) (2008) (providing a broad list of suggested major life activities).

⁹⁵ Bryan J. Warren, *When Determining Whether an ADA Claimant Is Disabled, the Claimant's Impairment Must Be Considered in Light of Available Corrective Measures, and Failure to Meet DOT Regulations Does Not Establish that the Claimant was Regarded as Disabled*: *Murphy v. United Parcel Service, Inc.*, 38 DUQ. L. REV. 1143, 1166 (2000).

Congress's failure to adequately define major life activity forced the courts to interpret which types of activities most people would consider important, or "major," in their daily lives. This, of course, led precisely to the problem—what exactly does "major" mean? "Major" as to whom? The disabled? Congress? The courts? The common link among the few recognized major life activities is difficult to spot. As noted by Lisa Eichhorn, breathing "is a physiological function that is necessary to all life. Other [identified major life activities, such as] seeing and hearing, are sensory functions that are not quite so crucial to human existence. Still others, walking, speaking, and performing manual tasks, are physical acts of a more abstract nature."⁹⁶ Faced with a dearth of legislative guidance, the courts have spent nearly two decades arguing over whether or not certain activities qualify as major life activities under the ADA.⁹⁷ Although the Supreme Court could have provided guidance by definitively stating which activities it considered major for the purposes of the ADA, it instead instructed that only those activities which are "of central importance to daily life" should qualify as major life activities.⁹⁸ Not surprisingly, the Court's nebulous guidance failed to prevent a circuit split over which major life activities should fall within ADA protection.

Recognizing the circuit split and an unresponsive Supreme Court, Congress provided a list in the ADAAA to assist courts in interpreting the kinds of activities the statute was intended to reach. According to the ADAAA, "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."⁹⁹ The list includes many of the major life activities found in the EEOC Compliance Manual,¹⁰⁰ although the ADAAA adds several activities which will likely lead to further interpretational difficulties. Notably, Congress added the activities of eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.¹⁰¹ While the major life activities of eating, sleeping, standing, lifting and bending are unlikely to create much

⁹⁶ Eichhorn, *supra* note 27, at 1429.

⁹⁷ See *id.* at 1428–30.

⁹⁸ *Toyota Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554.

⁹⁹ ADAAA § 4(a), 122 Stat. at 3555.

¹⁰⁰ See 29 C.F.R. 1630.2(i) (2008) (providing a non-exhaustive list of major life activities, including "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

¹⁰¹ ADAAA § 4(a), 122 Stat. at 3555.

interpretational difficulty for the courts, the same cannot be said for concentrating, thinking, and communicating. “Concentrating” and “thinking” each involve entirely inward-conducted activity,¹⁰² and “communicating” suffers from such overreaching that mere social ineptitude could fall within its grasp.

It is not surprising that the courts have been hesitant to include primarily inward-conducted activities, like concentrating and thinking, within the scope of the ADA. Scholars studying societal treatment of the disabled have identified two primary models for thinking about a disability’s effect on both the afflicted individual and the community in which he lives.¹⁰³ The *medical model* of disability categorizes people as either “disabled” or “non-disabled,” and regards the individual’s physiological incapacity itself as the problem.¹⁰⁴ The medical model severs societal responsibility from the disabled individual, instead celebrating those who, without help, “overcome” their disabilities.¹⁰⁵ In contrast, the *social model* of disability places the disabled into a societal construct made up of prejudices and assumptions about normality (and thus carries with it a degree of social responsibility for the disabled).¹⁰⁶ The federal courts have fully embraced the medical model,¹⁰⁷ which tends to support a more restrictive, every-man-for-himself approach to disability rights than does the social model.¹⁰⁸ Unless the prevailing judicial attitude dramatically shifts under the ADAAA, legislative inclusion of inward-directed activities, such as “concentrating” and “thinking,” seems unlikely to result in any greater protection of the disabled.¹⁰⁹

¹⁰² What I suggest by the phrase “inward-conducted activity” is an implicit recognition by the courts that impairments should be objectively measurable to enjoy ADA protection. Of the ADAAA’s enumerated list of major life activities, only “learning,” “thinking,” and “concentrating” occur almost entirely within one’s mind, and all three can be difficult to measure. Of these, the major life activity of “learning” can be distinguished from “thinking” and “concentrating” because learning is far more measurable (unlike the abilities to concentrate or think, which are difficult to measure because they can vary extensively from person to person without necessarily imposing an impairment on that individual’s ability to engage in that activity).

