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The Untold Story of the Rest of the Americans with Disabilities Act

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I. INTRODUCTION

The Americans with Disabilities Act ("ADA")[1] can be described as the All-Star team of civil rights legislation. The framers of the ADA sought to create sweeping change in nearly every facet of the lives of people with disabilities. To achieve these ambitious goals, the framers assembled the best and brightest parts of other civil rights legislation: pieces of Title VII of the Civil Rights Act of 1964,[2] Section

1. Americans with Disabilities Act, ch. 126, 42 U.S.C. § 12101 (2005).
2. 42 U.S.C. § 2000e *et seq.* (2005).

504 of the Rehabilitation Act of 1973,[3] Title II of the Civil Rights Act of 1964,[4] and the Fair Housing Act.[5] The end result was a comprehensive statute with three major parts: Title I, dealing with employment,[6] Title II, dealing with public services,[7] and Title III, dealing with public accommodations.[8]

The All-Star analogy has obvious limits. All-Star teams are typically chosen by fans or coaches, who are able to select whomever they want. In contrast, the framers of the ADA had to make important sacrifices to achieve passage of the statute. And while All-Star teams usually only play together for a short period of time, the ADA has hung around a bit longer, celebrating its fifteenth birthday.

At this milestone, like spectators of All-Star games, nearly everyone has an opinion about the ADA's success. Most commentators, while acknowledging that the ADA has created some positive change, believe that its overall effects have been disappointing.[9] A standard set of explanations has evolved in the literature for "what is wrong" with the ADA. These include the increasingly narrow way the courts (in particular, the Supreme Court) have interpreted the ADA, specifically, its definition of disability cases; the limits of antidiscrimination law in changing the broader problems faced by people with disabilities; and the limitations of the accommodation mandate.[10] These competing explanations generate different proposals for ADA reform, including amending the ADA to overturn unpopular court decisions and a more aggressive return to social welfare policies.[11] This Article challenges the assumption, taken nearly as a given until now, that these explanations apply equally to all Titles of the ADA.

These explanations are typically offered in scholarship relating to the ADA's employment law provisions (Title I), which is the most written about and litigated of the ADA's three major Titles. Given the overwhelmingly pro-defendant outcomes of Title I cases,[12] these

3. 29 U.S.C. § 794 (2005).
4. 42 U.S.C. § 2000a *et seq.* (2005).
5. 42 U.S.C. § 3601 *et seq.* (2005).
6. 42 U.S.C. § 12111 *et seq.* (2005).
7. 42 U.S.C. § 12131 *et seq.* (2005).
8. 42 U.S.C. § 12181 *et seq.* (2005).
9. *See infra* Part II.B.
10. *See infra* Part II.C.
11. *See infra* Part II.D.
12. *See* Amy L. Allbricht, *ABA Special Feature: 2003 Employment Decisions Under the ADA Title I–Survey Update*, 28 MENTAL & PHYSICAL L. REP. 319, 319 (2003) [hereinafter *ABA 2003 Employment Decisions*] (showing that in 2003, 97.3% of Title I cases had pro-employer outcomes); *see also* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO

explanations and accompanying suggestions for reform are well thought out and persuasive—as applied to Title I. But, to an extent underappreciated in the previous literature, Titles II and III are different. Based in part on a quantitative analysis showing that Title II and III cases are more pro-plaintiff than Title I cases, I suggest that the Title I explanations and suggestions are to varying degrees incomplete or inaccurate when applied to the ADA's non-employment Titles. Thus, at a time when ADA reform is an increasingly important legal and political issue, there is a danger in allowing the Title I-dominated suggestions and explanations to completely frame the overall debate. Although Titles II and III have been limited in their ability to create change, I argue that this is a result of these Titles' public and private enforcement mechanisms.

