N.Y.U. Journal of Legislation and Public Policy
QUORUM

ERIC C. YARNELL

APPLYING "CORRECTIVE MEASURES" TO THE ADA: LOOKING BEYOND THE GLASSES EXCEPTION

May 11, 2014

Abstract: Individuals with disabilities often take medications, wear prostheses, or employ methods to help alleviate the effects of their disabilities. Collectively, these are commonly known as "mitigating measures." Under the amended Americans with Disabilities Act (ADA), when a court determines whether someone is disabled, the court cannot take the effects of his or her mitigating measures into account. However, the amended ADA *does* permit courts to consider the corrective effects of "ordinary eyeglasses or contact lenses" when making disability determinations. This Article argues that the ADA's sole exception for corrective lenses is inappropriate as currently written. Most seriously, the current statutory language is deficient because it does not provide a framework through which changes in science or technology may be taken into account. In time, other mitigating measures might become as cheap, as common, and as effective as glasses are today. This Article proposes that the ADA's isolated exception for corrective lenses be replaced with a general exception framework and test. Specifically, when determining whether an impairment substantially limits a major life activity, mitigating measures should be taken into account for any measure (1) that provides assured, total, and relatively permanent control of all symptoms; (2) that is reasonably inexpensive to use; and (3) whose use would not be viewed as socially stigmatizing from the perspective of the reasonable observer.

Author: Eric C. Yarnell is a Fellow with the U.S. District Court for the Northern District of Illinois.

Published by the 2014–15 Editorial Board of the N.Y.U. Journal of Legislation and Public Policy.

APPLYING "CORRECTIVE MEASURES" TO THE ADA: LOOKING BEYOND THE GLASSES EXCEPTION

Eric C. Yarnell[*]

INTRODUCTION

With the ADA Amendments Act of 2008 ("ADAAA"), Congress made extensive changes to the original Americans with Disabilities Act ("ADA").[1] Congress believed that the Supreme Court had fundamentally and harmfully misinterpreted the ADA in several decisions.[2] To Congress, these misinterpretations erroneously narrowed the number of people who could claim coverage under the law.[3]

In the noteworthy pre-ADAAA decision, *Sutton v. United Air Lines, Inc.*,[4] the Court held that the determination of whether an individual's physical or mental impairment substantially limits a major life activity should take into account mitigating measures. Individuals with disabilities often employ methods, wear prostheses, or take medications to help alleviate the effects of their disabilities. When it passed the ADAAA, Congress specifically criticized the *Sutton* de-

[*] Fellow, U.S. District Court for the Northern District of Illinois; J.D., Loyola University Chicago School of Law; B.A., Northwestern University. This Article has benefited from the helpful insights of Professor Michael Zimmer, Hillary Coustan, and Ken Walden. I would also like to thank Professor Cynthia Ho for her encouragement and sage advice. The opinions expressed in this Article are those of the author alone and do not necessarily reflect the views of the author's past or present employers.

[1] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The ADAAA modified certain provisions within the ADA while leaving others unchanged. This Article uses the term "ADAAA" in reference to the Amendments Act and the changes to the ADA outlined therein.

[2] *See id.* sec. 2(a)(4) ("[T]he holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.* . . . and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.").

[3] *Id.*

[4] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

cision.[5] Under the amended law, the determination of whether an individual is substantially limited must now be made *without* regard to the mitigating measures that the individual might employ. Congress listed several common examples of mitigating measures, including medication, hearing aids, and prosthetics.[6]

However, there is one explicit exception to this rule: The corrective effects of "ordinary eyeglasses or contact lenses" *can* be considered in the disability determination.[7] Ironically, corrective lenses were the very mitigating measure at issue in the maligned *Sutton* case.[8] In the ADAAA and its accompanying legislative history, Congress provided scant reasoning for this "corrective lenses exception."[9] Further, the inclusion of this one specific exception suggests the possibility that other types of mitigating measures also could have been, and perhaps *should* have been, excluded.

This Article suggests that the ADA should be further amended by replacing the isolated exception for corrective lenses with a general exception framework and definition. Part I begins by providing background information on the original ADA and its legislative history. Part I also explains how several federal courts approached mitigating measures under the original law. Part II discusses the changes that Congress made when enacting the ADAAA and Congress' intentions in doing so. Part III suggests that the ADAAA's specific "corrective lenses exception" is crude and inappropriate in light of the ADA's underlying principles.

Part IV proposes that Congress further amend the ADA by fashioning a general exception framework. Part IV suggests that, when determining whether an impairment substantially limits a major life activity, mitigating measures *should* be taken into account whenever such a measure satisfies a three-factor test. Under the proposed test, a court should take into account any mitigating measure (1) that provides assured, total, and relatively permanent control of all symptoms; (2) that is reasonably inexpensive to use; and (3) whose use would not be viewed as socially stigmatizing from the perspective of the reasonable observer. Lastly, Part IV applies this framework to several common impairments.

I.
LEGISLATIVE BACKGROUND TO THE ADA

The ADA was enacted in 1990 amid high hopes that the law would symbolize a new era of equality for individuals with disabilities.[10] The statute defined

[5] *See supra* note 2.
[6] *Id.* § 3(4)(E)(i)(I).
[7] *Id.* § 3(4)(E)(ii).
[8] *Sutton*, 527 U.S. at 471.
[9] *See infra* Part II.
[10] *See generally* Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 337 (2010) (providing a brief history of the passage of the ADA).

"disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of" an individual.[11] Although the ADA took its definition of "disability" from Section 504 of the Rehabilitation Act of 1973,[12] the definition nevertheless proved to be vague and confusing to many of the courts that interpreted it.[13] Of particular note, the ADA did not address "mitigating measures,"[14] giving courts no guidance as to whether they should consider a plaintiff bringing a claim under the ADA in a "mitigated" or "unmitigated" state.[15]

The extent to which someone is literally impaired by a condition such as severe myopia, for instance, can easily differ depending on whether the individual's eyeglasses are taken into account. Yet, the original ADA provided no instruction on how to assess mitigating measures. One federal court summarized the predicament, noting that "the statutory language is far from clear, particularly with respect to the key question . . . : should a court . . . consider his *untreated* medical condition or his condition after treatment with ameliorating medications?"[16]

In contrast, Congress *did* specifically articulate its statutory "findings." The findings provide some insight into how Congress originally approached the subject of disability.[17] For instance, Congress noted that approximately 43 million Americans had some type of disability,[18] and that such individuals comprised a "discrete and insular minority" that had historically been subjected to societal isolation and segregation.[19]

The ADA's legislative history might offer the most insight into the congressional perspective on mitigating measures. According to a 1990 House Committee on Education and Labor Report, the determination of whether an individual has a disability "should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[20]

---

[11] Americans with Disabilities Act of 1990, Pub. L. 101-336 § 3, 104 Stat 327.

[12] Pub. L. No. 93-112. *See also* Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 470 & n.9 (5th Cir. 1998) ("[T]he ADA's definition of 'disability' is borrowed from the Rehabilitation Act's definition of 'handicapped . . . .'"); Lauren J. McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might be the Saving Grace of* Sutton, 109 YALE L.J. 1161, 1164–65 (2000).

[13] *See, e.g.*, *Washington*, 152 F.3d at 467 (stating that the statutory definition is "not unambiguously clear").

[14] *See* Joiner, *supra* note 10, at 342.

[15] *See* McGarity, *supra* note 12, at 1167–69 (discussing the different approaches circuit courts took to mitigation).

[16] Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998).

[17] *See* Americans with Disabilities Act of 1990, Pub. L. 101-336 § 2, 104 Stat. at 328.

[18] *See id.*

[19] § 2, 104 Stat. at 329.

[20] H.R. COMM. ON EDUC. AND LABOR, H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; *see also* Perry Meadows & Richard A. Bales, *Using Mitigating Measures to Determine Disability Under the Americans With Disabilities Act*, 45 S.D. L. REV. 33, 39–40 (2000).

Similarly, a 1990 House Judiciary Committee Report noted that an individual's "impairment should be assessed without considering whether mitigating measures . . . would result in a less-than-substantial limitation."[21] As an example, both reports noted that an individual who has difficulty hearing would have a substantial limitation even if the individual uses a hearing aid.[22]

However, a 1989 Senate Labor and Human Resources Committee Report articulated a slightly more ambiguous perspective on mitigating measures.[23] The Report first stated that the determination of whether an individual has a disability "should be assessed without regard to the availability of mitigating measures . . . ."[24] However, the Report also suggested that "medical conditions that are under control . . . *do not currently limit major life activities* . . . ."[25]

Given the lack of clear statutory guidance, federal courts adopted different approaches to "mitigating measures" in the wake of the ADA's passage.[26] Several circuits took their cue from the legislative history and considered the plaintiff in his or her unmitigated state.[27] The First Circuit exemplified this approach in *Arnold v. United Parcel Service, Inc.*, where a plaintiff's diabetes had been mitigated by insulin medication.[28] The First Circuit admitted that the statutory language was ambiguous with respect to how mitigating measures should be

[21] H.R. JUDICIARY COMM., H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451, 1990 WL 121680; *see also* Meadows & Bales, *supra* note 20, at 40.

[22] H.R. REP. NO. 101-485, pt. 2, at 52; H.R. REP. NO. 101-485, pt. 3, at 28–29; *see also* Meadows & Bales, *supra* note 20, at 39–40.

[23] *See* S. REP. NO. 101-116, at 22–24 (1989); *see also* Meadows & Bales, *supra* note 20, at 40 ("Legislative history emanating from the Senate, however, arguably is inconsistent with this legislative history from the House.").

[24] S. REP. NO. 101-116, at 22–24; *see also* Meadows & Bales, *supra* note 20, at 40.

[25] S. REP. NO. 101-116, at 24 (emphasis added). This statement was made in context of the "regarded as" prong (subpart "C") of the ADA's disability definition. Americans with Disabilities Act of 1990, Pub. L. 101-336 § 3(2), 104 Stat. at 329–30 ("The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or *(C) being regarded as having such an impairment*.") (emphasis added); *see also* S. REP. NO. 101-116, at 22–24. If an individual were not "currently" limited, he or she would arguably not be covered by the first prong of the disability definition but only by the "regarded as" prong. *See Washington*, v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 468 (5th Cir. 1998).

[26] See text accompanying *infra* notes 27–52 (providing an overview of this jurisprudence).

[27] *See, e.g.*, Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997) ("[D]isabled individuals who control their disability with medication may still invoke the protections of the ADA."); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629 (7th Cir. 1998) ("We determine whether a condition constitutes an impairment, and the extent to which the impairment limits an individual's major life activities, without regard to the availability of mitigating measures such as medicines, or assistive or prosthetic devices."); *see also* Brief for The Nat'l Emp't Lawyers Ass'n as Amicus Curiae Supporting Petitioners at 4, Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) (No. 97-1943) , 1999 WL 86516; Ian D. Thompson, *Medicating the ADA*—Sutton v. United Airlines, Inc.*: Considering Mitigating Measures to Define Disability*, 28 PEPP. L. REV. 257, 263–64 (2000).

