
STILL KICKIN' AFTER ALL THESE YEARS: SUTTON AND TOYOTA AS SHADOW PRECEDENTS

Deborah A. Widiss*

ABSTRACT

In the first 10 years following the enactment of the Americans with Disabilities Act of 1990 (ADA), the Supreme Court interpreted the Act as setting a very high threshold for what kinds of conditions qualified as disabilities, and for what had to be shown to establish that an individual was discriminated against because he or she was “regarded as” having a disability. These decisions were superseded by the ADA Amendments Act of 2008 (ADAAA). The ADAAA characterized the Court’s interpretations as counter to congressional intent and added substantive language that specifically rejects numerous aspects of the Court’s opinions. Despite the clarity of this override, this symposium contribution shows some courts continue to follow portions of the decisions that were clearly superseded.

In a series of articles, I have demonstrated that courts often continue to rely on overridden precedents—or what I have called shadow precedents. My earlier work explores instances in which it was unclear or debatable whether the override or the prior precedent should control. This article, by contrast, highlights examples of ongoing reliance on shadow precedents where it is unquestionably improper. In numerous post-ADAAA cases, courts follow the superseded precedents without mentioning the amendments at all, or they misunderstand the clear language of the override. These mistakes are particularly prevalent in courts’ interpretation of the plaintiff’s burden in “regarded as” claims; courts continue to apply the old, explicitly repudiated standard rather than the standard adopted in the ADAAA.

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In 2008, the ADA Amendments Act (ADAAA) was enacted with broad bipartisan support—a particularly impressive feat in this era of heightened partisan gridlock—and signed by President George W. Bush.¹ Congress announced, in statutory language, that it “rejected” prior Supreme Court interpretations of the Americans with Disabilities Act (ADA) which had set an extremely high standard for what kinds of impairments could constitute a qualifying disability.² The ADAAA stated that the courts were to construe the ADA’s definition of disability in favor of “broad coverage,” so that the ADA could fulfill its intended role of “provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³

The ADAAA, like the ADA before it, was properly celebrated as landmark legislation.⁴ But the ADAAA’s impact depends on how courts interpret it. In a series of earlier articles, I have explored the extent to which courts continue to rely on overridden precedents, or what I have called

1. See generally Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187 (2007) (providing detailed discussion of the drafting and negotiations involved with the ADAAA); see also Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2029 (2013) [hereinafter Befort, *Empirical Examination*].

2. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3554 (codified as amended 42 U.S.C. § 12101 (2012)) (explicitly rejecting aspects of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 194 (2002)).

3. *Id.*, § 2(a)(1), 122 Stat. at 3553 (quoting Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b) (codified as amended at 42 U.S.C. § 12101(b)(1))(internal quotations omitted).

4. See, e.g., Befort, *Empirical Examination*, *supra* note 1.

“shadow precedents.”⁵ I have shown that courts sometimes continue to follow the *underlying reasoning* of a decision even when the *holding* has been clearly superseded, or they continue to follow overridden decisions when interpreting similar language found in other statutes.⁶ In these contexts, it is often up for debate whether courts should follow the override or the prior precedent.⁷ In this Article, I show that similar questions have arisen under the ADAAA, but my primary objective is different. In this project, I highlight ongoing reliance on shadow precedents—here, *Sutton v. United Air Lines, Inc.*⁸ and *Toyota v. Williams*⁹—that is unquestionably improper. There are numerous cases arising under the ADA itself, resolving conflicts that occurred after the ADAAA’s effective date, that apply pre-ADAAA case law rather than the standard Congress put in place.¹⁰

To be clear, I am not suggesting that the ADAAA is a failure. Far from it. The overall number of citations to *Sutton* and to *Toyota* has dropped dramatically, far more quickly than is typical after most overrides.¹¹ I found many decisions where courts were applying the new law correctly.¹² But there were also many clear errors. Confusion was particularly pronounced in cases involving claims by plaintiffs that they were discriminated against

5. See generally Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012) [hereinafter Widiss, *Hydra*]; Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009) [hereinafter Widiss, *Shadow Precedents*].

6. See Widiss, *Shadow Precedents*, *supra* note 5, at 542–56.

7. Compare, e.g., Widiss, *Hydra*, *supra* note 5, at 933–41 (arguing that courts should reinterpret the language in related statutes in accordance with an override, so long as it is a plausible interpretation of the pre-existing language), with Charles A. Sullivan, Response, *The Curious Incident of Gross and the Significance of Congress’s Failure to Bark*, 90 TEX. L. REV. SEE ALSO 157 (2012), available at <http://www.texaslrev.com/90-see-also-157/> (arguing the prior precedent should govern interpretation of related statutes).

8. 527 U.S. 471 (1999).

9. 534 U.S. 184 (2002).

10. See *infra* Part IV.C.

11. See *infra* Part II.

12. See *infra* Part IV.A; NATIONAL COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT, at 13 (2013), available at <http://www.ncd.gov/publications/2013/07232013> (reporting that “[a]ssessment of overall outcomes in court decisions interpreting and applying the ADAAA shows that the Act has had a dramatic impact in improving the success rates of plaintiff in establishing disability,” although also noting that many “still lost their cases on other grounds”).

for being “regarded as” disabled.¹³ Although the ADAAA rejected the standard for “regarded as” claims announced by the Supreme Court in *Sutton*, many courts—including some circuit courts—incorrectly assert that the prior standard remains controlling and that *Sutton* was abrogated on “other grounds.”¹⁴

In compiling this study, I looked at decisions issued in 2013, 2014, or 2015 found on Lexis that cited to *Sutton* or *Toyota*. I did not assess whether litigants properly briefed the new standards and courts ignored them, or whether (as I think more likely) lawyers failed to recognize the import of the override as they constructed their legal filings. Whatever the cause, the upshot is clear. Overrides are not self-enacting. Even five years after it was enacted, the ADAAA—an unusually strong and clear override—has failed to change fully the law on the ground.

This Article proceeds as follows. Part I introduces *Sutton* and *Toyota* and discusses the changes that the ADAAA made to the definition of disability. Part II shows that there has been a dramatic decline in citations to *Sutton* and to *Toyota* since the ADAAA was enacted, situating these numbers within the context of a larger study I am completing on the extent to which citations levels typically change after an override. Part III describes my research method for this study. Part IV discusses my findings, providing examples of cases that cite *Sutton* and *Toyota* for proper reasons, arguably proper reasons, and improper reasons.

I. *SUTTON*, *TOYOTA*, AND THE ADA AMENDMENTS ACT

This Part summarizes the Supreme Court’s early case law interpreting the ADA’s definition of “disability” and the changes made by the ADAAA. Many readers may know this material well. However, since, as discussed below, review of court decisions demonstrates widespread confusion about some aspects of the override, I deem it important to cover this history in some detail.

The ADA prohibits discrimination on the basis of disability.¹⁵ The primary definition of disability within the Act—as originally enacted, and still today, although, as discussed below, the ADAAA further explained key terms—includes three prongs:

13. See *infra* Part IV.C.3.

14. See *id.*

15. 42 U.S.C. § 12112 (2012).

(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.¹⁶

During the 1990s, the Supreme Court interpreted this language as setting a very high bar to establish that an individual had a qualifying disability. The leading cases were *Sutton*¹⁷ and *Toyota*.¹⁸

In *Sutton*, the Court considered a claim brought by twin sisters with extreme myopia who were denied jobs as pilots because of their poor vision.¹⁹ Uncorrected, each had a visual acuity in each eye of 20/200 or worse, but with corrective lenses, each had normal (20/20) vision.²⁰ The Court held that the plaintiffs did not have a qualifying disability.²¹ It stated impairments should be assessed in their mitigated, rather than unmitigated, state.²² This interpretation was based, in part, on the ADA's statutory requirement that disability be evaluated "with respect to an individual," thus making the disability analysis "an individualized inquiry."²³ In two companion cases, the Court held that commercial vehicle operators who had lost their jobs because of other impairments—high blood pressure, and vision in only one eye—also did not have qualifying disabilities, because their impairments likewise were not deemed limiting enough when considered after mitigating measures.²⁴ The Court's position that impairments should be assessed in a mitigated state was counter to the position taken by the three federal agencies responsible for implementing the Act, and it was also counter to several statements in the committee reports of the ADA.²⁵

The Court in *Sutton* also considered whether the sisters could succeed

16. 42 U.S.C. § 12102(1).

17. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

18. *Toyota Motor Manufacturing, Ky, Inc. v. Williams*, 534 U.S. 184 (2002).

19. *Sutton*, 527 U.S. at 475.

20. *Id.* (quoting App. 23) (alteration in original).

21. *Id.* at 475, 488–89, 494.

22. *Id.* at 481–89.

23. *Id.* at 483 (citing 42 U.S.C. § 12102(2) (2012)) (internal quotation marks omitted).

24. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999); *Murphy v. U.P.S., Inc.*, 527 U.S. 516, 519, 521 (1999).

25. See *Sutton*, 527 U.S. at 499–503 (Stevens, J., dissenting).

on a claim that they were “regarded as” having a disability.²⁶ Again, the Court ruled that the plaintiffs’ claim failed.²⁷ It interpreted the “regarded as” prong as requiring a plaintiff to prove that:

- (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities,
- or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.²⁸

In other words, a plaintiff was required to prove a complicated counterfactual: Not only that an employer or other covered entity incorrectly believed that she had an impairment, but also that the covered entity incorrectly believed that the impairment (which might not even exist) substantially limited a major life activity.

Three years later, the Court decided *Toyota*.²⁹ This case was brought by a woman with carpal tunnel syndrome who had requested reasonable accommodations that would permit her to continue to work at an automobile manufacturing plant.³⁰ She alleged that she was substantially limited in her ability to perform manual tasks, lift, and work, as well as other major life activities.³¹ The Court held that she did not have a qualifying disability.³² It stated that the terms “substantially limited” and “major life activities” both needed “to be interpreted strictly to create a demanding standard for qualifying as disabled.”³³ It reasoned therefore that a plaintiff would need to show that his or her impairment “prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives,” and that the “impairment’s impact must also be permanent or long term.”³⁴ The Court again emphasized that the ADA required an individualized inquiry, and that a simple diagnosis of impairment was insufficient.³⁵ As in *Sutton*, the Court declined to decide definitively whether working could *ever* qualify as a major life activity, which

26. *Id.* at 489.

27. *Id.* at 494.

28. *Id.* at 489.

29. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

30. *Id.* at 187.

31. *Id.* at 190.

32. *Id.* at 187, 200–02.

33. *Id.* at 197 (emphasis added).

34. *Id.* at 198 (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)–(iii) (2001)).

35. *Id.* at 195, 198–99.

it characterized as a “difficult question.”³⁶ However, it stated that an inability to work at one job would certainly be insufficient to meet the standard.³⁷ The upshot of *Sutton* and *Toyota*, and lower court interpretations following these key precedents, was that it was extremely difficult for individuals to prove that they had serious enough impairments to qualify as disabilities under the Act.³⁸

In 2008, Congress enacted the ADAAA.³⁹ The ADAAA was a broadly bipartisan bill, and it passed by unanimous consent in the Senate and by a vote of 402 to 17 in the House.⁴⁰ The impetus for the law was clear: Congress strongly disagreed with much of the Supreme Court’s analysis in *Sutton* and *Toyota*. The ADAAA’s statutory findings reaffirmed that “Congress intended that [the ADA] ‘provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’”⁴¹ Congress then found that the “holdings of the Supreme Court in [*Sutton*] and its companion cases [had] narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect,” and that the “holding of the Supreme Court in [*Toyota*] further narrowed the broad scope of protection intended to be afforded by the ADA.”⁴² The ADAAA’s statutory purposes announced that Congress “rejected” central aspects of the holdings of *Sutton* and *Toyota*: *Sutton*’s analysis regarding mitigating measures; *Sutton*’s interpretation of the “regarded as” standard; *Toyota*’s

36. *Id.* at 199–200; *see also* *Sutton v. United Air Lines, Inc.* 527 U.S. 471, 492 (1999) (noting “some conceptual difficulty in defining ‘major life activities’ to include work, for it seems to argue in a circle”) (internal quotations omitted).

37. *Id.* at 200–01.

38. *See, e.g.,* Feldblum et al., *supra* note 1, at 188, 218–24 (collecting lower court cases relying on *Sutton* and *Toyota* to hold that individuals with wide variety of impairments did not have qualifying disabilities); *see also* 153 CONG. REC. S8345 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin) (asserting that individuals with “impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer” had all been denied coverage under the ADA as interpreted by the Supreme Court in *Sutton* and *Toyota*).

39. ADA Amendments Act Pub. L. No. 110-325, 122 Stat. 3553 (2008).

40. *See Federal Legislation and Administrative Clinic Plays Important Role in Passage of ADA Amendments Act*, GEORGETOWN UNIVERSITY (Sept. 2008), <https://www.law.georgetown.edu/archiveada/documents/GULCpressrelease9-08.pdf>.

41. Pub. L. No. 110-325, § 2(a)(1), 122 Stat. at 3553 (2008) (quoting the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b) (codified at 42 U.S.C. § 12101(b)(1) (2012))).

42. *Id.* §§ 2(a)(4), (5).

assertion that “substantially” and “major” “need to be interpreted strictly”; and the language in *Toyota* requiring individuals to establish that they are prevented or severely restricted from doing activities “of central importance to most people’s daily lives.”⁴³

To effectuate these purposes, Congress made several important changes to the substantive provisions of the ADA. Although the core provisions of the disability definition remain unchanged, the ADAAA adds an extensive list of activities that constitute major life activities.⁴⁴ This list explicitly includes working,⁴⁵ repudiating *Sutton* and *Toyota*’s suggestions that working might not be a major life activity.⁴⁶ The ADAAA further provides that the concept of major life activities includes operation of “a major bodily function.”⁴⁷ It also enacted “rules of construction” for the definition of disability.⁴⁸ These include an explicit statement that the definition of disability shall be construed “in favor of *broad coverage* of individuals,” a clear repudiation of the *Toyota* Court’s holding that the definition should be construed “strictly.”⁴⁹

The ADAAA specifies that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”⁵⁰ This supersedes the analysis in *Sutton* and its companion cases as to mitigating measures,⁵¹ although ordinary eyeglasses and contact lenses may still be considered.⁵² The amended statute explicitly states that impairments that are episodic or

43. *Id.* § 2(b)(2), (3), (4) (internal quotations omitted).

44. 42 U.S.C. § 12102(2)(A) (2012) (providing that “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”).

45. *See id.*

46. *See supra* notes 36–37 and accompanying text.

47. 42 U.S.C. § 12102(2)(B) (identifying bodily functions as including “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”).

48. *Id.* § 12102(4).

49. *Compare id.* § 12102(4)(A) (emphasis added), with *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

50. *Id.* § 12102(4)(E).

51. *See supra* text accompanying notes 22–25.

52. 42 U.S.C. § 12102(4)(c)(ii) (2012). The ADAAA also adds new language precluding the use of tests related to uncorrected vision unless they can be shown to be job-related and a business necessity. *Id.* § 12113(c).

in remission may be covered, and that a showing that an impairment supersedes one major life activity is sufficient to demonstrate a disability, even if it does not limit other major activities.⁵³ These provisions supersede lower court decisions that had interpreted the standard differently.⁵⁴

The ADAAA also unequivocally supersedes the interpretation of the “regarded as” standard articulated in *Sutton*. The ADAAA provides that individuals can meet this requirement if they establish that they have been subjected to an adverse action or discrimination “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*.”⁵⁵ The same subsection states that the “regarded as” standard does not apply to impairments that are “transitory and minor,”⁵⁶ suggesting, as discussed more fully below, that the other prongs of the definition *may* apply to transitory or temporary impairments.⁵⁷ This is an implicit superseding of *Toyota*’s statement to the contrary.⁵⁸

Finally, the ADAAA explicitly authorizes the EEOC to issue regulations further explaining the statutory terms.⁵⁹ The EEOC’s final regulations, approved by a bipartisan vote and published in the Federal Register on May 25, 2011, set forth the agency’s view of the proper interpretation of the new statutory language.⁶⁰ The relevance of regulatory

53. *Id.* §§ 12102(4)(C), (D).