This Article proceeds as follows. In Part II, I present the existing employment-law based ADA narrative. First, I show that the large Title I-dominated body of ADA literature views the ADA as disappointing. I then discuss the explanations offered for this phenomenon and present the different recommendations for how to fix the ADA. In Part III, I tell the parallel (but different) story of Titles II and III of the ADA. First, I show that Title II and III cases have had more pro-plaintiff results than Title I. This, I suggest, should not be overstated, because these Titles, like Title I, still have not created their hoped-for changes in the lives of people with disabilities. Next, I demonstrate that the existing Title I-based explanations do not adequately explain Title II and III's limitations, which I instead attribute to under-enforcement. Finally, I turn to a discussion of what can be done to improve the private and public enforcement of Titles II and III of the ADA.

II. THE EXISTING EMPLOYMENT LAW-BASED ADA NARRATIVE

The voluminous body of ADA scholarship is not a recent development.[13] But what has gone relatively unnoticed is the extent to which this ever-growing body of literature is dominated by Title I of

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ST. L.J. 239, 240 (2001) [hereinafter Colker, *Winning & Losing*] (showing that defendants prevail in 93% of ADA Title I cases at the trial level that are appealed, and in 84% of cases that reach the courts of appeals).

13. For a discussion of the explosion of ADA-related scholarship, see Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 3 n.2 (2004) [hereinafter Bagenstos, *Future*]. Since the time of that article's publication, the "volumes of work" have only expanded, with numerous new articles and at least two more law review symposia. *See Symposium, Justice for All? Stories About Americans with Disabilities and Their Civil Rights*, 8 J. GENDER, RACE & JUST. 1 (2004) (three volume edition); Dedicated Issue: Americans with Disabilities Act, 39 WAKE FOREST L. REV. iii (2004).

the ADA. This Part explores three aspects of this trend. First, a consensus seems to have emerged that the ADA has been (at least) disappointing in its ability to create anticipated changes in the lives of people with disabilities. This is especially so in the ADA's perceived lack of effectiveness in raising employment levels for people with disabilities. Second, ADA scholarship offers different explanations for this lack of effectiveness. The most common are the limiting ways that courts have interpreted the ADA, the inherent theoretical limitations of the accommodation mandate, and the limits of traditional antidiscrimination law in remedying the real problems facing people with disabilities. Third, these different explanations lead to different recommendations on how to fix the ADA or otherwise revamp the broader world of disability law and policy.

A. ADA Scholarship Has Trended Toward Title I

Reviewing ADA scholarship requires time and patience. But even a casual perusal through recent articles about the ADA shows that a large part of what is written is based on its employment law provisions.[14] This is not just a quantity issue. Most of the high-profile ADA articles in recent years have dealt with the ADA's employment provisions. Professor Christine Jolls, for example, modeled "accommodation mandates," which she uses to predict employment outcomes under Title I of the ADA.[15] Similarly, Professor Michael Stein has written about the ADA's employment law provisions from several perspectives: law and economics, historical, and jurisprudential.[16] The empirical work of Professors Peter Blanck[17]

14. Among people familiar with disability law scholarship, this should not be a particularly controversial assertion. But to convince myself, I reviewed all of the law review articles written about the ADA in the past year (a year in which the only Supreme Court decision on the ADA, *Tennessee v. Lane*, 541 U.S. 509 (2004), was *not* a Title I case). Over half of these articles were almost exclusively focused on Title I of the ADA.

15. *See* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 240-42 (2000) [hereinafter Jolls, *Accommodation Mandates*] (arguing that the older framework for analyzing accommodation mandates is flawed and offering a new, more empirically accurate framework); *see also* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2002) [hereinafter Jolls, *Antidiscrimination & Accommodation*] (arguing that accommodation law and antidiscrimination law are overlapping and not mutually exclusive categories).

16. *See* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations As Antidiscrimination*, 153 U. PA. L. REV. 579 (2004); *see also* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

17. *See* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH (Peter David Blanck ed., 2000); *see also* Peter Blanck, *The Emerging Work Force: Empirical Study of the Americans with Disabilities Act*, 16 J. CORP. LAW 693 (1992); Peter Blanck, *Empirical Study of the Employment Provisions of the Americans with Disabilities Act: Methods, Preliminary Findings, and Implications*, 22 N.M. L. REV. 119 (1992).

and Ruth Colker[18] and research by Sam Bagenstos[19] have trended toward Title I of the ADA.[20] In contrast, only a limited number of commentators have focused their research efforts on Titles II and III of the ADA.[21]