[28] 136 F.3d 854 (1st Cir. 1998).

approached.[29] As a result, the court analyzed the congressional reports in the ADA's legislative history, concluding that Congress intended for mitigating measures to *not* factor into the disability determination—an individual should be considered in his or her unmitigated state.[30] Therefore, the court held that the plaintiff was an "individual with a disability" under the ADA, notwithstanding his utilization of a variety of treatments to mitigate his diabetes.[31]

Notably, however, the First Circuit limited its holding to the facts of the case and the specific impairment at issue.[32] In a footnote, the court speculated that it might have reached a different decision had the plaintiff's impairment been nearsightedness, a condition commonly ameliorated with eyeglasses.[33] Thus, the court suggested that a nearsighted individual might not be an individual with a disability, due to the availability of eyeglasses, "a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms."[34]

Other courts tried to forge a middle ground between considering all mitigating measures and considering none. The plaintiff in *Washington v. HCA Health Services of Texas, Inc.* suffered from the inflammatory disorder Adult Still's Disease[35] but, with medication, was able to live a "relatively normal" life.[36] The Fifth Circuit also sought guidance from the ADA's legislative history.[37] The court reasoned that, although the Senate Report was ambiguous as to whether mitigating measures were to be considered, the two House Reports "explicitly" suggested that mitigating measures *not* be considered.[38] Importantly, the House reports were more recent and were "express and directly on point" and, as a result, the court held that impairments could be considered in their unmitigated state.[39]

Notwithstanding its decision, however, the Fifth Circuit admitted that a more "reasonable" reading of the ADA would be for courts *to* take mitigating

[29] *Id.* at 858 (describing the statutory language as "far from clear").

[30] *Id.* at 859 ("[It is] abundantly clear that Congress intended the analysis of an 'impairment' and of the question whether it 'substantially limits a major life activity' to be made on the basis of the underlying . . . condition, without considering the ameliorative effects of . . . mitigating measures.").

[31] *Id.* at 866.

[32] *Id.* ("This holding is based on the facts of this case and is limited to the condition presented here, namely diabetes mellitus.").

[33] *Id.* at 866 n.10 ("[W]e might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses.").

[34] *Id.*

[35] *See generally* YEHUDA SHOENFELD, RICARD CERVERA & M. ERIC GERSHWIN, DIAGNOSTIC CRITERIA IN AUTOIMMUNE DISEASES 25–28 (Yehuda Shoenfeld et al. eds., 2008) ("Adult Still disease . . . is an inflammatory disorder characterized mainly by spiking high fever, arthritis, rash; and clinical features that resemble juvenile inflammatory arthritis.").

[36] Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464, 466 (5th Cir. 1998).

[37] *Washington*, 152 F.3d at 467; *see also* Joiner, *supra* note 10, at 344–45.

[38] *Washington*, 152 F.3d at 468; *see also* Joiner, *supra* note 10, at 345.

[39] *Washington*, 152 F.3d at 468-70; *see also* Joiner, *supra* note 10, at 345–46.

measures into account.[40] Considering itself beholden to the legislative history, the court then formulated a narrower ruling.[41] It held that only an individual with a "serious impairment[] [or] ailment[]"—such as a hearing impairment—would be considered in an unmitigated state.[42] Specifically, the Fifth Circuit required this individual to employ mitigating measures frequently, and the measures would need to be "continuous and recurring."[43] On the other hand, if an individual had a "permanent correction[] or amelioration"—such as a transplanted organ—the individual would be considered in a mitigated state.[44]

In *Sutton v. United Air Lines, Inc.*,[45] the Supreme Court rejected both the First and the Fifth Circuit approaches, holding that courts should always take mitigating measures into consideration. The plaintiffs in *Sutton* had severe myopia, which, in its uncorrected state, effectively prevented them from engaging in a variety of life activities.[46] With corrective lenses, however, the plaintiffs could attain perfect, 20/20 vision.[47] The defendant-employer argued that the disability determination should take the plaintiffs' glasses into account.[48]

The Court, in an opinion by Justice O'Connor, held that the plaintiffs were not covered under the ADA.[49] Notably, the Court held that the ADA's statutory provisions were clear enough to preclude any inquiry into legislative history.[50] The Court proffered several key rationales: (1) the phrase "substantially limits" in the ADA requires that an individual be presently—not hypothetically—limited; (2) the ADA requires an individualized inquiry that would be lost if a court considered "how an uncorrected impairment usually affects individuals"; (3) taking mitigating measures into consideration also allows a court to consider

[40] *Washington*, 152 F.3d at 469 ("[The] cases, which have held that mitigating measures must be taken into account, offer the most *reasonable* reading of the ADA.").

[41] *Id.* at 470–71.

[42] *Id.* ("We hold that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state. The impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis, that is, he must put on his prosthesis every morning or take his medication with some continuing regularity. In order for us to ignore the mitigating measures, they must be continuous and recurring; if the mitigating measures amount to permanent corrections or ameliorations, then they may be taken into consideration."); *see* Joiner, *supra* note 10, at 346–47.

[43] *Washington*, 152 F.3d at 470–71; Joiner, *supra* note 10, at 346–47.

[44] *Washington*, 152 F.3d at 470–71 ("If an individual has a permanent correction or amelioration, such as an artificial joint or a pin or a transplanted organ, that individual must be evaluated in his mitigated state . . . ."); *see also* Joiner, *supra* note 10, at 346–47.

[45] 527 U.S. 471 (1999).

[46] *See id.* at 475; Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limits" Mean?*, 76 MO. L. REV. 43, 52 (2011).

[47] Sutton v. United Airlines, Inc., 527 U.S. 471, 475 (1999); *see also* Miller, *supra* note 46, at 52; Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 35 (2007).

[48] *Sutton*, 527 U.S. at 481–82.

[49] *Id.* at 482.