54. *See, e.g.*, *Flores v. Am. Airlines, Inc.*, 184 F. Supp. 2d 1287, 1292 (S.D. Fla. 2002) (holding that a plaintiff with monocular vision was did not have a qualifying disability, despite the fact that he was limited in the major life activity of seeing, because although he was “inconvenienced as a result of monocular vision,” the plaintiff failed to present evidence that he was “prevented from performing *any* daily activities” (emphasis added)); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 453 (S.D. Tex. 1999) (holding that a plaintiff with epilepsy did not have a qualifying disability because, with medication, he only suffered from “light seizures” occasionally rather than regular grand mal seizures).

55. 42 U.S.C. § 12102(3) (emphasis added); for a detailed discussion of the background of “regarded as” protection and the substance of the override, see generally Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvalidate the “Regarded As” Prong of the Statutory Definition of Disability*, 4 UTAH L. REV. 993 (2010).

56. *Id.*

57. *See infra* Part IV.B.2.

58. *See Toyota Motors Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (stating that an impairment must “be permanent or long term” in order to be considered a disability).

59. Pub. L. No. 110-325, § 2(b)(6), 122 Stat. at 3554.

60. *See* 29 C.F.R. 1630; *Fact Sheet on the EEOC’s Final Regulations Implementing*

language to the ongoing reliance on aspects of *Sutton* and *Toyota* is discussed more fully below.⁶¹

II. CITATION PATTERNS AFTER THE OVERRIDE

In a working paper, Brian Broughman and I study the extent to which levels of citations to Supreme Court decisions change after an override.⁶² We develop an original dataset of annual citations to three different groups of Supreme Court decisions: (1) those overridden by Congress; (2) those overruled by the Supreme Court; and (3) a “matched control” of cases that were neither overridden nor overruled. We then look at the extent to which the level of “net” citations (defined as the total number of positive or neutral citations to a case minus the total number of negative citations, such as warnings, to a case) change after an override as compared to cases in the other two groups. We find that, on average, citation levels to cases that have been overridden by Congress drop only minimally, but they fall quite dramatically after a judicial overruling. However, within this broad finding, there are some important distinctions. Citations to overridden cases typically drop far more quickly after “restorative overrides”—which explicitly repudiate a prior Supreme Court decision as an incorrect interpretation of the pre-existing law—than after overrides that simply update or clarify the pre-existing law.

Our point is not that it is always improper to cite to an overridden precedent. As discussed more fully below, there are many reasons why courts would properly continue to cite to overridden precedents.⁶³ That said, we would expect to see *some change* in citation pattern after an override. We find, however, that cases that have been superseded by overrides that are intended to update or clarify the law are almost indistinguishable from our control group; this suggests that overrides may not be playing their expected role in the separation of powers.

The ADAAA was a “restorative” override. As discussed above, it was unmistakable that Congress intended to reject much of the Court’s analysis

the ADAAA, EEOC, http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm (last visited June 5, 2015).

61. See *infra* Part IV.

62. See generally Brian Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent* (USC Gould Sch. of Law Ctr. for L. & Soc. Sci., Paper No. CLASS15-12, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584048.

63. See *infra* Part IV.A.

in *Sutton* and *Toyota*. The absolute number of citations to *Sutton* and to *Toyota* has dropped extraordinarily dramatically and quickly.⁶⁴

Table 1 – *Sutton* and *Toyota* Number of Citations per Year, sorted by Shepard's Category (2008 is the year the ADAAA was enacted)

Year	<i>Sutton</i>			<i>Toyota</i>		
	total	positive	warning	total	positive	warning
2003	212	56	0	208	58	0
2004	196	64	0	191	57	0
2005	263	74	0	262	59	0
2006	345	92	0	313	87	0
2007	263	89	0	304	73	0
2008	286	91	4	303	76	3
2009	243	81	31	226	56	33
2010	228	82	31	218	67	36
2011	165	48	22	182	35	31
2012	131	22	19	122	11	22

The citation profiles of both cases look, generally, like those of a case that has been overruled, rather than the typical overridden case. These raw numbers suggest the majority of courts are now properly applying the new standard, rather than the old superseded standard.⁶⁵ Presumably, many employees who would not have been considered disabled before are now deemed to meet the statutory standard.⁶⁶

64. In earlier work, I have suggested that overrides would be more effective if Congress explicitly repudiated Supreme Court decisions it was overriding in statutory language. See Widiss, *Shadow Precedents*, *supra* note 5, at 562–63. The unusually rapid drop in citation levels after the ADAAA, which includes such statements, suggests this may be correct.

65. See also National Council on Disability, *supra* note 12 (collecting and analyzing early cases under the amended law, and concluding that courts were generally applying the new standards correctly).

66. See *id.*, at 13. There is some concern, however, that courts may now be applying an extremely restrictive interpretation of what is required to show that one is “qualified” to do the job. See generally, e.g., Befort, *Empirical Examination*, *supra* note 1.

But in the sections below, I show that even here—where the override was quite clear and where there was widespread discussion of the override in both popular and legal press—courts continue to rely on *Toyota* and *Sutton* as shadow precedents. In some instances, it is arguably reasonable that the old rules should apply. But in many of the examples discussed below, courts (and likely the lawyers appearing before them) have simply made mistakes.

III. RESEARCH METHOD

The research method for this Article was straightforward: I used *Shepard's* citation service to identify cases decided during 2013, 2014, or 2015 that cited *Sutton* or *Toyota*.⁶⁷ This means that I did not read any of the (presumably many) recent disability cases that did not cite either *Sutton* or *Toyota*. Thus, I do not and cannot draw any general conclusions about how the ADA is being interpreted. My focus is narrower: I document how *Sutton* and *Toyota* continue to shape emerging law, more than five years after the ADAAA was enacted.

After identifying the universe of recent cases included in Lexis⁶⁸ that cite to *Sutton* or *Toyota*, I then read many of the decisions, looking for patterns or cases that illustrated mistakes or confusion particularly well. Again, I am not suggesting that the cases discussed below are necessarily representative of the full body of current disability law. I certainly hope they are not; I would like to believe that they are outliers. That said, some mistakes were widely repeated within the dataset—and that suggests that there may be serious problems with some aspects of how the ADAAA is being implemented.

67. I chose to limit research to these recent years because I hoped that most decisions would consider facts that arose after the ADAAA's effective date. I found that this was more mixed than I had expected, as discussed below. *See infra* Part IV.A.

68. This data set includes a significant number of decisions issued by district or circuit courts that are picked up on Lexis (and often Westlaw) but not authorized for publication. I deem these decisions important for two reasons. First, many resolve an individual's claim relying on an incorrect legal standard. Second, it has become increasingly common for courts to cite to unpublished decisions, even if they are not formally afforded precedential weight. The dataset does not include any decisions that were not found on Lexis at all.

IV. SUTTON AND TOYOTA AS SHADOW PRECEDENTS

A. Proper Reliance on Sutton and Toyota

There are many good reasons for courts to continue to cite to overridden precedents. First, an override may only supersede a part of a decision. Lower courts are bound to apply Supreme Court precedent except to the extent that it is superseded. As discussed below, it is sometimes ambiguous or unclear where to draw the line. But, there are aspects of the *Sutton* and *Toyota* decisions that are clearly still “good law.” For example, *Sutton* includes a summary of the ADA’s basic prohibition of discrimination on the basis of disability.⁶⁹ Congress did not change this operative language, and courts might still reasonably cite it.