¹⁰³ For an excellent discussion of the medical and social models of disability, see MARY JOHNSON, *MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS* (2003) and Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621 (1999).

¹⁰⁴ Areheart, *supra* note 74, at 186–87.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 188.

¹⁰⁷ *Id.* at 192.

¹⁰⁸ *Id.* at 192–94 (discussing how the prevailing medical model of disability creates misperceptions and even a degree of hostility toward the disabled).

¹⁰⁹ The judiciary’s skepticism toward inward-directed activities seems likely to continue unless the courts’ perceptions of the disabled also dramatically shift toward the social model.

Including “communicating” as a major life activity is subject to similar, and potentially more difficult, interpretational pitfalls. Presumably, Congress meant communication to cover *nonverbal* communication, since it also included speaking as a separate major life activity.¹¹⁰ The term “communicating,” however, is incredibly complex, and encompasses verbal, nonverbal,¹¹¹ and written communication. Some scholars estimate that as much as ninety percent of our communication occurs nonverbally,¹¹² and many individuals find themselves severely limited in one or more forms of nonverbal communication.¹¹³ Many of these same individuals, however, have little difficulty verbally communicating with others, although they may, for example, stand a little too close, or frequently interrupt others while speaking.¹¹⁴ Yet, if an employer fires an employee with a proxemics problem, perhaps because that employee’s issue disrupts other employees or makes clients nervous, the employee might find himself with a viable ADA claim based on what, in reality, amounts to mere social ineptitude.¹¹⁵ This example demonstrates the inherent problem with overly broad classifications, which provide protection to individuals who fall within the statutory text while remaining outside the spirit of the statute. Such over-inclusion can lead to frustration in the courts and inconsistent application of the statute.¹¹⁶

The communication/social ineptitude dilemma leads to another serious issue. Protecting an employee who suffers from social

¹¹⁰ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555.

¹¹¹ The term “nonverbal communication,” itself, is a bit of a misnomer. Nonverbal behavior includes several subtleties of speech and vocal phenomena, which are auditory, but more properly described as nonverbal. See ALBERT MEHRABIAN, *NONVERBAL COMMUNICATION* 1 (1972). For the purposes of this illustration, however, such a precise definition is unwarranted. Therefore, my discussion of nonverbal behavior extends only to kinesic behavior (gestures, expressions, postures, positions and the like).

¹¹² JAMES W. NEULIEP, *INTERCULTURAL COMMUNICATION: A CONTEXTUAL APPROACH* 287 (3d ed. 2006).

¹¹³ See *id.* Nonverbal communication can be broken down into several subparts (for example, *proxemics*—communication through the use of social and personal space). See MARK L. KNAPP, *NONVERBAL COMMUNICATION IN HUMAN INTERACTION* 3–5, 36 (1972).

¹¹⁴ *Id.*

¹¹⁵ Or perhaps a vast cultural difference. See Irenäus Eibl-Eibesfeldt, *Universals in Human Expressive Behavior*, in *NONVERBAL BEHAVIOR: APPLICATIONS AND CULTURAL IMPLICATIONS* 17, 17–30 (Aaron Wolfgang ed., 1979) (discussing the similarities and differences in cross-cultural nonverbal behavior); see also MEHRABIAN, *supra* note 111, at 6–7 (discussing several studies finding that people of different cultures have diverging expectations and preferences for proxemic behavior).