B. The ADA Title I Scholarship Views the ADA as Disappointing

To different extents (and certainly with exceptions), the legal scholarship focused on Title I of the ADA views the ADA as disappointing. Commentators and researchers justify this assertion in different ways. The claim is often supported with employment statistics. The federal government's National Health Information Survey, for example, found that when disability is defined as an impairment that imposes limitations on any life activity, the employment rate for working-age people with disabilities declined from 49% in 1990 to 46.6% in 1996.[22] Similarly, a 2000 Harris Survey

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18. *See* Colker, *Winning & Losing*, *supra* note 12; *see also* Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002) (discussing Titles II and III of the ADA); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) [hereinafter Colker, *Windfall*]; *but see* Ruth Colker, *A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000) [hereinafter Colker, *Fragile Compromise*] (discussing Title III of the ADA).

19. *See* Samuel Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397 (2000); *see also* Samuel Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003); Samuel Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003); *but see* Samuel Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004) (discussing, in part, Titles II and III of the ADA, as will be explored below).

20. There are several possible explanations for this phenomenon. Despite the growing number of academics writing about the ADA, disability legal studies is still a relatively new field. Of the 178 ABA-approved law schools whose catalogs could be accessed online, only 99 had taught any type of "disability law" course in the past three years. The rest presumably covered the topic, if at all, within the framework of an employment law course. The American Association of Law Schools (AALS), the professional association of legal teachers, does not yet have a section devoted entirely to disability law (although it has started the process of establishing one). Most of the discussion about disability law in the AALS process has come under the auspices of the section on employment discrimination or the section on law and mental disability.

21. *See* Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of* Garrett*: An "As Applied" Saving Construction for the ADA's Title II*, 39 WAKE FOREST L. REV. 133 (2004); Ruth Colker, *Fragile Compromise*, *supra* note 18; Mark C. Weber, *Disability Discrimination by State and Local Governments: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995) [hereinafter Weber, *Disability Discrimination by State and Local Governments*]. Sadly, one of the leading scholars in this area, Adam Milani, passed away in 2005. *See, e.g.*, Adam Milani, *Whcelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69 (2004) [hereinafter Milani, *Wheelchair Users*].

22. When disability is defined as a diagnosed impairment, the employment rate for working-age men with disabilities fell from 84.7% in 1990 to 77.3% in 1996, and stayed relatively stagnant at just above 63% for working age-women. *See* H. STEPHEN KAYE, IMPROVED

of working-age people with disabilities showed that only 32% of people with disabilities reported being employed, compared with 81% of the general population.[23]

Other commentators take more of a litigation perspective and suggest that the ADA is disappointing because the success rate of Title I plaintiffs is so low. Professor Colker, for example, has shown that contrary to media perceptions, plaintiffs usually lose Title I cases. Her research shows that defendants prevail in 94% of ADA Title I cases at the trial level and in 87.5% of cases at the courts of appeals.[24] These conclusions are supported by other researchers like the American Bar Association ("ABA"), which compiles ADA Title I results for each year. For 2003, like previous years, the ABA found that plaintiffs lost Title I cases a vast majority of the time.[25] Similarly, Professor Lou Rulli, focusing on Title I cases filed in the Eastern District of Pennsylvania, has found that the success rate is so low that the private bar is hesitant to take these cases.[26]

C. Different Explanations for These Title I Failures

Commentators have offered different (and overlapping) explanations for Title I's perceived disappointments. In Part III of this Article, I suggest that these explanations do not adequately explain the limitations on Title II and III's effectiveness.

EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES 9 & fig. 1 (May 2003), *available at* http://dsc.ucsf.edu/pub_listing.php?pub_type=report.

23. NAT'L ORGANIZATION ON DISABILITY, 2000 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES 27 (2000). There are older findings with similar results. As early as 1996, commentators were asserting that the employment of people with disabilities actually had deteriorated in relation to other groups. *See* Walter Y. Oi, *Employment and Benefits for People with Diverse Disabilities*, *in* DISABILITY, WORK AND CASH BENEFITS 103 (Jerry L. Mashaw et al. eds., 1996) (suggesting that the percentage of disabled individuals with jobs had fallen from 33% in 1986 to 31% in 1996).