Second, statutory overrides, like statutes more generally, are typically deemed to be prospective rather than retroactive.⁷⁰ The ADAAA stated that it would become effective on January 1, 2009.⁷¹ Courts have consistently held that factual disputes that arose before this date should be resolved under the ADA as it was interpreted prior to the ADAAA.⁷² *Sutton* and *Toyota* are leading interpretations, and courts properly continue to cite to them in such cases. Even though I did not consider any *decisions issued* before 2013, my dataset included many disputes over events that *occurred* prior to 2009.⁷³

Third, courts frequently cite to *Sutton* or *Toyota* to explain what the standard *had been* under the law and then discuss how Congress changed the standard in enacting the ADAAA.⁷⁴ Shepard’s generally indicates such

69. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477–78 (1999).

70. See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311–12 (1994); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 263 (1994); see also Widiss, *Shadow Precedents*, *supra* note 5, at 534–36 (discussing competing arguments as to whether restorative overrides should be interpreted retroactively).

71. Pub. L. No. 110-325, § 8, 122 Stat. 3553, 3559 (2008).

72. See, e.g., *Reynolds v. Am. Nat’l Red Cross*, 701 F.3d 143, 150–52 (4th Cir. 2012) (declining to apply ADAAA retroactively); *Carraras v. Sajo, Garcia & Partners*, 596 F.3d 25, 33 n.7 (1st Cir. 2010) (same); *Milholland v. Sumner Cnty. Bd. of Educ.*, 569 F.3d 562, 565 (6th Cir. 2009) (same); *EEOC v. Argo Distribution, LLC*, 555 F.3d 462, 469–70 n.8 (5th Cir. 2009) (same).

73. This was particularly true with respect to circuit court decisions, since they had already reached the appeals stage. See, e.g., *Widomski v. State Univ. of N.Y.*, 748 F.3d 471, 475 n.1 (2d Cir. 2014).

74. See, e.g., *Mazzeo v. Color Resolutions Int’l, LLC*, 746 F.3d 1264, 1267–70 (11th Cir. 2014) (discussing how disability definition in the ADAAA and EEOC regulations differed from the Court’s interpretations in *Toyota* and *Sutton*).

citations as “negative” citations. My larger project with Professor Broughman subtracts such “negative” citations from the overall citation count to assess “net” (presumably positive) citations. However, in combing through the cases for this Article, I discovered that Shepard’s is not always consistent in its signaling. There were decisions that properly noted the override and rejected the analyses from *Sutton* and *Toyota* that were not identified by Shepard’s as “negative” cites.⁷⁵

B. Arguably Proper Reliance on *Sutton* and *Toyota*

There were also decisions that I would classify as “arguably proper” in following *Sutton* and *Toyota* rather than the ADAAA. My prior work has identified two kinds of questions that often arise after an override is enacted: whether and how an override should affect interpretation of other laws with similar language that were not amended,⁷⁶ and whether the underlying rationales of a decision, as well as its holding, are superseded.⁷⁷ Both arise with respect to the ADAAA.

1. Related Statutes

When Congress amends a statute to supersede a judicial interpretation, it is often debatable what effect—if any—that override should have on the interpretation of similar language found in other statutes. In the ADAAA context, these include state laws prohibiting discrimination on the basis of disability, and other federal laws, such as the Fair Housing Act, that likewise prohibit disability discrimination.

Some courts have wrestled thoughtfully with these complexities. For example, Pennsylvania’s disability discrimination law, the Pennsylvania Human Relations Act (PHRA), is quite similar to the pre-amendment ADA; prior to the enactment of the ADAAA amendments, it was

75. See, e.g., *Cain v. Atelier Esthetique Inst. of Esthetics, Inc.*, 13 Civ. 7834, 2014 U.S. Dist. LEXIS 88115, at *9–10 (S.D.N.Y. June 26, 2014); *Mastrio v. Eurest Servs., Inc.*, No. 3:13-cv-00564, 2014 U.S. Dist. LEXIS 27050, at *7–8 (D. Conn. Mar. 4, 2014).

76. In the employment discrimination context, there has been extensive litigation on this point regarding the standard of causation that governs individual disparate treatment claims. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2523 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 173, 176–77 (2009); Widiss, *Hydra*, *supra* note 5, at 881–900, 908–20 (discussing this issue and collecting cases).

77. See generally Widiss, *Shadow Precedents*, *supra* note 5, at 531–34, 542–46, 551–56.

interpreted identically.⁷⁸ Several federal district courts have concluded, however, that Pennsylvania's failure to enact amendments comparable to the ADAAA means that the Pennsylvania law continues to be governed by the standards set forth in *Sutton* and *Toyota*.⁷⁹ By contrast, the Iowa Supreme Court reasoned that even though Iowa had not amended its statute, Iowa's prohibition on discrimination on the basis of disability could be interpreted consistent with the more generous understanding of disability adopted in the ADAAA, as well as with earlier interpretations of the Iowa law.⁸⁰

The approach endorsed by the Iowa court is similar to that which I have advocated in earlier writing.⁸¹ That is, there should be a rebuttable presumption that state statutes be interpreted consistently with federal analogues—as amended by overrides—so long as the language of the state statute can reasonably bear this interpretation. This approach furthers efficiency and consistency. It also reflects the reality that although it may be reasonable to assume that a state legislature intends a state statute to be interpreted generally in accordance with similar federal law, there is rarely any basis to know whether that state legislature specifically agreed with the Supreme Court's interpretation of the federal statute on a particular point or with any Congressional repudiation of that Supreme Court interpretation. That said, there are also some strong justifications for the contrary position

78. See, e.g., *Slagle v. Cnty of Clarion*, 435 F.3d 262, 265 n.5 (3d Cir. 2006) (stating that the PHRA will be interpreted identically to federal antidiscrimination laws, unless language is present which requires a different interpretation); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999) (“[O]ur analysis of an ADA claim applies equally to a PHRA claim”).

79. See, e.g., *Koci v. Cent. City Optical Co.*, No. CV 14-2983, 2014 U.S. Dist. LEXIS 160940, at *12–13 (E.D. Pa. Nov. 14, 2014); *Riley v. St. Mary Med. Ctr.*, No. 13-CV-7205, 2014 U.S. Dist. LEXIS 72366, at *10–11 (E.D. Pa. May 27, 2014) (stating that while the plaintiff had “adequately pled a disability under the ADAAA,” she had not “pled the existence of a disability under the [PHRA], which is to be interpreted under the pre-amendment ADA standard for disability”); *Rubano v. Farrell Area Sch. Dist.*, 991 F. Supp. 2d 678, 689 n.7, 704 (W.D. Pa. 2014) (stating that because the Pennsylvania legislature failed to amend the PHRA to fall in line with the ADAAA, the standards under each are different and thus PHRA claims would be analyzed under the pre-amendment ADA standards).

80. *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 9–13 (Iowa 2014); cf. *Roghelia v. Hopedale Mining, LLC*, No. 13HA8, 2014 Ohio App. LEXIS 2874, at *15–16 (June 23, 2014) (discussing how Ohio's disability law had been interpreted more generously than the federal law and that the ADAAA meant that the federal law was now again similar to Ohio's standard).

81. See *Widiss, Hydra*, *supra* note 5, at 918–20, 933–37.

taken by the courts in Pennsylvania.

Similar questions can arise with respect to whether the ADAAA changed the interpretation of federal laws prohibiting disability discrimination in other contexts, such as housing. For example, some courts follow pre-ADAAA interpretations of the “disability” definition when deciding claims under the Fair Housing Act.⁸² For reasons explored at length elsewhere, I think courts should re-interpret the language of these other federal statutes in accordance with the meaning endorsed by the override, so long as that is a plausible interpretation of the pre-existing language.⁸³ However, this is likewise an area where there is room for disagreement, and, accordingly, I classify ongoing reliance on *Sutton* and *Toyota* when interpreting either state or federal statutes with language similar to that of the ADA as “arguably proper.”