¹¹⁶ As can under-inclusion, as demonstrated by the original ADA. See, e.g., Tracey I. Levy, *Legal Obligations and Workplace Implications for Institutions of Higher Education Accommodating Learning Disabled Students*, 30 J.L. & EDUC. 85, 85–86 (2001) (discussing the exponential increase in claims filed by learning-disabled students seeking accommodations under the ADA).

ineptitude may diminish the law's potency with respect to those suffering from seriously debilitating communicative disorders, such as stuttering or Down Syndrome (although this would largely be covered by the ADAAA's new list of major bodily functions).¹¹⁷ There are social and economic problems associated with protecting those who don't need protection. Socially, overbroad protection often has a dilutive effect, and could potentially lead to excessive litigation,¹¹⁸ or worse, judicial hostility against the very class the statute was enacted to protect.¹¹⁹ Over time, after a large number of plaintiffs with questionable disabilities succeed in their claims, courts may view with severe skepticism *anyone* claiming a disability under the ADA, whether or not their disabilities fall within the spirit of the statute.

Economically, employers may suffer serious harm, as they could find themselves hamstrung in crafting a workforce. Employers concerned about compliance with the ADAAA may run serious financial risk by terminating employees who display virtually *any* form of social ineptitude or awkwardness. Ironically, job applicants with minor communicative abnormalities could face the perverse effect of not being hired solely because an employer does not want to risk subsequent litigation. Ultimately, the more money employers must spend developing preventive measures, litigating, or settling ADA claims from plaintiffs that were not intended to fall within the statute's protections, the more difficulty applicants and employees will have finding and retaining their jobs.

Despite these problems, it would be difficult to argue that the ADAAA's inclusion of an illustrative list of major life activities is entirely unhelpful. The greater cause for concern is the likely event of one of the following outcomes: (1) the list will either generate confusion as to which activities should enjoy protection, or (2) it will result in such a broad inclusion that the courts will be unable to identify anyone *without* a disability. The first concern—that the list merely highlights the inherent deficiencies within the definition of disability—seems the more likely result. Under the original ADA, many courts concluded that “concentrating,” to take an illustrative example, did not constitute a major life activity.¹²⁰ The courts

¹¹⁷ See *infra* Part II.B.

¹¹⁸ See Molly M. Joyce, Note, *Has the Americans with Disabilities Act Fallen on Deaf Ears? A Post-Sutton Analysis of Mitigating Measures in the Seventh Circuit*, 77 CHI.-KENT L. REV. 1389, 1409 (2002) (noting the likelihood that overly broad protection under the ADA would lead to excessive lawsuits against employers).

¹¹⁹ See Waterstone, *supra* note 81, at 1814–16.

¹²⁰ See, e.g., *Poindexter v. Atchison, Topeka & Santa Fe Ry. Co.*, 168 F.3d 1228, 1231 (10th Cir. 1999) (noting that “sleeping, although not enumerated in the regulations, constitutes a

reasoned that concentrating “may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an ‘activity’ itself.”¹²¹ Congress apparently did not agree with this reasoning. If concentrating alone is considered a major life activity, are employers expected to tolerate employees who slack off, under the fear that the employee might file an ADA claim as to a limitation in his ability to concentrate? Certainly there are medical conditions that manifest themselves primarily in limiting a person’s ability to concentrate (and, presumably, these are the conditions the ADAAA meant to reach),¹²² but such conditions should fall within one of the other major life activities under the ADAAA.¹²³ Therefore, including “concentrating” in the statutory list seems redundant and confusing. Courts will likely face the problematic task of distinguishing meritorious claims based on “concentrating” from those claims where the plaintiff was simply lazy.¹²⁴

Another problem warrants brief mention. For nearly twenty years, we have witnessed the problem of under-inclusion in the context of the ADA. Under-inclusion tends to bar those who fall within the spirit, but outside the text of the statute, from enforcing their federal rights. Over-inclusion will have the opposite, although not necessarily preferable, result—those who fall within the text, but not the spirit, of the statute will be able to enforce federal rights they may not be entitled to. The original ADA launched a massive number of disability discrimination claims.¹²⁵ The ADAAA will likely have the same effect, perhaps accentuated by the fact that so many more employees will fall within the statute’s text. While the “floodgates” argument generally suffers from the fact that our court system is designed to handle as many meritorious claims as necessary to protect individual rights, Congress does a disservice to the system by

major life activity, while concentration does not”).