[50] *Id.* ("[W]e have no reason to consider the ADA's legislative history.").

the *negative* side effects that might result from using the measures; and (4) the "43 million" disabled individuals number cited in the congressional findings was too low to account for all of the Americans who employ corrective measures—thus, Congress only intended to cover those individuals with uncorrectable impairments.[51] Justice Ginsburg added in concurrence that individuals with correctible impairments, such as nearsightedness, "can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination."[52]

Thus, in *Sutton*, the Supreme Court resolved the circuit split that had developed over whether the determination of disability should take into account mitigating measures. But as Part II will show, Congress strongly disagreed with this holding.

II.
CONGRESSIONAL REJECTION OF *SUTTON* & THE ADAAA

In 2008, Congress amended the ADA, specifically rejecting *Sutton*'s approach to mitigating measures.[53] The ADAAA includes new congressional findings, which emphasize that Congress intended for the original ADA to "provide broad coverage."[54] The findings also note that, in *Sutton*, the Supreme Court erroneously "narrowed the broad scope of protection intended" by requiring that courts take into consideration the corrective effects of mitigating measures.[55] Clarifying the issue of mitigating measures, the ADAAA states 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."[56] This statutory provision effectively overrules the Supreme Court's holding in *Sutton*. The ADAAA goes on to provide a non-exhaustive list of "mitigating measures" whose corrective effects will not be considered.[57] This list includes medication, prostheses, and hearing aids.[58]

[51] *See id.* at 482–85; Colker, *supra* note 47, at 38–41.

[52] *Id.* at 494–95 (Ginsburg, J., concurring) ("I agree that 42 U.S.C. § 12102(2)(A) does not reach the legions of people with correctable disabilities. The strongest clues to Congress' perception of the domain of the [ADA] . . . as I see it, are legislative findings that 'some 43,000,000 Americans have one or more physical or mental disabilities . . . .'") (internal citations omitted).

[53] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553; *see also* Miller, *supra* note 46, at 52; Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 682 n.95 (2010).

[54] Sec. 2(a)(1), 122 Stat. at 3553; *see* Jones, *supra* note 53, at 667–68; Miller, *supra* note 46, at 56

[55] Sec. (2)(a)(4), 122 Stat. at 3553.

[56] Sec. 4, § 3(4)(E)(i), 122 Stat. at 3556; *see also* Jones, *supra* note 53, at 668–69; Miller, *supra* note 46, at 64.

[57] Sec. 4, § 3(4)(E)(i)(I)-(IV), 122 Stat. at 3556.

[58] *Id.*

As noted above, however, the ADAAA articulates an exception to this rule for eyeglasses and contact lenses.[59] Further, this is the *only* exception to the general rule for mitigating measures.[60] Accordingly, the ameliorative effects of ordinary corrective lenses *will* be considered when a court determines whether an individual is substantially limited.[61] The ADAAA itself provides no justification for this "corrective lenses exception."

Unfortunately, the legislative history behind the ADAAA offers little additional insight into why Congress elected to fashion the exception. On September 16, 2008, Senators Tom Harkin (D-Iowa) and Orrin Hatch (R-Utah) provided a statement to the Senate, justifying the need for an amended ADA.[62] Echoing the enacted provisions of the ADAAA, the Senators articulated that mitigating measures, other than ordinary corrective lenses, should not be taken into account.[63] The Senators included a one-sentence explanation of the sole exception, noting that "the use of ordinary eyeglasses or contact lenses, without more, is not significant enough to warrant protection under the ADA."[64]

Thus, with the enactment of the ADAAA, Congress very clearly rejected the *Sutton* approach to mitigating measures. Under the new law, measures other than corrective lenses cannot be considered when determining whether an impairment substantially limits a major life activity.

The ADAAA thus completely altered the state of the law with respect to the role of mitigating measures in ADA cases.[65] One important idea emphasized by the new law is that Congress intended for the ADAAA to be interpreted broadly.[66] Under pre-ADAAA jurisprudence, many individuals with impairments had difficulty establishing that they were even protected under the ADA, and plaintiffs were overwhelmingly unsuccessful in their ADA cases.[67] However, with the ADAAA, Congress specifically instructed that the definition of disability "shall be construed in favor of broad coverage of individuals" under the statute.[68] It is likely that judges no longer have the analytical room to credibly prom-

[59] *Id.* at § 3(4)(E)(ii), 122 Stat. at 3556 ("The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."); *see also* Miller, *supra* note 46, at 65.

[60] Sec. 4, § 3(4)(E); *see* Miller, *supra* note 46, at 65 ("This is the one explicit circumstance in which even the ADAAA standards examine a disability in the post-corrective state . . . .").

[61] Sec. 4, § 3(4)(E)(ii).

[62] 154 CONG. REC. S8840-01 (daily ed. Sept. 16, 2008) (statement of Sens. Harkin and Hatch), 154 Cong. Rec. S8840-01, 2008 WL 4223414.

[63] *Id.*

[64] *Id.* ("The bill provides one exception to the rule on mitigating measures, specifying that ordinary eyeglasses and contact lenses are to be considered in determining whether a person has a disability.").

[65] *See* Joiner, *supra* note 10, at 360 ("One of the most sweeping changes to the ADA was to the mitigating measures conundrum.").

[66] *See, e.g.*, Jones, *supra* note 53, at 669; Miller, *supra* note 46, at 55–56.

[67] *See* Joiner, *supra* note 10, at 358 ("The American Bar Association determined that during the 1990s employers prevailed in 91.6% of cases brought under the ADA.").

[68] ADA Amendments Act of 2008, Pub. L. 110-325, sec. 4, § 3(4)(A), 122 Stat. 3553, 3555.

ulgate overly conservative constructions of the ADA.[69] Thus, the ADAAA's "mitigating measures" provisions must be broadly interpreted as well. Under the current law, unless an impaired plaintiff wears ordinary corrective glasses or contact lenses, a court must view the plaintiff in an unmitigated state.