2. Underlying Reasoning

There are also questions about the extent to which the reasoning underlying the holdings in *Sutton* and *Toyota* was superseded. A leading example of this question is the *Sutton* Court’s assertion that the ADA requires an “individualized inquiry” and the related point in *Toyota* that “merely having an impairment does not make one disabled for purposes of the ADA.”⁸⁴ Both propositions are still cited routinely without indication that the ADAAA affects their ongoing viability.⁸⁵ And it is true that the ADAAA does not include statutory language that directly supersedes these conclusions and that the EEOC’s regulations on point continue to affirm these general propositions.⁸⁶

82. See, e.g., *Bhogaita v. Altamonte Heights Condo. Ass’n*, 765 F.3d 1277, 1288 (11th Cir. 2014) (following *Sutton* in interpreting the Fair Housing Act (FHA) “because of the similarity between the pre-amendment ADA and the FHA”).

83. See generally Widiss, *Hydra*, *supra* note 5, at 926–42.

84. See *supra* text accompanying notes 23 & 35.

85. See, e.g., *Shaughnessy v. Xerox Corp.*, No. 12-CV-6158T, 2015 U.S. Dist. LEXIS 39537, at *8 (W.D.N.Y. Mar. 27, 2015) (citing *Sutton* for the proposition courts must make an individualized assessment of whether an impairment constitutes a disability); *Martin v. St. Luke’s Episcopal Hosp.*, No. CV-H-13-0718, 2014 U.S. Dist. LEXIS 132998, at *15 (S.D. Tex. Sept. 23, 2014) (same); *Purcell v. Fadlallah*, No. 10-13444, 2013 U.S. Dist. LEXIS 99470, at *21 (E.D. Mich. July 17, 2013) (same).

86. See 29 C.F.R. §1630.2(j)(1)(ii) (2014) (“An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, *not every impairment will constitute a disability within the meaning of this section.*”) (emphasis added); 29 C.F.R. §

However, as discussed above, the ADAAA defined “major life activity” to include “major bodily functions,” such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”⁸⁷ In other words, under the amended statutory language, any condition that substantially limits the working of any of these bodily systems is sufficient to constitute a disability.

The EEOC regulations now take the position (which I believe is reasonable) that many conditions—including intellectual disabilities, cancer, diabetes, epilepsy, major depressive disorder, post-traumatic stress disorder, and bipolar disorder—will “virtually always” be sufficient to satisfy the statutory standard.⁸⁸ Thus the ADAAA, at least as interpreted by the EEOC, comes quite close to adopting a diagnosis-based theory of disability for many kinds of impairments. Nonetheless, courts routinely cite to the assertions in *Sutton* and *Toyota*’s that an individualized inquiry is required without considering—or even acknowledging—that the statutory language regarding major bodily functions and the EEOC’s new guidance offers strong grounds for reconsidering extensive reliance on these propositions from the earlier cases.⁸⁹ Some of these decisions are in cases where the plaintiff alleged an impairment that is included on the EEOC’s list as “virtually always” sufficient.⁹⁰

There is also room for disagreement regarding the extent to which the ADAAA superseded *Toyota*’s holding that an “impairment’s impact must also be permanent or long term.”⁹¹ As noted above, the ADAAA

1630.2(j)(iv) (“The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.”).

87. *Id.* § 12102(2)(B).

88. 29 C.F.R. § 1630.2(j)(3).

89. See generally cases cited *supra* note 85.

90. See, e.g., *Purcell v. Fadlallah*, No. 10-13444, 2013 U.S. Dist. LEXIS 99470, at *19–21 (E.D. Mich. July 17, 2013) (holding plaintiff had failed to provide sufficient individualized evidence to establish that diabetes was a qualifying disability). But see 29 C.F.R. §§ 1630.2(j)(1)(viii), (3) app. (2014) (stating that “an individual with diabetes is substantially limited in endocrine function” and suggesting that accordingly the individualized assessment should be “particularly simple and straightforward”). It may be that the plaintiff in *Purcell* failed to meet even this lower standard, but it is difficult to know because the court relied exclusively on pre-ADAAA precedent in reaching its conclusion that the showing was inadequate. See *Purcell*, 2013 U.S. Dist. Lexis 99470, at *19–21.

91. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (citing 29

emphasizes that the definition of disability should be interpreted in favor of “broad coverage,” and that *Toyota* set an unreasonably high bar. The clarification of the standard for “regarded as” claims explicitly states that it does not include impairments that are “transitory and minor,” and it defines “transitory” as an impairment with an “actual or expected duration of six months or less.”⁹² However, this statutory reference to transitory and minor applies *only* to the “regarded as” prong; there is no such limitation for the “actual” or “record of” prongs of the definition. Accordingly, the EEOC takes the position that a short term or temporary impairment “lasting or expected to last fewer than six months *can* be substantially limiting within the meaning” of these aspects of the definition of disability.⁹³ (Of course, to qualify as an actual disability, the impairment cannot be “minor,” since a plaintiff must show that it substantially limits a major life activity.⁹⁴) Many courts have agreed with this interpretation.⁹⁵ On the other hand, some courts have held that, even after the passage of the ADAAA, temporary disabilities are generally insufficient.⁹⁶ While I disagree with this interpretation, it is probably fair to say it is not clearly counter to the plain language of the ADAAA.

C. Mistaken Reliance on Sutton and Toyota

The sections above identify proper and arguably proper reasons for courts to continue to cite to *Sutton* and *Toyota*. This section, by contrast, documents mistakes—ongoing reliance on shadow precedents where it is clear that it is unwarranted. This is not to say that the *outcomes* in all of these cases were incorrect. There are probably many cases discussed below where it was appropriate for a court to grant the employer’s motion for summary judgment or motion to dismiss. But the grounds supporting that outcome

C.F.R. §§ 1630.2(j)(2)(ii)–(iii) (2001)).

92. 42 U.S.C. § 12102(3)(B).

93. 29 C.F.R. § 1630.2(j)(ix).

94. *See* 42 U.S.C. § 12102(1)(A).

95. *See, e.g.,* Heatherly v. Portillo’s Hot Dogs, Inc., 958 F. Supp. 2d 913, 920–21 (N.D. Ill. 2013) (holding that restriction on lifting due to a high risk pregnancy could be a qualifying disability); Esparza v. Pierre Foods, 923 F. Supp. 2d 1099, 1104–05, 1106 (S.D. Ohio 2013) (finding that kidney stones that required surgery and two weeks recovery time could be a qualifying disability).

96. *See, e.g.,* Mastrio v. Eurest Servs., Inc., No. 3:13-cv-00564(VLB), 2014 U.S. Dist. LEXIS 27050, at *9–12 (D. Conn. Mar. 4, 2014) (stating that despite EEOC guidance on the matter, the court and “several other courts in this Circuit . . . adhere[] to the traditional notion that temporary or short term disabilities are not covered by the statute absent allegations highlighting the extreme severity of the disability”).

were incorrect. In some instances, even applying the more generous standard set forth in the ADAAA, courts might conclude that the individual did not have a qualifying disability. And I think it quite likely that in many of the cases, the employer might have been able to prove that it had a legitimate non-discriminatory rationale for the challenged adverse action. But it also seems highly probable that at least some of the plaintiffs' claims were improperly dismissed.

More generally, these cases are concerning because, regardless of whether the *outcome* in any particular case was correct or incorrect, the incorrect *reasoning* of the decision may be followed by other courts, thus perpetuating the ongoing, and improper, influence of *Sutton* and *Toyota*. Indeed, in our larger study of overrides, Professor Broughman and I found that early citations—either positive or negative—to overridden decisions were extremely influential in setting paths that other courts followed.⁹⁷ My hope in writing this Article is that it will help lawyers and judges stamp out these mistakes.