24. *See* Colker, *Winning & Losing*, *supra* note 12, at 248. As discussed below, Colker uses Title I cases at the appellate level. She observes that "plaintiffs appear to fare worse at the trial court and appellate levels under the ADA than in other areas of the law." *Id.* at 257.

25. This study found that of 304 ADA Title I cases included in the ABA's Mental and Physical Disability Law Reporter, 213 resulted in employer wins, 6 in employee wins, and 85 in decisions in which the merits of the claim were not resolved. Of the 219 decisions that resolved the claim, 97.3% resulted in employer wins and 2.7% in employee wins. This leads the study's authors to conclude that "[t]he results clearly show a continuation of the pattern . . . of employers prevailing and employees losing in an overwhelming majority of the final court outcomes and in a substantial majority of the administrative decisions." *ABA 2003 Employment Decisions*, *supra* note 12, at 319.

26. *See* Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and its Impact Upon the Poor*, 8 J. GENDER, RACE & JUST. 595 (2005).

1. Court Hostility/Skepticism

Most critics contend that the courts, and the Supreme Court in particular, have read the ADA too narrowly. This is especially true as to the Court's interpretation of the ADA's definition of disability.[27] In *Sutton v. United Airlines, Inc.*,[28] the Court held that in considering whether an impairment "substantially limits" a major life activity, courts should consider the individual's mitigating measures.[29] In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[30] the Court held that major life activities are "activities that are of central importance to most people's daily life."[31] The Court has also sanctioned a narrow reading of the "regarded as" prong of the definition of disability,[32] which many had presumed was intended to be a catch-all provision.[33]

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27. 42 U.S.C. § 12102(2) (2005) ("The term 'disability' means, with respect to an individual—(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.").

28. 527 U.S. 471 (1999).

29. *See id.* at 487-91 (holding that plaintiffs, who were sisters, were not "disabled" for the purposes of the ADA because their eyeglasses improved their vision to 20-20); *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66 (1999) (holding that plaintiff may not be protected under the ADA, despite having vision in only one eye, because his brain has developed subconscious adjustments to compensate for reduced depth perception); Murphy v. United Parcel Service, Inc., 527 U.S. 516, 518-19 (1999) (holding that the plaintiff was not protected under the ADA because, when medicated, his high blood pressure did not prevent him from functioning normally).

30. 534 U.S. 184 (2002).

31. *Id.* at 185 (holding that the plaintiff's disability must be judged according to "whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job").

32. 42 U.S.C. § 12102(2)(C) (2005) (defining the term "disability" with respect to an individual as "being regarded as having such an impairment," with "impairment" being a physical or mental condition that substantially limits at least one major life activity).

33. Early on, the Equal Employment Opportunity Commission ("EEOC"), the administrative agency tasked with promulgating regulations under Title I of the ADA, took an expansive view of how the "regarded as" part of the definition should be interpreted:

> [I]f an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "Myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear, or stereotype" can be drawn.

29 C.F.R. pt. 1630, app., § 1630.2(1) (2004). The Supreme Court ultimately disagreed, holding in *Sutton* that an employer's refusal to hire an impaired individual could not be considered as "regarding him" as substantially limited in working. Rather, a refusal to place an individual in single job because of his impairment will be treated as evidence only of the employer's belief that the individual could not do that individual job, not a class or range of jobs. *Sutton*, 527 U.S. at 491.