III.
INAPPROPRIATENESS OF AN EXPLICIT EXCEPTION FOR CORRECTIVE LENSES

Though it may well have been reasonable for Congress to exclude individuals with unremarkable impairments from coverage under the ADA, the ADAAA's exception for corrective lenses is crude and inappropriate. Critically, Congress provided no real justification as to *why* corrective lenses were specifically exempted but other common and similarly effective mitigating measures were not. The statement by Senators Harkin and Hatch that the use of glasses is not "significant" enough to bestow coverage under the ADAAA does not thoroughly explain why they proposed the exception.

There are some reasonable assumptions as to why Congress might have crafted this exception. Many Americans—indeed, many members of Congress—wear ordinary corrective lenses each day. The nearsighted individual is hardly similarly situated to someone who is a quadriplegic or is totally blind.[70] Given the widespread use of glasses, there is little, if any, systematic discrimination against their users—unlike with other mitigating measures. Further, if the ADA were to cover all common wearers of corrective lenses—more than 150 million people by some estimates[71]—the group of disabled individuals could balloon into a majority. This large group would have very little in common with the "discrete and insular" minority notoriously victimized by discrimination and stigma.[72] But because we do not know why Congress created the corrective lenses exception, it is easy to speculate that there may be *other* mitigating measures that would meet Congress' un-vocalized reasoning.

Congress' approach of explicitly listing ordinary eyeglasses and contact lenses as a general category runs afoul of the "individualized inquiry" that so of-

[69] *See, e.g.*, Cordova v. Univ. of Notre Dame Du Lac, 936 F. Supp. 2d 1003, 1007 (N.D. Ind. 2013) (describing the ramifications of the ADAAA); Healy v. Nat'l Bd. of Osteopathic Med. Exam'rs, Inc., 870 F. Supp. 2d 607, 616–17 (S.D. Ind. 2012) (outlining the same).

[70] *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 494–95 (1999) (Ginsburg, J., concurring); Brief for Soc'y for Human Res. Mgmt. as Amicus Curiae in Support of Respondents, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (No. 97-1943), 1999 WL 160319, at *5 [hereinafter "Amicus Brief of Soc'y for Human Res. Mgmt."] ("In most cases . . . persons [that wear eyeglasses] function normally in virtually all occupations.").

[71] *Eye Health Statistics at a Glance*, AM. ACAD. OF OPHTHALMOLOGY 4 (Apr. 2011), http://www.aao.org/newsroom/upload/Eye-Health-Statistics-April-2011.pdf.

[72] *See, e.g.*, Brief for the Respondent, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (No. 97-1943), 1999 WL 164436, at *11 ("Movie stars, CEOs, anchormen, Senators, and Supreme Court Justices use corrective lenses. There is no history of isolation and segregation of the nearsighted.").

ten forms the basis of analysis under the ADA.[73] Discrimination itself is often the result of generalizations and stereotypes. From its earliest breath, the ADA was intended to eradicate such generalizations.[74] To do so, concepts like "reasonable accommodation" and "regarded as" urge courts to consider each individual plaintiff separately.[75]

However, the very existence of the corrective lenses exception codifies a generalization about those who use them. It is not an individualized assessment of those who wear glasses, but a categorical exclusion from coverage. Any exception to the general mitigation rule ought to have been congruous with the underlying principles of the ADA. Thus, the ADAAA should have promulgated a more open-ended principle—one that *could* be interpreted on a case-by-case basis. A principle, rather than an explicit exception, would have better accorded with the "individualized inquiry" approach.

The current statutory language is deficient because it does not provide a framework that can take into account present and future changes in science or technology. As noted above, it may be safely assumed that Congress exempted glasses because they are, among other things, effective at completely correcting vision impairments and overwhelmingly common. This is certainly a fair and reasonable appraisal of society in the early twenty-first century. However, even in the relatively recent past, corrective lenses were less common, less effective, and far more expensive.[76] Over the years, as science, technology, and the means of production have advanced, corrective lenses have evolved into the cheap, common, and effective accessories of today.

The next century will likely witness the development of devices, newer techniques, and more effective medicines than currently exist. In time, these mitigating measures might become as cheap, as common, and as effective as glasses are today. Unfortunately, the current ADA—thanks to the ADAAA—does not take future developments into account. The ADAAA's approach to mitigating

[73] *See* Keith v. Cnty. of Oakland, 703 F.3d 918, 923 (6th Cir. 2013) ("'[The] ADA mandates an individualized inquiry in determining whether an [applicant's] disability or other condition disqualifies him from a particular position.'") (alteration in original) (quoting Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000)); *see also* Joiner, *supra* note 10, at 349 ("The nature of the impairment and the mitigating measures employed must all be examined in order to accurately assess whether a person should be considered disabled within the meaning of the ADA.").

[74] *See* Americans with Disabilities Act of 1990, Pub. L. 101-336, § 2, 104 Stat 327, 328-29 (1990).

[75] *Sutton*, 527 U.S. at 483 ("[W]hether a person has a disability under the ADA is an individualized inquiry."); *see also, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001) ("[A]n individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.").

[76] *See* J. WILLIAM ROSENTHAL, SPECTACLES AND OTHER VISION AIDS: A HISTORY AND GUIDE TO COLLECTING 39 (1996) ("As printed books proliferated [in the fifteenth century], so did the demand for spectacles. Mass production methods . . . and sweatshops . . . turned out dozens of pairs daily. . . . All of the products were primitive and of poor quality.").

measures was static: all mitigating measures are to be ignored, except for corrective lenses. Thus, a future court—faced with a case that involves, for instance, a hypothetical pill that could eliminate every deleterious effect of diabetes or a hypothetical hearing aid implant that could be unnoticeable, cheap, and effective—would still have to consider the ADA plaintiff in an unmitigated form.