¹²¹ *Id.* (quoting *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999)).

¹²² Such as Attention Deficit Hyperactivity Disorder (“ADHD”). The National Institute of Mental Health describes ADHD as a disorder where the sufferer has “difficulty staying focused and paying attention,” and “difficulty controlling behavior.” See <http://www.nimh.nih.gov/health/publications/attention-deficit-hyperactivity-disorder/complete-index.shtml>.

¹²³ For example, neurological or brain functions. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555.

¹²⁴ Although the courts may not have much difficulty determining whether an employee was lazy or actually suffered from a substantially limiting impairment, the point is that a lazy employee should never find himself with a viable ADA claim. Yet, under the ADAAA, he might.

¹²⁵ See, e.g., Levy, *supra* note 116, at 85–86 (discussing the substantial increase in ADA accommodations claims filed by learning-disabled students).

adopting overly broad statutes that permit coverage beyond the reach of the statutory intent.

On the other hand, it is hard to fault Congress for failing to define major life activity. The term is difficult to pin down, and given the legislative intent of providing broader coverage for the disabled, defining major life activity may have provided the courts with a new excuse to limit the reach of the Act. Congress, however, should have been more meticulous in its adoption of the illustrative examples. For instance, rather than including “concentrating” and “thinking” as major life activities, Congress should have made coverage of those activities dependent upon a demonstration that the plaintiff suffers from a limitation on a bodily function.¹²⁶

As it is unlikely that Congress will revisit the ADAAA in the near future, the burden of suppressing these concerns rests squarely on the courts. When addressing ADA claims under the amendment, the courts should remember that Congress intended broad coverage *for the disabled*. Courts should apply a case-by-case analysis to each plaintiff bringing an ADA claim, and consider the legislative intent behind both the ADA and the ADAAA. Courts should approach new ADA claims not with a strict or liberal view toward major life activity, but rather a realistic, moderate appreciation of the aims of the Act. In assessing whether or not a plaintiff is limited in a major life activity, the courts ought not overlook the statute’s proposed flexibility. The ADAAA provides several avenues for supporting a disability claim, so the courts should avoid assuming every activity constitutes a major life activity for the purposes of ADA coverage.

B. Operation of Major Bodily Function as a Major Life Activity

After the absurdity of numerous court decisions holding employees who suffered from serious medical conditions (such as cancer,¹²⁷ mental retardation,¹²⁸ ovarian cysts,¹²⁹ and cerebral palsy¹³⁰)

¹²⁶ For example, an employee with ADHD could almost certainly demonstrate a substantial limitation in his neurological functioning, which would fall under the protection of the amendment. See ADAAA § 4(a), 122 Stat. at 3555.

¹²⁷ See *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996) (finding that the plaintiff was not substantially limited in the major life activity of “working,” even after the plaintiff explained the medical treatments and complications she faced in fighting breast cancer).

¹²⁸ See *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App’x 874, 877–78 (11th Cir. 2007) (per curiam) (finding that even though the plaintiff was limited because of his mental retardation, he failed to present a prima facie case of ADA discrimination).

¹²⁹ See *Guzmán-Rosario v. United Parcel Serv., Inc.*, 397 F.3d 6, 11 (1st Cir. 2005) (finding that the symptoms of the employee’s ovarian cysts—dizziness and extreme pain—were not sufficient to show that she was substantially limited in working).