This narrow construction of the definition of disability, commentators suggest, has contributed to plaintiffs' low success rates in ADA cases, which has in turn limited the ADA's effectiveness (particularly Title I). [34] An undercurrent running through much of this scholarship is the sense among commentators that the judiciary is generally hostile to the ADA.[35]

Administrative agencies and policy bodies have also pointed the finger at the Supreme Court, and specifically its decisions that define disability, as the culprit for what is wrong with the ADA. The Equal Employment Opportunity Commission ("EEOC") and the

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34. *See ABA 2003 Employment Decisions*, *supra* note 12, at 320 ("A clear majority of the employer wins in this survey were due to [the] employees' failure to show that they had a protected disability."); *see also* Robert Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 415 (1997) (discussing the courts' misconstructions of the ADA's definition of disability); ARLENE MAYERSON & MATTHEW DILLER, *The Supreme Court's Nearsighted View of the ADA*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 124 (Leslie Pickering Francis & Anita Silvers eds., 2000) (arguing that the Supreme Court's narrow reading of the ADA leads to absurd results and inequality); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1299-1307 (2000) (discussing courts' restrictive interpretations of the "regarded as" definition); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 325 (2000) (detailing legislative history that supports determining disability without considering mitigating measures and the courts' contrary decisions); Arlene Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997) [hereinafter Mayerson, *Restoring Regard*] (acknowledging the narrowing construction of the definition of disability which thereby deprives qualified individuals of the opportunity to prove that they have been discriminated against in violation of the ADA); Chai Feldblum, *Definition of Disability Under the Federal Anti-Discrimination Law – What Happened? Why? And What Can We Do About It?* 21 BERKELEY J. EMP. & LAB. L. 91, 91-92, (2000) [hereinafter Feldblum, *Definition of Disability*].

35. Bonnie Potras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 339 (2001) [hereinafter Tucker, *Revolving Door*]; Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. LAB. L. 19, 22 (2000) [hereinafter Diller, *Judicial Backlash*]; Colker, *Windfall*, *supra* note 18, at 100. There is also an interesting research strand relating to negative public perceptions of the ADA, mostly relating to its employment provisions. *See* NAT'L COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, NO. 5: NEGATIVE MEDIA PORTRAYALS OF THE ADA (Feb. 20, 2003), *available at* http://www.ncd.gov/newsroom/publications/pdf/negativemedia.pdf (discussing the myths created by the media reporting on the ADA); *see also* Ruth Shalit, *Defining Disability Down: Why Johnny Can't Read, Write, or Sit Still*, NEW REPUBLIC, Aug. 25, 1997, at 16 (describing media portrayals of the ADA as creating a "lifelong buffet of perks, special breaks and procedural protections for people with questionable disabilities"); Linda Hamilton Krieger, *Foreward – Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 9 (2000) (describing media portrayals of the ADA as "a law . . . run amuck, granting windfalls to unworthy plaintiffs and forcing employers to 'bend over backwards' to accommodate preposterous claims"); Cary LaCheen, *Achy Breaky Pelvis, Lumbar Lung, and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 224-32 (2000) (detailing the trend of television and radio to cover ADA cases that are likely to lack merit).

Department of Justice ("DOJ") have complained that this line of decisions makes it harder for them to enforce the ADA.[36] The National Council on Disability ("NCD"), an independent federal agency tasked with gathering information about the implementation, effectiveness, and impact of the ADA, has issued a report entitled "Righting the ADA," intended to recommend to the President and Congress on how to best protect the civil rights of people with disabilities.[37] This Report takes the position that "several of the Court's rulings involving the ADA [particularly *Sutton* and *Toyota*] depart from the core principles and objectives of the ADA," compromising Title I's effectiveness.[38]

Supreme Court decisions have also increased the scope of an employer's available defenses under the ADA. In *Albertsons, Inc. v. Kirkingburg*,[39] the Court made it easier for defendants to show that an individual is not qualified for a position because that individual cannot meet a legitimate "qualification standard." And in *Chevron v. Echazabal*,[40] the Court held that an employer can refuse to hire an individual with a disability whom the employer reasonably believes is a threat to himself (although not a direct threat to the safety of other employees). These decisions have drawn the ire of ADA commentators and have also been blamed for limiting the effectiveness of the ADA's employment provisions.[41]

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36. NAT'L COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, NO. 7, THE IMPACT OF THE SUPREME COURT'S ADA DECISIONS ON THE RIGHTS OF PERSONS WITH DISABILITIES 16 (Feb. 25, 2003), *available at* http://www.ncd.gov/newsroom/publications/pdf/decisionsimpact.pdf.