Of course, Congress could amend the ADA every time a new advancement meets the same unspoken criteria that caused it to exclude ordinary corrective lenses. But this approach would be inefficient, time consuming, and unnecessary. As Part IV will suggest, Congress can amend the ADA *once*, replacing the corrective lenses exception with an exception principle.

IV.
PROPOSED AMENDMENT TO THE ADA

This Article proposes that Congress once more amend the ADA. Any exception to the general mitigation rule should be more *interpretive* than the sole corrective lenses exception found in the current law. This Part proposes particular language that reflects both Congress' clear intent that the ADA have broad coverage as well as the inadequacies of the current corrective lenses exception. This Part also applies this definition to several common impairments.

A. Proposed ADA Rule Concerning Mitigating Measures

This Article proposes that Congress incorporate the following modifications into 42 U.S.C. § 12102(4):

> (4) Rules of construction regarding the definition of disability
> The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
>
> (A)–(D) [Unchanged]
>
> (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—
>
> (I) medication, medical supplies, equipment, or appliances, low-vision devices, prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
>
> (II)–(IV) [Unchanged]
>
> (ii) Paragraph (E)(i) shall not apply to any mitigating measure
>
> (I) that provides assured, total, and relatively permanent control of all symptoms;
>
> (II) that is reasonably inexpensive to use; and
>
> (III) whose use would not be viewed as socially stigmatizing from the perspective of the reasonable observer.

Under this proposed amendment, subsection (4) largely remains intact. It continues to articulate the general rule that mitigating measures cannot be taken into consideration. Further, the amendment retains all of paragraph (i)(I), other than the now unnecessary parenthetical about corrective lenses. The proposed paragraph (i)(I) continues to provide courts with guidance as to the range of mitigating measures covered by the general rule.

The proposed amendment's key modification is paragraph (ii), which effectively replaces the ADAAA paragraph (ii)'s corrective lenses exception. Under the proposal, this paragraph articulates a nonspecific, interpretative framework that can be applied to any mitigating measure. If a plaintiff's mitigating measure satisfies the three factors in paragraph (ii), the general rule in paragraph (E)(i) does not apply, and the court will take the ameliorative effects of the mitigating measure into account.[77]

B. Rationale Behind the Proposed Amendment

Respecting Congress' desire to make it easier for individuals to be covered under the ADA, the proposed amendment retains the general rule that forbids courts from considering a plaintiff in a mitigated state. Furthermore, the exception framework articulated by paragraph (ii) describes several criteria, *each* of which must be met in order to exclude a mitigating measure from the general rule. Because only a few types of mitigating measures could ever meet these strict criteria, the proposed amendment is consistent with the congressional goal of broad coverage.

Rather than simply listing excepted mitigating measures by name, the proposed paragraph (ii) articulates a general standard that enables courts to engage in fact- and plaintiff-specific inquiries. This analysis would be consistent with other facets of the ADA that demand courts to conduct an individualized inquiry into a particular plaintiff in a particular case.[78] In addition, the proposed amendment would not need to be further amended to take into account future scientific and medical advances. In theory, as types of mitigating measures become cheaper, more common and effective, and less stigmatizing, it will be easier for them to meet the three criteria of paragraph (ii). Thus, with the proposed amendment in place, the ADA can adapt to an increasingly technologically advanced society.

"Assured, Total, and Relatively Permanent Control"

[77] Under the proposed amendment, if a mitigating measure is excluded under paragraph (ii), but also causes deleterious *side effects*, a court would nevertheless consider the plaintiff in "mitigated" form. However, the court would then analyze whether the side effects substantially limit a major life activity. If so, the plaintiff would still be covered under the ADA. *See generally* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484 (1999) (suggesting that considering a plaintiff in mitigated form enables a court to consider the negative side effects of the mitigating measure); McGarity, *supra* note 12 at 1163–64 (citing, approvingly, the *Sutton* approach to "disabling corrections").

[78] *See supra* text accompanying notes 74–75.

The proposed paragraph (ii) first requires that an excepted mitigating measure provide assured, total, and relatively permanent control of all symptoms. This factor is based on language that was used by the First Circuit in *Arnold v. United Parcel Service, Inc.*,[79] which was decided before *Sutton*. There, the court speculated that eyeglasses might be permissibly considered when determining whether nearsightedness substantially limits a major life activity.[80] The rationale is clear: An individual who uses a mitigating measure that completely eliminates the deleterious effects of an impairment is far different from someone whose impairment is uncorrectable and whose life is, as a result, more practically challenging.[81]

"Reasonably Inexpensive to Use"

The proposed paragraph (ii) next requires that an excepted mitigating measure be reasonably inexpensive to use under the plaintiff's financial circumstances. This factor is also based on language used by the First Circuit in *Arnold*.[82] A mitigating measure should only be excluded from the general rule if a plaintiff can cheaply utilize it, because inexpensiveness fosters regular use. The more expensive a mitigating measure is, the less replaceable it is, and the more difficult continued use is. If an impaired individual can use her mitigating measure without much expense, it is likely that she will regularly do so. This criterion prevents a situation from occurring where an impaired individual has a high possibility of stopping a mitigating measure because it becomes too expensive.

No Stigmatization

The last prong of the proposed paragraph (ii) requires that, in order for a mitigating measure to be excepted, its use cannot be viewed as socially stigmatizing from the perspective of the reasonable observer. Thus, if a plaintiff risks real stigmatization by using a mitigating measure, paragraph (ii) cannot be used to exclude her from ADA coverage due solely to the fact that the measure might be effective and inexpensive. After all, a key purpose behind the ADA is to eliminate baseless discrimination and irrational societal views.[83] A requirement that an excepted mitigating measure be free of associated stigma facilitates Congress' anti-discrimination goals.