¹³⁰ See *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 767 (10th Cir. 2006)

were not substantially limited in any major life activity,¹³¹ Congress expanded the definition of major life activity to include major bodily functions.¹³² As amended, the section declares that “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”¹³³

In part, inclusion of bodily systems as major life activities likely stemmed from the noteworthy case of *Bragdon v. Abbott*.¹³⁴ The case involved a woman who was denied dental services because she suffered from HIV.¹³⁵ In her suit, the plaintiff claimed that HIV substantially limited the major life activity of reproduction.¹³⁶ A divided Supreme Court agreed,¹³⁷ and laid the foundation for protecting those who suffer from debilitating diseases under the ADA. Although disability rights advocates lauded *Bragdon*’s outcome, many saw the decision as more of an anomaly than a progressive step toward greater disability rights.¹³⁸

With its expansive approach to the ADAAA, Congress seems to have recognized the impact of *Bragdon* and supported its conclusion—diseases that create serious limitations on major life activities should be covered by the ADA. While this recognition fits within the overall concept of providing broad coverage for the disabled,¹³⁹ Congress may have overreached. Certain maladies, such as cancer, HIV, and epilepsy, almost certainly fall within this section. However, courts should be careful not to blindly find all people with a particular disorder disabled for the purposes of the ADA. Perhaps every sufferer of a very serious condition will meet the statutory

(finding a woman’s limitations due to her cerebral palsy, including difficulty preparing, chewing, and swallowing food, were too narrow and specific to show a substantial limitation in caring for oneself).

¹³¹ In fact, HIV/AIDS may well be the only severe medical condition confirmed by the (divided) Supreme Court to impose a substantial limitation on a major life activity, and even that decision fell short of declaring HIV/AIDS a *per se* disability under the ADA. See *Bragdon v. Abbott*, 524 U.S. 624 (1998).

¹³² See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555

¹³³ *Id.*

¹³⁴ 524 U.S. 624 (1998).

¹³⁵ See *id.* at 628–29.

¹³⁶ *Id.* at 637.

¹³⁷ See *id.* at 655.

¹³⁸ See, e.g., Amy C. Reeder, Case Note, *Bragdon v. Abbott: Is Asymptomatic HIV a Per Se Disability Under the Americans with Disabilities Act?*, 50 MERCER L. REV. 631, 640 (1999) (“*Bragdon* is an anomaly among ADA cases with respect to the Court’s methodology in determining whether a plaintiff has a ‘disability.’”).

¹³⁹ See ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2(a)(1), 2(b)(1), 122 Stat. 3553, 3553–54.

definition, but the courts must continue to make individualized findings as to the extent of the plaintiff's infirmity.¹⁴⁰ Such individualized scrutiny is particularly important with moderate or obscure conditions, such as celiac sprue,¹⁴¹ a genetic disorder that substantially limits the digestive and bowel functions of those suffering from the disease. Under the ADAAA, an employee would not need to demonstrate that he or she is substantially limited in the major life activity of eating (something that would be very difficult for a sufferer of celiac sprue),¹⁴² but merely that celiac sprue substantially limits his or her digestive or bowel functions. Although celiac sprue certainly frustrates those afflicted with it,¹⁴³ many people who suffer from the disease lead perfectly healthy, normal lives, without the attendant disadvantages common to those with disabilities.¹⁴⁴ Courts must not, therefore, be lured into branding particular diseases as per se disabling under the ADAAA, despite a temptation to do so under the statute's broad inclusion of bodily functions as major life activities.

While Congress prudently recognized the need to expand the ADA to protect those with severe medical conditions, it also should have emphasized the importance of examining the specific medical condition at issue on a case-by-case basis. Some may argue that a case-by-case analysis of ADA claims will result in inconsistent application of the statute, but such a concern fails to recognize that an individualized approach is both required by the language of the ADA, and will offer better protection for the disabled. Maintaining an individualized approach not only reflects Congress's intent in

¹⁴⁰ The ADAAA retains the ADA's requirement that disability determinations must be made with respect to the individual. ADAAA § 4(a), 122 Stat. at 3555.