37. NAT'L COUNCIL ON DISABILITY, RIGHTING THE ADA 1 (Dec. 1, 2004), *available at* http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf [hereinafter NCD, RIGHTING THE ADA].

38. *Id.*; *see also id.* at 45 ("The result of tbe Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination."). The NCD also suggests that Congress intended the "regarded as" prong of the disability definition to have more bite, and function as a catch-all provision. *Id.* at 51-55.

39. 527 U.S. 555 (1999).

40. 536 U.S. 73 (2002).

41. *See* Diller, *Judicial Backlash*, *supra* note 35, at 20-22 (criticizing Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)); *see also* D. Aaron Lacy, *Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self*, 44 SANTA CLARA L. REV. 55, 90-94 (2003) (criticizing Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002), and contending that the decision "fails to acknowledge the anti-paternalistic purpose of the ADA"); Tara R. Jones, *The Threat-To-Self Defense and the Americans with Disabilities Act*, 27 S. ILL. U. L.J. 539, 563 (2003) (criticizing *Echazabal*, stating that the case "was wrongly decided because the decision is inconsistent with the plain language of the ADA," because "the ADA should be [sic] not have been interpreted in a manner that fails to recognize that an employee, who may be a threat to himself, may still be qualified for the job at hand, and, therefore, cannot be considered 'not

Finally, in *Board of Trustees of the University of Alabama v. Garrett*,[42] the Court held that state employers could not be sued for damages under Title I. Although on its face this decision only applied to one category of cases—those involving monetary relief from state employers—it effectively terminated such lawsuits. Commentators noticed and have suggested that *Garrett* impedes Congress's vision of the ADA's effectiveness.[43]

2. Limits of Antidiscrimination Law

Other commentators have focused on the limits of antidiscrimination law in appropriately addressing the real problems faced by people with disabilities.[44] Professor Bagenstos has recently argued that the antidiscrimination approach embodied in the ADA has proven ineffective in creating lasting change for people with disabilities.[45] What has been under-appreciated in the literature,

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otherwise qualified' under the ADA."); NCD, RIGHTING THE ADA, *supra* note 37, at 81-92 (criticizing *Albertson's*).

42. 531 U.S. 356 (2001).

43. *See* Michael Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 105-07 (2001) ("[T]he Court majority [in *Garrett*] showed no deference whatever to Congress's discretion in formulating remedies."); *see also* K.G. Jan Pillai, *Incongruent Disproportionality*, 29 HASTINGS CONST. L.Q. 645, 681, 686-88 (2002) (noting that the Court in *Garrett* treated Congress as an administrative agency and "imposed upon Congress the aegis of the congruence and proportionality test."); Note, *The Irrational Application of Rational Basis:* Kimel, Garrett, *and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146, 2169 (2001) (arguing that the actions taken in *Garrett* "were not taken pursuant to any generic classification mandated by the legislature and thus should be subject to mere rationality review.").

44. *See* generally Bagenstos, *Future*, *supra* note 13; *see also* Sherwin Rosen, *Disability Accommodation and the Labor Market*, *in* DISABILITY AND WORK 27 (Carolyn L. Weaver ed., 1991) (arguing for government spending on education and work training, instead of accommodations); Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1003 (1998) (noting that disability policies "pull in different and, in some respects, inconsistent diretions"); Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 361 (1996) (describing the social welfare system as "a tangle of programs that reflect a series of compromises between competing principles"); Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination in the Disabilities of the ADA*, 33 HARV. C.R.-C.L. REV. 197, 233 (1998) (suggesting that funding increases for disability programs would reduce accommodation discrimination); Mark Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 124 (1998) ("Existing legal remedies embodied in the Americans with Disabilities Act and other laws, though beneficial, do not eliminate the problem [of discrimination against those with disabilities]."); Mark Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 889 (2000) (stating that current programs for the disabled still fail to meet adequately the needs of disabled individuals).