Importantly under the proposed amendment, however, stigmatization associated with a mitigating measure is viewed from the perspective of the *reasonable* observer. If the reasonable person would not view the mitigating measure as

[79] 136 F.3d 854, 866 & n.10 (1st Cir. 1998).

[80] *Id.*; *see supra* text accompanying notes 32–34.

[81] Echoing the Fourth Circuit's reasoning in a Rehabilitation Act case, it might "debase [the] high purpose if statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor. . . ." Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986); *see also* Brief for the Equal Emp't Advisory Council et al. as Amici Curiae Supporting Respondents, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (No. 97-1943), 1999 WL 161056, at *18.

[82] *See supra* text accompanying notes 32–34.

[83] *See* Americans with Disabilities Act of 1990, Pub. L. 101-336, § 2, 104 Stat 327, 328-29.

stigmatizing, it is irrelevant that the discriminator might have believed that the stigma exists or might have simply disliked the people that use the measure. Although this reasoning might seem harsh, the ADA is primarily concerned with widespread societal prejudice. If the reasonable person would not think that a stigma exists—presumably because there is no widespread prejudice—there should be no recourse under the ADA.[84]

C. Proposed Amendment, Applied

This Part applies the above framework to the common mitigating measures of ordinary corrective lenses, hearing aids, and medication for hypertension. Although the principle proposed by this Article is primarily concerned with anticipating future scientific, technological, and medical developments, a present-day analysis of several measures will hopefully illuminate how courts might interpret this language.

Ordinary Corrective Lenses

The ADAAA makes manifest that Congress clearly intended for ordinary eyeglasses and contact lenses to be excluded from the general mitigation rule. Under the amendment proposed by this Article, corrective lenses would similarly be excluded in nearly every case. As for factor (I), glasses and contact lenses very obviously provide assured, total, and relatively permanent control of all symptoms. Typically, a wearer's only "symptom" is the impaired vision itself.[85] As demonstrated by the factual background of *Sutton*, for example, corrective lenses can easily provide an individual with perfect vision.[86]

Moreover, corrective lenses would satisfy the requirements of factor (II). In the twenty-first century, eyeglasses are considered reasonably inexpensive.[87] Although the cost of glasses varies, an average pair might be obtained for less than $250 and, in some cases, for less than $100.[88] Further, many individuals possess applicable insurance coverage or access to financial assistance.[89]

---

[84] After all, there are many discriminatory acts that the law does not prohibit. For instance, an employer may legally terminate an employee because the employee has brown hair. Although this decision might be completely irrational, no widespread societal prejudice exists against brunettes, and no antidiscrimination law is warranted.

[85] *Nearsightedness*, N.Y. TIMES, http://www.nytimes.com/health/guides/disease/nearsightedness/overview.html?inline=nyt-classifier (last visited Apr. 21, 2014) (noting that other symptoms may include eyestrain and, "uncommon[ly]," headaches).

[86] *See supra* text accompanying notes 47–48.

[87] *See* Farhad Manjoo, *How To Get an Unbelievable, Amazing, Fantastic, Thrilling Deal on New Glasses*, SLATE (Aug. 27, 2008), http://www.slate.com/articles/technology/technology/2008/08/how_to_get_an_unbelievable_amazing_fantastic_thrilling_deal_on_new_glasses.html (explaining how the author purchased inexpensive eyeglasses).

[88] *See Eyeglass Store Buying Guide*, CONSUMER REPORTS (June 2013), http://www.consumerreports.org/cro/eyeglass-stores/buying-guide.htm; Gregory Karp, *Price Ranges for Glasses Prove Real Eye-Opener*, CHI. TRIB., July 22, 2007, http://www.chicagotribune.com

In addition, ordinary corrective lenses would easily satisfy factor (III). If there ever was a tangible societal stigma attached to wearing eyeglasses, it has long since disappeared. This is at least in part due to how common glasses are. According to a 2000 Gallup poll, approximately 70% of Americans wear some type of corrective lenses.[90] Furthermore, contact lenses are invisible, while glasses are often seen as fashionable.[91] Thus, ordinary corrective lenses would likely satisfy the three factors of paragraph (ii).

Hearing Aids

The ADAAA currently lists hearing aids as an example of mitigating measures that courts should *not* take into account when determining whether an individual is disabled.[92] Under the proposed amendment, if certain hearing aids were to meet the three factors of the amended paragraph (ii), those hearing aids would be excluded from the general rule in a fashion similar to eyeglasses. Currently, however, hearing aids would not satisfy the three requirements.

Even assuming that some hearing aids could satisfy factor (I) and restore normal hearing, hearing aids would nevertheless fail factors (II) and (III). Hearing aids are extremely expensive. Often, their cost is in the thousands of dollars—far exceeding that of ordinary corrective lenses.[93] More critically, however, the use of hearing aids still carries a social stigma. Unlike corrective lenses, the use of hearing aids is relatively uncommon. The *New York Times* has reported that only 14% of people over fifty *with hearing impairments* wear hearing aids.[94] This is likely due to a perceived stigma—perhaps these hearing-impaired individuals believe that hearing aids convey weakness or old age.[95] Thus, for several reasons, a court would still consider the ameliorative effects of hearing aids under the proposed amendment.

Drugs for Hypertension

/business/yourmoney/chi-ym-spending-0722jul22,0,2050256.story ("People can pay more than $1,000 for a pair of glasses, while at least one Internet provider promises a pair for $8.").

[89] *See* Amanda Gengler, *Keep an Eye on Vision Care Savings*, CNN MONEY (May 10, 2012), http://money.cnn.com/2012/05/10/pf/vision-care-savings.moneymag/; *Financial Aid for Eye Care*, NAT'L EYE INST., http://www.nei.nih.gov/health/financialaid.asp (last visited Apr. 21, 2014).