Our adversarial system relies primarily on lawyers to identify relevant law and make legal arguments that advance their client's position.⁹⁸ Given the substance of the ADAAA, in most instances it would be in the plaintiff's interest to highlight the statutory changes. However, defense counsel should also be expected to craft their arguments under the revised legal standard, whether or not plaintiffs properly cite it.⁹⁹ And judges should be expected to apply the operative law.¹⁰⁰ This is particularly true because ADA cases are very common in the federal court docket. Thus, even if the parties in a given case failed to cite properly to the new standard, it is reasonable to assume that the courts deciding cases that I reviewed (from 2013–2015) had decided other post-ADAAA cases.¹⁰¹ Indeed, in several cases, courts applied the

97. See Broughman & Widiss, *supra* note 62, at 22–24 & Table 4.

98. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2013) (stating that lawyers must pursue "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor").

99. See *id.* R. 3.3(1), (2) (2013) (providing that a lawyer shall not knowingly make a false statement of law or fail to disclose "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel").

100. See *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as written."); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) (stating that courts are bound to enforce valid statutes).

101. Approximately 5,000 ADA cases (1964 cases in ADA-employment, and 3039 cases in ADA-other) were filed in the U.S. district courts in 2013; there has been a steady

ADAAA standards but chastised counsel for failing to recognize the significance of the overrides and improperly resting on pre-ADAAA case law in their briefing.¹⁰² The examples that follow, however, demonstrate that sometimes such mistakes were not corrected.

A comprehensive review of the briefing in these cases was beyond the scope of this project.¹⁰³ Accordingly, I cannot determine where the breakdown occurred. Did plaintiff's counsel fail to cite to the proper legal standard? Did defense counsel try to obscure the significance of the changes? Or did courts, even if the parties briefed the matter properly, nonetheless fail to apply the correct standard? And if so, was this because of ideological disagreements with the revised law? Or simply careless mistakes? Whatever the cause, the end result was that the wrong law was applied.

1. Ignoring the ADAAA Entirely

I was rather shocked—and highly troubled—to find a significant number of cases in my data set that relied on *Sutton*, *Toyota*, and other pre-ADAAA case law without acknowledging the ADAAA at all, even though

increase in ADA filings since the ADAAA was enacted. See *Judicial Facts and Figures 2013*, Table 4.4, US COURTS.GOV (Sep. 30, 2013), <http://www.uscourts.gov/statistics/table/44/judicial-facts-and-figures/2013/09/30>. By contrast, many other overrides are rather obscure, and it is less surprising (and perhaps less problematic) that judges sometimes fail to properly apply the governing standard if the parties fail to brief the legal changes. See Deborah A. Widiss, Response, *Identifying Congressional Overrides Should Not Be This Hard*, 92 TEX. L. REV. SEE ALSO 145, 157–59 (2014) (discussing considerable lag time before courts begin to flag overrides).

102. See *Aldini v. Kroger Co.*, No. 12-13641, 2014 U.S. Dist. LEXIS 172061, at *18–22 (E.D. Mich. Dec. 12, 2014), *appeal filed* Jan. 16, 2015 (discussing how the defendant failed to recognize the ADAAA in their arguments and “failed to set forth any case law or argument that does not directly rely upon specifically rejected standards”); *Johnson v. Balt. City Police Dep’t*, Civil Action No. ELH-12-2519, 2014 U.S. Dist. LEXIS 41669, at *44–45 (D. Md. Mar. 27, 2014) (noting “neither party has addressed the impact on the cited case law of the enactment of the [ADAAA]” but holding the case is governed by the ADAAA).

103. Cf. Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. J. 1, 56–62 (2013) (analyzing early complaints filed under the ADAAA and concluding that plaintiffs’ lawyers often failed to effectively plead the new standard); NAT’L COUNCIL ON DISABILITY, *supra* note 12, at 93 (“In more than a few [early] cases ... [under the ADAAA, plaintiff’s] changes for favorable outcomes were squandered by substandard, sometimes dismal, legal pleadings and briefs on their behalf.”).

the facts arose after the ADAAA's effective date. These include cases relying on *Sutton*'s assertion that the effect of mitigating measures must be considered,¹⁰⁴ on *Toyota*'s assertion that an "impairment's impact must . . . be permanent or long term,"¹⁰⁵ on *Toyota*'s assertion that the ADA is intended to create a "demanding standard,"¹⁰⁶ on *Toyota*'s assertion that it must prevent or severely restrict the individual's ability to perform activities that are central to daily life,¹⁰⁷ and, as discussed below, many relying improperly on *Sutton*'s "regarded as" standard.¹⁰⁸

In some of these decisions, both sides were represented by counsel.¹⁰⁹ Many others included a plaintiff who was *pro se*, which might explain why the ADAAA was not properly discussed in court filings (although, as noted above, defense counsel is obligated to apply governing law, even if the plaintiff failed to do so).¹¹⁰ A sizable subset of these decisions arose under Title II of the ADA, which governs discrimination by public entities, rather than Title I, which governs discrimination by private employers.¹¹¹ The ADA's primary definition of disability applies to the Act as a whole—and the amendments made by the ADAAA to that definition likewise apply to the ADA as a whole.¹¹² Thus, the issue is quite different from the question

104. See, e.g., *Rathy v. Wetzel*, No. 13-72, 2014 U.S. Dist. LEXIS 115331, at *12 (W.D. Pa. Aug. 19, 2014); *Pleasant v. D&N Elec. Co.*, No. 1:11-CV-2748-TWT, 2013 U.S. Dist. LEXIS 46937, at *6 (N.D. Ga. Apr. 1, 2013).

105. *Shaughnessy v. Xerox Corp.*, No. 12-CV-6158T, 2015 U.S. Dist. LEXIS 39537, at *7 (W.D.N.Y. Mar. 27, 2015); *Rodriguez v. Rochester Genesee Reg'l Transp. Auth.*, No. 14-CV-6038T, 2014 U.S. Dist. LEXIS 106566, at *7 (W.D.N.Y. Aug. 4, 2014).

106. *Roebuck v. Summit Cnty. Dep't of Jobs & Family Servs.*, No. 5:13 CV 2816, 2014 U.S. Dist. LEXIS 73906, at *4 (N.D. Ohio May 30, 2014).

107. *Shaughnessy*, 2015 U.S. Dist. LEXIS 39537, at *7; *Rodriguez*, 2014 U.S. Dist. LEXIS 106566, at *7; *Jones v. City of St. Louis*, No. 4:12-CV-00831, 2013 U.S. Dist. LEXIS 30435, at *6 (E.D. Mo. Mar. 5, 2013).

108. See *infra* Part IV.C.

109. See, e.g., *Pleasant*, 2013 U.S. Dist. LEXIS 46937, at *1; *Jones*, 2013 U.S. Dist. LEXIS 30435, at *1.

110. See, e.g., *Rodriguez*, 2014 U.S. Dist. LEXIS 106566, at *1; *Roebuck*, 2014 U.S. Dist. LEXIS 73906, at *1.

111. See, e.g., *Koch v. Vill. of Schiller Park*, No. 12-CV-1224, 2014 U.S. Dist. LEXIS 82110, at *15 (N.D. Ill. June 17, 2014); *Fuller v. Wheat*, No. 4:12-CV-03957-CLS-TMP, 2013 U.S. Dist. LEXIS 188450, at *17–18 (N.D. Ala. Nov. 8, 2013); *George v. Cnty. of Jefferson*, No. 2:10-CV-3389-AKK, 2013 U.S. Dist. LEXIS 141621, at *28 (N.D. Ala. Sept. 30, 2013); *Campbell v. Thomas*, No. 2:10-CV-694-WC, 2013 U.S. Dist. LEXIS 137320, at *1 (M.D. Ala. Sept. 25, 2013).

112. See Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554 (2008).

discussed above regarding whether the ADAAA should affect the interpretation of distinct federal laws such as the Fair Housing Act or state laws. There is no question that it is improper to continue to interpret ADA Title II claims pursuant to the superseded standards. While undeniably an error, it is perhaps not surprising that improper reliance on *Sutton* and *Toyota* might linger in this context longer than in employment cases, since the amendments may have received more attention for their effects in the employment law context. This suggests that there may need to be further education highlighting that the amendments apply to the ADA as a whole.