45. *See* Bagenstos, *Future*, *supra* note 13, at 35-42 (noting that by applying the "job-related" rule and the "access/content distinction," "courts have drained the accommodation requirement

Bagenstos suggests, is the extent to which the employment of people with disabilities is impeded by structural barriers, like health insurance and in-home assistance, which the ADA is poorly suited to reach.[46]

The accommodation mandate, which could have been a tool to move the ADA away from a strict "antidiscrimination" approach, has been limited by the courts' interpretations. Bagenstos suggests that courts have only required accommodations that are "job-related." Courts require employers to offer the same access that people without disabilities enjoy without requiring content changes.[47] This interpretation is a byproduct of our antidiscrimination jurisprudence, which teaches that civil rights statutes are intended to punish bad actors instead of directing defendant-employers to fix broader societal wrongs.[48]

3. Theoretical Limitations of the Accommodation Mandate

An "accommodation mandate" means that, unlike previous antidiscrimination law that required equal treatment, the ADA requires affirmative steps in the form of reasonable accommodations, which may go beyond equal access. Some commentators have suggested that the "accommodation mandate" is economically flawed. Standard economic principles "predict that the costs of accommodation will decrease the hiring and wages of people with disabilities."[49] Researchers have used this economic theory to create and empirically test predictions regarding Title I's effects on the employment levels of people with disabilities.[50]

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of significant power to eliminate . . . structural barriers to employment for people with disabilities.").

46. *Id.*

47. By content changes, Bagenstos means changes that do more than provide access to people with disabilities to already existing aspects of the employment relationship, program, service, activity, or privately-owned place of public accommodation. *Id.*

48. *Id.* at 42.

49. Peter Blanck et al., *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267, 274 (2003); *see also* Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 180 (1989) (discussing the costs of mandated benefits to the wages and hiring of people with disabilities).

50. There is a vigorous debate as to whether these studies actually show that the ADA has harmed the employment levels of people with disabilities. *See, e.g.*, Blanck, *supra* note 49, at 268-70 (stating that research attempts to determine the law's effects on employment prospects are inconclusive, noting shifting definitions on disability, and raising important questions about the validity of various studies). It is beyond the scope of this Article to join this debate. For my purposes, I take these studies at face value as one proffered explanation for why Title I has been disappointing.

Thomas DeLeire, for example, examined how the ADA affects the likelihood of employment and wages of disabled individuals.[51] He found that the ADA has led to a 7.2% decrease in the employment of disabled individuals but no change in relative wages.[52] The most significant drop was in 1990, which DeLeire attributes to the passage of the ADA.[53] Similarly, Daron Acemoglu and Joshua Angrist analyzed the Current Population Survey data from 1988 to 1997 to test their economic model.[54] They concluded that the ADA negatively impacted the employment of disabled men between twenty-one and fifty-eight, and women under age forty.[55] They found a large drop in 1992, which, like DeLeire, they attributed to the ADA's employment law provisions (specifically, the accommodation mandate), which became effective in 1992.[56] Christine Jolls, while arguing that antidiscrimination and accommodation are "overlapping rather than fundamentally distinct categories,"[57] has also found that under the ADA, wage levels will remain the same but employment levels will drop.[58]

Other legal commentators have made similar points in less economic terms. They suggest that courts (and the public), while accustomed to an antidiscrimination framework, are less comfortable with, and perhaps hostile to, an accommodation mandate.[59] Courts are hesitant to order relief that might make firms less competitive, and firms are reluctant to spend their own money on reasonable accommodations unless ordered to do so. To the extent

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51. *See* Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693 (2000) (using the Survey of Income and Program Participation data from 1986 to 1995 to examine the ADA's effects on the wages and employment of individuals with disabilities).

52. *Id.* at 705.

53. *Id.* at 694-95.

54. *See* Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 916 (2001).

55. *Id.* at 916, 949.

56. *Id.* at 917, 929-33.

57. *See* Jolls, *Antidiscrimination & Accommodation*, *supra* note 15, at 645 (suggesting that the debate over antidiscrimination and accommodation has not "appreciated" that "some aspects of antidiscrimination law . . . are in fact requirements of antidiscrimination").