¹⁴¹ Celiac sprue, or celiac disease, is "a d[isease] occurring in children and adults characterized by sensitivity to gluten, with chronic inflammation and atrophy of the mucosa of the upper small intestine; manifestations include diarrhea, malabsorption, steatorrhea, nutritional and vitamin deficiencies." *STEDMAN'S MEDICAL DICTIONARY*, *supra* note 2, at 553.

¹⁴² Those with celiac sprue are intolerant to gluten, and, while it is difficult for these people to eat outside of the home, they can eat anything not made with wheat, oats, rye, barley or malt. See <http://www.nlm.nih.gov/medlineplus/ency/article/000233.htm>.

¹⁴³ This author included.

¹⁴⁴ The ADA cites data indicating that disabled individuals, "as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(6), 104 Stat. 328, 329 (1990) (codified at 42 U.S.C. § 12101(a)(6) (2006)). While this statement is undoubtedly true, sufferers of celiac sprue simply must maintain a particular diet; the distinction is no different from one who suffers from a severe peanut allergy. Further, it should be noted that celiacs' tolerances to gluten vary widely, from those with very mild symptoms to, in rare circumstances, those who perish due to the disease. This variance offers additional support for the necessity of a case-by-case analysis of each plaintiff's condition rather than broad classifications.

defining the scope of disability under the ADA,¹⁴⁵ but it remains the only logical approach to determining whether or not a plaintiff falls within the statutory protections. Not every individual afflicted with a particular disease will manifest exactly the same limitations and functional problems.¹⁴⁶ Therefore, an individualized approach is not only logical but necessary to ensure fair application of the ADAAA's broad statutory terms.

C. Goodbye Toyota Standard of Substantial Limitation

Among the stated purposes for the ADAAA, Congress "reject[ed] the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,"¹⁴⁷ which held that the definition of disability should be interpreted "strictly to create a demanding standard for qualifying as disabled."¹⁴⁸ Congress also rejected the additional finding in *Toyota* that, in order to be substantially limited, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."¹⁴⁹ The ADAAA goes on to indicate that the courts have applied an "inappropriately high level of limitation necessary to obtain coverage under the ADA."¹⁵⁰ For example, in *Littleton v. Wal-Mart Stores, Inc.*,¹⁵¹ a man diagnosed with mental retardation was found not substantially limited in the major life activities of learning, thinking, communicating, social interaction, and working.¹⁵² The court reasoned that because Littleton had earned a certificate of high school special education and then attended a technical college where he

¹⁴⁵ As indicated by the language of the statute: "[t]he term 'disability' means, with respect to an individual." ADAAA § 4(a), 122 Stat. at 3555 (emphasis added).

¹⁴⁶ The question here is not *which* bodily functions are limited, but *how limited* those functions become as a result of the particular disease or illness.

¹⁴⁷ ADAAA § 2(b)(4), 122 Stat. at 3554 (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 182 (2002)) (emphasis added).

¹⁴⁸ *Toyota*, 534 U.S. at 197.

¹⁴⁹ ADAAA § 2(b)(4), 122 Stat. at 3554 (quoting *Toyota*, 534 U.S. at 198).

¹⁵⁰ *Id.* § 2(b)(5), 122 Stat. at 3554.

¹⁵¹ 231 F. App'x 874 (11th Cir. 2007).