[90] Frank Newport, *Forty Percent of Americans Who Use Glasses Would Consider Laser Eye Surgery*, GALLUP (Mar. 6, 2000), http://www.gallup.com/poll/3115/forty-percent-americans-who-use-glasses-would-consider-laser-eye-surgery.aspx.

[91] *See* Adam Tschorn, *Eyeglasses a New Fashion Essential?*, L.A. TIMES, Apr. 29, 2012, http://articles.latimes.com/2012/apr/29/image/la-ig-eyeglasses-20120429-1 ("[I]t's clear that glasses have gone from nerd necessity to chic accessory.").

[92] ADA Amendments Act of 2008, Pub. L. 110-325, sec. 4, § 3(4)(E)(i)(I), 122 Stat. 3553, 3556.

[93] See Susan Seliger, *Why Won't They Get Hearing Aids?*, N.Y. TIMES, Apr. 5, 2012, http://newoldage.blogs.nytimes.com/2012/04/05/why-wont-they-get-hearing-aids/ ("Hearing aids can run from $1,800 to $6,800 or more per pair, according to Consumer Reports.").

[94] *See id.*

[95] *See id.* ("Even among the enlightened, hearing aids still carry a stigma.").

Medication for hypertension (high blood pressure) would also likely fail the test put forth by the proposed paragraph (ii). Drugs are often prescribed to combat the effects of hypertension.[96] The impairment is quite common, though not to the same extent as nearsightedness. According to the Centers for Disease Control (CDC), nearly 32% of Americans over twenty years old have hypertension.[97] With respect to the proposed factor (III), this numerosity has arguably destigmatized the use of blood pressure medication.[98] In addition, as for proposed factor (II), many hypertension drugs are relatively cheap.[99]

However, the use of hypertension medication would likely not satisfy factor (I)'s requirement that the mitigating measure provide assured, total, and relatively permanent control of all symptoms. Devising an effective drug treatment plan for hypertension can be difficult.[100] And even with medication, patients are still required to modify their lifestyle and behavior,[101] often by altering their diet, engaging in physical activity, and losing weight.[102]

This Article emphasizes, though, that even if drugs for hypertension would not currently satisfy the three requirements of the proposed paragraph (ii), they might in the future. Indeed, many types of drugs—for hypertension as well as for other diseases—are becoming more effective, common, and accepted each year.[103] The amendment proposed by this Article would be particularly valuable with respect to future advances in drug therapy.

CONCLUSION

[96] Lynn Yoffee, *Medications for Hypertension*, EVERYDAY HEALTH, http://www.everydayhealth.com/ hypertension/treating/medications-used-to-treat-hypertension.aspx (last visited Apr. 21, 2014) (describing various hypertension medications).

[97] *FastStats: Hypertension*, CDC.GOV, http://www.cdc.gov/nchs/fastats/hyprtens.htm (last visited Apr. 21, 2014). One *Sutton* amicus brief stated that nearly 50 million Americans suffered from hypertension. *See* Amicus Brief of Soc'y for Human Res. Mgmt., *supra* note 70, at 5.

[98] *See* Nancy Cochran, Letter to the Editor, *Help Rid the Stigma*, ADVERTISER-TRIB., April 15, 2013, http://www.advertiser-tribune.com/page/content.detail/id/554323/Help-rid-the-stigma.html?nav=5008 (noting that the use of hypertension drugs is less stigmatizing than the use of antidepressants).

[99] *See, e.g.*, *Expensive New Blood Pressure Meds No Better than Generics, According to Long-Term Data*, SCI. DAILY (Aug. 14, 2010), http://www.sciencedaily.com/releases/2010/08/100813082715.htm (reporting that generic hypertension drugs are just as effective as expensive medications).

[100] *Medications for Treating Hypertension*, HARVARD WOMEN'S HEALTH WATCH (Aug. 2009), http://www.health.harvard.edu/newsletters/Harvard_Womens_Health_Watch/2009/August/Medications-for-treating-hypertension ("Designing an effective medication program for hypertension is like fitting together the pieces of a jigsaw puzzle.").

[101] *See* Mark Nelson, *Drug Treatment of Elevated Blood Pressure*, 33 AUSTRALIAN PRESCRIBER 108 (2010) *available at* http://www.australianprescriber.com/magazine/33/4/article/1120.pdf ("Drug therapy . . . does not obviate the need for behavioural modification.").

[102] *See, e.g.*, *How is High Blood Pressure Treated?*, NAT'L HEART, LUNG, & BLOOD INST., http://www.nhlbi.nih.gov/health/health-topics/topics/hbp/treatment.html (last visited Apr. 21, 2014).

[103] IMS Inst. for Healthcare Informatics, Medicine Use and Shifting Costs of Healthcare: A Review of the Use of Medicines in the U.S. in 2013, 3 (Apr. 2014) ("There were 1.6% more prescriptions [in general] filled in 2013, an increase in growth of 0.4% over the level in 2012 . . . .").

The passage of the ADAAA helped realize the congressional goals of broadened coverage under the ADA. Throughout the original ADA's first decade, courts often put forth restrictive interpretations of the statute. In particular, the Supreme Court in *Sutton v. United Air Lines, Inc.* required courts to consider impaired plaintiffs in their mitigated states.[104] By enacting the ADAAA, Congress rejected this rule, mandating that courts *not* consider the corrective effects of mitigating measures.[105] The ADAAA articulates a sole exception for ordinary glasses and contact lenses[106] and, although this exception is reasonable, it does not go far enough. The amendment proposed by this Article reflects the antidiscrimination goals and case-specific analyses that underlie the ADA. In addition, the proposed amendment anticipates future developments in science and technology in a way that current law does not.

[104] Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).
[105] ADA Amendments Act of 2008, Pub. L. 110-325, secs. 2–3, 122 Stat. 3553.
[106] *Id.* sec. 4, § 3(4)(E)(ii).