I also found several cases that arose under the Rehabilitation Act of 1973, an Act that (among other things) prohibits employment discrimination on the basis of disability by the federal government and federal contractors.¹¹³ Although the Rehabilitation Act predates the ADA, the ADAAA amended the Rehabilitation Act to incorporate into that statute the ADA's (amended) definition of disability.¹¹⁴ Despite this clear change in the law, there were several Rehabilitation Act cases in my dataset that improperly applied pre-ADAAA case law (i.e., *Sutton* and *Toyota*).¹¹⁵ This is particularly ironic since part of the rationale for the ADAAA was to return to interpretations that had governed disability discrimination under the Rehabilitation Act prior to the ADA.¹¹⁶

It bears emphasis that *all of the cases that I reviewed were decided in 2013 or later*. Thus, they were decided *at least four years after the ADAAA became effective*.¹¹⁷ The courts and the lawyers appearing before them had ample time to learn about the amendments. But these cases were decided as if the ADAAA had never been enacted.

113. 29 U.S.C. § 701 (2014).

114. Pub. L. 110-325, § 7, 122 Stat. 3553, 3558 (2008); *see also* 29 U.S.C. § 705(9)(B) (stating that for many provisions of the Rehabilitation Act, including the provisions addressing employment discrimination found in subchapter V of the Act, the term "disability" means "the meaning given it in section 12102 of Title 42" [the ADA]). My thanks to Steve Befort for helping clarify my understanding of the interaction between the two statutes.

115. *See, e.g.*, *Nadel v. Shinseki*, No. 12-CV-1902, 2014 U.S. Dist. LEXIS 153564, at *14–17 (S.D.N.Y. Sept. 30, 2014); *Williams v. Donahoe*, No. 3:14-CV-00002-DSC, 2014 U.S. Dist. LEXIS 83574, at *9–11 (W.D.N.C. June 19, 2014).

116. *See* Pub. L. 110-325, § 2(b), 122 Stat. 3553, 3554 (2008) (stating ADAAA was intended to "reinstate" the reasoning of a 1987 Supreme Court decision establishing the standard for "regarded as" claims under the Rehabilitation Act).

117. *See id.* § 3559 (providing the ADAAA became effective on January 1, 2009).

2. Acknowledging the ADAAA but Misconstruing It

There were also a significant number of decisions that acknowledged in some way that the ADAAA had been enacted, but nonetheless applied pre-ADAAA case law in contexts where it had clearly been superseded. In many instances, this meant following statements in *Sutton* or *Toyota* that are no longer controlling. Somewhat more subtly—but equally inappropriate—this category also included numerous decisions in which courts followed circuit or district court precedents applying the rules announced by *Sutton* and *Toyota*, without discussing whether these lower court precedents should be reconsidered in light of the changes made by the ADAAA. It is almost certain that I only saw a small subset of the decisions that made this second kind of mistake because I only searched for cases that cited *Sutton* or *Toyota*. Thus, cases only ended up in my dataset if the decision *also cited to Sutton* or *Toyota* (sometimes in the context of indicating that the lower court decision had quoted these Supreme Court decisions).

For example, in one case, the plaintiff alleged that he had sprained his back in a workplace injury.¹¹⁸ He received physical therapy for a month, and he alleged that he “could not sleep in bed or lay down because of the pain” for several months and that co-workers routinely commented on the pain he was in.¹¹⁹ The court referenced the ADAAA, but then relied on a litany of pre-ADAAA Supreme Court, circuit court, and district court case law to hold this injury did not meet the standard as a qualifying disability.¹²⁰ In another decision, the plaintiff alleged that he was unable to raise his right arm over his head and that his doctor had restricted him from lifting more than 15 pounds.¹²¹ The court relied on pre-ADAAA case law, holding that comparable lifting restrictions were insufficient, as well as referring to pre-ADAAA decisions regarding what was needed to establish a substantial limitation with respect to the ability to work, without assessing at all how the amendments should affect this analysis.¹²²

The roots of many pre-ADAAA circuit and district court decisions were cut out by the ADAAA. Accordingly, the conclusions reached in these decisions—such as whether temporary disabilities can qualify, or whether

118. See *De La Noval v. Papa's Dodge*, No. 3:14-CV-00460-VLB, 2015 U.S. Dist. LEXIS 38736, at *5–6 (D. Conn. Mar. 26, 2015).

119. *Id.*

120. *Id.* at *12–15.

121. *Morris*, 2014 U.S. Dist. LEXIS 133168, at *25.

122. *Id.* at *25–30.

particular kinds of conditions can qualify—need to be rethought in light of the amendments (even though these lower court decisions may not themselves be “red-flagged” on Lexis or Westlaw). Many of the court decisions that I reviewed properly undertook this analysis. As one court explained, pre-ADAAA cases “carry little, if any, precedential weight with respect to the issue of [disability]” when deciding a case where facts arose after the effective date of the ADAAA.¹²³ And in certain circumstances, courts reasonably determined that the rules established by those earlier decisions are still an appropriate interpretation of the amended Act.¹²⁴ But it is undeniably improper to reflexively cite to pre-ADAAA lower court decisions as controlling law without considering whether the conclusions they reach are still valid.

3. The “Regarded As” Problem

Despite the ADAAA’s clear renunciation of *Sutton*’s interpretation of the “regarded as” standard,¹²⁵ numerous courts continue to apply it. These cases are a subset of the categories above. That is, there were some decisions that cited to *Sutton* without acknowledging the ADAAA at all.¹²⁶ There were far more that recognized that the ADAAA had superseded *Sutton* in many respects but asserted, incorrectly, that its articulation of the standard for

123. *Feldman v. Law Enforcement Assocs. Corp.*, 779 F. Supp. 2d 472, 483 n.3 (E.D.N.C. 2011); *see also, e.g., Aldini v. Kroger Co.*, No. 12-13641, 2014 U.S. Dist. LEXIS 172061, at *21 (E.D. Mich. Dec. 12, 2014) (“[I]t is clear that to the extent that the [ADAAA] specifically rejected the more strict and narrow standards set forth in [*Sutton*] and [*Toyota*], the Court cannot rely upon decisions that rely upon those same rejected standards.”); *EEOC v. Midwest Reg’l Med. Ctr., LLC*, No. CIV-13-789-M, 2014 U.S. Dist. LEXIS 114297, at *3–7 (W.D. Okla. Aug. 18, 2014) (holding that pre-ADAAA Tenth Circuit precedent regarding the standard for disability was no longer binding because it relied on aspects of *Sutton* and prior regulations that had been superseded).

124. For example, as noted above, some courts have decided, after thoughtful analysis, that despite new language in the ADAAA and the EEOC’s new regulations, temporary conditions are almost always insufficient to qualify as a disability. *See supra* note 96 and accompanying text. This kind of reasoned conclusion is quite different from decisions that rely on prior decisions holding that temporary disabilities cannot qualify without considering the ADAAA at all.

125. *See supra* notes 43 & 55 and accompanying text.

126. *See, e.g., Young v. UPS*, 992 F. Supp. 2d 817, 835–36 (M.D. Tenn. 2014); *Allen v. Neighborhood Hous. Servs. Silicon Valley*, No. 12-1656 PSG, 2013 U.S. Dist. LEXIS 96434, at *6, n.19 (N.D. Cal. July 9, 2013); *Jones v. City of St. Louis*, No. 4:12-CV-00831, 2013 U.S. Dist. LEXIS 30435, at *7 (E.D. Mo. Mar. 5, 2013); *Jones v. Econ. Opportunity Planning Ass’n of Greater Toledo*, No. 3:11 CV 2084, 2013 U.S. Dist. LEXIS 15511, at *18–19 (N.D. Ohio Feb. 5, 2013).

“regarded as” claims was still controlling.¹²⁷ Because these mistakes were so common, the issue merits more extensive discussion.