¹⁵² *Id.* at 877–78. Finding Littleton not covered by the ADA for the major life activities of social interaction and working is not surprising, as many courts have been hostile toward claims of social interaction (or, as more commonly framed, "interacting with others"). See, e.g., *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997). Working is difficult to establish under both the ADA and the ADAAA, as plaintiffs must show that they are substantially limited in a broad range of jobs, not just one particular job. As argued in Part II.A, *supra*, communicating probably should not be maintained as a major life activity, as courts may have a difficult time determining whether or not such an impairment is substantially limiting. However, the fact that medically diagnosed mental retardation was found not to be substantially limiting to any of the asserted major life activities, *Littleton*, 231 F. App'x at 877–78, particularly learning—the hallmark of mental retardation—is quite startling.

studied mechanical maintenance, he could not be substantially limited in the major life activity of learning.¹⁵³ The court's reasoning, however, seems inherently flawed. The fact that Littleton could only earn a certificate for high school studies and then was limited to pursuing his studies at a technical college, is strong evidence *of*, not *against*, a substantial limitation in the major life activity of learning. Littleton's accomplishments should be commended (especially under the medical model of disability), but to hold that Littleton was not substantially limited because he was capable of learning *something*, albeit at a severely disadvantaged level from the rest of the population, demonstrates the courts' hostility to ADA claims.

Cases like *Littleton* proved to Congress that the courts were using the substantially limits prong of the ADA too restrictively. In the ADAAA, Congress specifically states that the definition of disability should be construed "in favor of broad coverage."¹⁵⁴ Although Congress's recognition of the need to relax the standard was an important step toward providing protection of the disabled, Congress failed to alter the language of the ADA to reflect that change. Now, under the ADAAA, the courts will be forced to approach the substantially limits prong with very little guidance—and the minimal guidance provided directly contradicts the language of the statute. On the one hand, the ADAAA instructs the courts to construe the language broadly.¹⁵⁵ On the other hand, the language is exactly the same as it was under the original ADA. As a result, Congress essentially instructs the courts to interpret the same language differently. Although this instruction should prevent a restrictive approach to the statute, it provides no other guidance. Rather than take the opportunity to tell the courts how to construe substantially limits, Congress simply instructed the courts one way *not* to construe the language.¹⁵⁶ Thus, the ADAAA provides far less interpretational guidance than would be expected for an amendment purporting to clarify the meaning of its terms.

To clarify the scope of substantially limits, Congress could have redefined the term to more aptly fit the statutory intent. Although retaining the word "substantially" may prove to be of some benefit to employers,¹⁵⁷ the contradiction between the word "substantial" and

¹⁵³ *Littleton*, 231 F. App'x at 877.

¹⁵⁴ ADAAA § 4(a), 122 Stat. at 3555.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* § 2(b)(1)–(5), 122 Stat. at 3554 (rejecting previous Supreme Court interpretations of the ADA's language, but declining to specifically create a more acceptable construction).

¹⁵⁷ It is unclear if the decision to leave "substantially limits" as the applicable standard occurred as a result of excessive pressure from business and industry leaders, but it is likely that

the legislative directive to construe the term broadly render the phrase ambiguous, if not meaningless. If Congress truly wished to relax the applicable standard, it could have reflected this intention by changing the language to, for example, "moderately limits," which seems closer to the definitional scheme Congress intended. In addition, "moderately limits" would better equip the courts to apply a case-by-case analysis of each ADA claim, and to determine the extent of the plaintiff's alleged disability. Maintaining the substantially limits language could increase the likelihood that the courts will relapse into their previous textualist approach to the statute, and interpret the language restrictively. Altering the language to match its intent, on the other hand, would have provided clearer guidance to the courts, and resulted in an application more consistent with the intent of the amendments.

III. THE PENDULUM SWINGS BACK

While the courts' strict interpretation of the original ADA almost completely barred the disabled from enjoying protection against unlawful discrimination, the ADAAA seems poised to swing wildly in the other direction. Congress appears to have drafted the ADAAA out of reactionary panic rather than deliberative thought. Although the ADAAA clears up some of the ambiguities of the ADA,¹⁵⁸ it creates many more. One of the brilliancies of our legal system, however, is that the burden of interpretation falls to the courts. The judiciary's interpretation of the ADAAA will determine just how far the pendulum swings toward broad coverage of disabilities for ADA claims. The courts should approach the ADAAA with a view toward moderation and balance between protecting the legitimately disabled from discriminatory employment practices and protecting employers from those who fall outside the spirit of the ADAAA. The last nineteen years have shown what can happen when an extreme interpretation of mildly ambiguous statutory language is adopted—those the statute was intended to protect were largely excluded. Taking another extreme—protecting those who do not need it—will certainly not result in any better application of the law. Instead, a careful, moderate approach should be adopted.

business owners will be pleased by Congress's choice to retain the language. Employers may find some small refuge in the substantially limits language of the ADAAA when defending against ADA claims.