A case from the District of Colorado illustrates the problem well.¹²⁸ The court began by quoting the new language from the ADAAA which states that an individual must simply establish that she has been subject to an adverse action “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*.”¹²⁹ But immediately after quoting this language, the court opined:

In the Tenth Circuit, “[a] person is regarded as disabled when (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.” *Johnson v. Weld County, Colo.*, 594 F.3d 1202, 1219 (10th Cir. 2010) (internal quotation marks and citation omitted). “In both cases, it is necessary that [the employer] entertain misperceptions about the individual—it must believe either that [the individual] has a substantially limiting impairment that [the individual] does not have or that [the individual] has a substantially limiting impairment when, in fact, the impairment is not so limiting.” *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).¹³⁰

There are a few important things to note about this passage—mistakes that are repeated in several other decisions in my dataset. First, the court relies upon *Sutton* and asserts that *Sutton* has been “superseded by statute on other

127. See, e.g., *Wingfield v. Escallate, LLC*, No. 5:12 CV 2620, 2014 U.S. Dist. LEXIS 139885, at *15–16 (N.D. Ohio Sept. 30, 2014); *Morris v. Town of Islip*, No. 12-CV-2984-JFB-SIC, 2014 U.S. Dist. LEXIS 133168, at *21–22 (E.D.N.Y. Sept. 22, 2014); see also, e.g., *McDonald v. Care Ctr. (Linda Vista), Inc.*, No. 1:13-cv-01882-CL, 2014 U.S. Dist. LEXIS 108925, *11–12 (D. Or. Aug. 7, 2014) (quoting the ADAAA “regarded as” standard but then applying *Sutton*’s standard without acknowledging that it conflicted with the new standard); *Dennis v. Airport Chevrolet, Inc.*, No. 1:13-cv-00008-CL, 2014 U.S. Dist. LEXIS 22893, at *10–11 (D. Or. Feb. 24, 2014) (similar).

128. See *Morgan v. Goodwill*, No. 12-cv-00274-WYD-CBS, 2013 U.S. Dist. LEXIS 178769 (D. Colo. July 19, 2013).

129. *Id.* at *19 (quoting 42 U.S.C. § 12102(3) (2012)) (emphasis added).

130. *Id.* at *19–20 (alterations in original).

grounds.” Other court decisions that quote *Sutton* for this proposition make the same assertion.¹³¹ This is incorrect. As discussed above, the ADAAA replaced *Sutton*’s interpretation of what was required to establish a “regarded as” claim with new statutory language.¹³² Second, the court relies on circuit court precedent as establishing the rule that applies “[i]n the Tenth Circuit.” But this circuit court precedent also relied on *Sutton*, and its conclusions now need to be reconsidered. And third, and in some respects most troubling, the court does not seem to recognize that there is a *conflict* between the statutory language it quotes and the standard announced in the case law upon which it relies—that is, that the statutory language unequivocally repudiates the prior interpretation announced in the case law.

This kind of confusion is found not only in district court cases, but also in at least a few circuit court decisions.¹³³ These characterizations of the post-ADAAA “regarded as” standard are obviously wrong; it is almost certain that other circuit court decisions will eventually clarify the law. But in the meantime, employees are being held to a standard that has been repudiated. And in at least some cases, applying *Sutton*’s “regarded as” standard likely led to the wrong result, at least on the threshold question of whether the employee was “regarded as” having a disability. For example, in one case, the plaintiff hit his head at work, leading to doctor-imposed restrictions on lifting, driving, pulling, pushing, stooping, or bending.¹³⁴ The court, however, quoted *Sutton* and Sixth Circuit precedent applying *Sutton* to assert that “settled law” required a plaintiff to prove that an employer ascribes to the individual an inability to perform the job when “in fact, the individual is

131. See, e.g., *Wingfield v. Escallate, LLC*, No. 5:12 CV 2620, 2014 U.S. Dist. LEXIS 139885, at *16 n. 3 (N.D. Ohio Sept. 30, 2014) (asserting that *Sutton* was “abrogated on other grounds”); *Moss v. Pennyrite Rural Elec. Coop.*, No. 5:13-CV-00212, 2014 U.S. Dist. LEXIS 36096, at *15 (W.D. Ky. Mar. 19, 2014) (asserting that *Sutton* was “overruled on other grounds”); see also generally cases cited *supra* note 127.

132. See *supra* note 55 and accompanying text.

133. See *Koessel v. Sublette Cnty. Sheriff’s Dep’t*, 717 F.3d 736, 741–42 (10th Cir. 2013) (relying on the pre-ADAAA “regarded as” standard in deciding a factual dispute that arose after the effective date of the ADAAA); *Baker v. Windsor Republic Doors*, 414 F. App’x 764, 771 (6th Cir. 2011) (quoting *Sutton*’s “regarded as” standard and asserting that *Sutton* was “abrogated by statute . . . on other grounds”). The facts in *Baker* pre-dated the ADAAA. See *id.* at 768. Thus it was appropriate for the court in *Baker* to follow *Sutton*, but its incorrect assertion regarding the effect of the override has misled lower courts within the Sixth Circuit deciding *post*-ADAAA cases. See, e.g., *Wingfield*, 2014 U.S. Dist. LEXIS 139885, at *16 n.3 (citing *Baker* in a *post*-ADAAA case for the assertion that *Sutton*’s “regarded as” standard had been “retained by the 6th Circuit”).

134. *Young v. UPS, Inc.*, 992 F. Supp. 2d 817, 825 (M.D. Tenn. 2014).

perfectly able to meet the job's duties."¹³⁵ The court then pointed out that the employer had honored the employee's medical restrictions and the employee's assertion that he had workplace limitations as evidence that he could not meet the "regarded as" standard.¹³⁶

Under the ADAAA, the analysis in a "regarded as" claim should be straightforward. Courts simply need to determine whether the plaintiff was subject to an adverse action because of an actual or perceived impairment.¹³⁷ Indeed, the EEOC suggests that "regarded as" claims *should be the default ADA claim* in cases that do not include a claim for reasonable accommodations, because they (should) avoid all of the tough questions regarding how significant a limitation needs to be to meet the standard of "substantially limiting."¹³⁸ Commentators have made the same point.¹³⁹ But plaintiffs must properly plead¹⁴⁰ and courts must properly apply the new standard. Otherwise, employees will be required to meet the standard set forth in *Sutton*—a standard explicitly rejected by Congress. This needs to change.

V. CONCLUSION

This Article has obvious implications for employment discrimination law. Aspects of the holdings in *Sutton* and *Toyota*—most notably the now superseded language from *Sutton* concerning the standard for "regarded as"

135. *Id.* at 835–36 (quoting *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001)).

136. *Id.* at 836.

137. 42 U.S.C. § 12102(3) (2012).

138. 29 C.F.R. § 1630.2(g)(3) (2013) ("Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment.").

139. See generally, e.g., Barry et al., *supra* note 103, 11–13 (2013); Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL'Y J. 35 (2013); Michelle A. Travis, *Impairment As a Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937 (2012).

140. See Barry et al., *supra* note 103, at 58 (surveying early cases filed under the ADAAA and finding that "a staggering 62.50% of complaints alleging a non-accommodation claim failed to raise [a 'regarded as' claim]").

claims—live on as shadow precedents. Lawyers and judges should be vigilant in ensuring that the definition of disability that Congress enacted is properly applied in all cases.

The broader implications of these findings reach beyond employment discrimination law. Our Constitutional structure vests all law-making authority in Congress, and overrides are expected to play a key role in maintaining legislative supremacy.¹⁴¹ They are the means by which Congress responds to judicial interpretations of statutes with which it disagrees, as well as a mechanism for updating or clarifying statutory law.¹⁴² Lawyers and courts therefore need to carefully assess statutory language, rather than reflexively relying on judicial precedents that interpret that language. They need to consider whether amendments to that statutory language affect the ongoing viability of prior precedent, including lower court decisions that rely on superseded Supreme Court decisions. In enacting the ADAAA, Congress repudiated the Supreme Court's unduly stingy understanding of disability. Congress spoke clearly; courts now need to listen.

141. U.S. CONST. art. I, § 1 ("All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

142. See Widiss, *Shadow Precedents*, *supra* note 5, at 518–23 (discussing the role of overrides as checks on judicial statutory interpretation).