¹⁵⁸ For example, the ADAAA eliminates consideration of mitigating factors when determining whether or not an individual is substantially limited in a major life activity. *Id.* § 4(a), 122 Stat. at 3556.

The ADA was designed to protect the disabled from unlawful discrimination.¹⁵⁹ At the same time, Congress consulted extensively with the business community to determine whether or not employers would be able to comply with the ADA.¹⁶⁰ Congress wanted to establish a strong system of protection, but, in part due to resistance from the business community, needed to craft a moderate approach that required ADA plaintiffs to offer proof that they actually suffered from a disability. While the exact definitional landscape of the term “disability” has proven elusive, the ADAAA should be viewed as a small step toward clarity. Still, because ambiguities remain, the courts should remember the history that led to the passage of the ADAAA, and resolve the remaining ambiguities in favor of a moderate approach that provides comprehensive protection for those, and *only* those, who need it.

Despite the ADAAA’s shortcomings, disability advocates ought to be excited about the statute. The amendments have the potential to create long overdue protections for employees and applicants suffering from disabilities. Some caution, however, is warranted. Many of the statutorily adopted major life activities—such as “thinking,” “concentrating,” and “communicating,”¹⁶¹—could create protections beyond the limits Congress intended. Additionally, including the normal operation of every bodily function as a major life activity¹⁶² could lead to protection of nearly everyone. Finally, Congress generated further ambiguity by retaining the substantially limits language with instructions telling the courts to interpret the term more liberally.¹⁶³ Congress could have avoided this ambiguity simply by drafting new language that more accurately reflects the statutory intent.

These potential problems may be averted by a thoughtful and moderate application by the judiciary, especially in the first few ADA cases it hears.¹⁶⁴ New precedent can be drawn, but unless the courts

¹⁵⁹ See 42 U.S.C. § 12101(b)(1) (2006).

¹⁶⁰ See Feldblum, *supra* note 41, at 530.

¹⁶¹ ADAAA § 4(a), 122 Stat. at 3555.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ There is reason to be cautiously optimistic. At the time of this writing, only sixty-two decisions cited the ADAAA. Of those, only one discussed fully the ADAAA’s standard and its potential application to the plaintiff’s case, while the remainder merely held the ADAAA inapplicable and moved on. The case that discussed the liberal standard of the ADAAA also identified many of the potential problems discussed within this Note. See *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850 (9th Cir. 2009). It should be noted, however, that although the Ninth Circuit did look to the ADAAA for guidance, it decided the case under the original ADA, *not* the ADAAA. See *id.* at 853. Specifically, the court held that the plaintiff, who suffered from Type II diabetes, could raise a genuine issue of whether he was substantially limited in the major life activity of eating. *Id.* at 859. The court noted that diabetes

are willing to approach the ADAAA from a dynamic, historical perspective, a knee-jerk judicial reaction similar in scope (but opposite in effect) to the last nineteen years could result. The original ADA, though noble in intention, failed to deliver the protection it promised. Armed with new legislation and a developed historical perspective, however, the courts could finally have the tools necessary to protect the disabled from employment discrimination.

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constitutes a physical impairment for purposes of establishing a disability, “because it affects the digestive, hemic and endocrine systems.” *Id.* at 858. The court then analyzed the many bodily effects of diabetes and patients’ difficulties keeping them under control, ultimately holding that diabetes could substantially limit an individual’s major life activity of eating for purposes of surviving summary judgment. *Id.* at 858–60.

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