58. Jolls, *Accommodation Mandates*, *supra* note 15, at 275.

59. *See* Tucker, *Revolving Door*, *supra* note 35, at 353 (claiming that courts do not appropriately enforce the ADA because they are "troubled by [the] contradiction hetween the traditional civil rights label given the ADA and the affirmative action obligation imposed by the Act which vastly exceeds the traditional nondiscrimination mandate"); *see also* Linda Hamilton Krieger, *Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 520 (2000) (arguing that the ADA's "complexity and under-specification" have created "intense normative ambiguity, which has in turn engendered hostility directed at the Act, its enforcers, and its beneficiaries").

accommodation is understood at all, it is viewed as an unwelcome species of affirmative action.[60]

D. Different Approaches to Strengthen Title I

As might be expected given their different explanations, commentators have offered varying recommendations for how to "restore" the ADA or otherwise increase the success of efforts to move and keep people with disabilities in the workforce. Although these recommendations are based on Title I concerns, they are often cast as applying to the entire ADA.

1. A Legislative Approach–Having Congress Overturn Unpopular Court Decisions

Disability policy bodies and academics have suggested amending the ADA.[61] Foremost on the wish list is a legislative overturning of the Supreme Court decisions restricting the definition of disability. Specifically, groups like the NCD have recommended amending the ADA's definition of disability to overturn *Sutton*, making it clear that individuals should be considered in their unmitigated states.[62] The NCD also would like to legislatively clarify that substantial limitation of major life activity means "either total inability to perform an activity or significant restrictions as to the condition, manner, or deviation under which an individual can perform," instead of "prevents or severely restricts an individual from performing the activity" (thus overturning *Williams*).[63] Commentators have also urged that the "regarded as" prong be restored to more of a catch-all provision.[64] Finally, the NCD recommends revising the ADA

60. *See* Tucker, *Revolving Door*, *supra* note 35, at 353 (explaining why certain courts have severely limited the ADA's scope).

61. NCD, RIGHTING THE ADA, *supra* note 37, at 99-125 (proposing an "ADA Restoration Act," noting that "[i]ncisive and forceful legislative action is needed to address the dramatic narrowing and weakening of the protection provided by the ADA, resulting from the Supreme Court's decisions, and to restore civil rights protections"). Academics have also suggested amending the ADA. *See* Feldblum, *Definition of Disability*, *supra* note 34, at 91-92, 128-29, 162 (criticizing the wording of the ADA statute and suggesting that Congress should amend the definition of disahility "to mean a physical or mental impairment").

62. NCD, RIGHTING THE ADA, *supra* note 37, at 44-46, 99-104.

63. *Id.* at 46-47, 99-104. The National Council on Disability also would like to further overturn *Williams* by clarifying that "major life activities" are not limited to "activities that are of central importance in most people's daily lives." *Id.* at 46.

64. *See id.* at 85-99 (noting that Congress intended the "regarded as" prong to be construed broadly); *see also* Feldblum, *Definition of Disability*, *supra* note 34, at 91-92, 128-29; Mayerson, *Restoring Regard*, *supra* note 34, at 588-89 (noting that the "regarded as" prong is supposed to draw attention away from individuals' disabilities and place focus on the employer's policies, but

to counteract the perceived enlargement of employers' defenses on the lack of "reasonableness" of a requested accommodation.[65] This would effectively overrule parts of *Barnett*,[66] *Albertsons*, and *Echazabal*. Commentators and legislators who have focused on using state law to fill gaps in ADA coverage have largely paralleled the efforts of those discussing amending the definition of disability on the federal level.[67]

Garrett, which dealt with the constitutional scope of congressional power, has also been interpreted by commentators to be a limiting factor in the ADA's effectiveness.[68] While commentators have consistently criticized the *Garrett* opinion,[69] and advocates have lobbied for a Court composed of Justices who will be less inclined to view state sovereign immunity in the same way as the *Garrett* majority,[70] *Garrett* itself is not readily amenable to legislative overturning. This has not stopped advocates from working towards a legislative solution to the *Garrett* problem. But instead of focusing on Washington, D.C., they have lobbied for state legislatures to waive

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that the prong continues to be narrowly construed, thus "creating arbitrary criteria based on physical or mental impairment").

65. NCD, RIGHTING THE ADA, *supra* note 37, at 85-99.

66. U.S. Airways v. Barnett, 535 U.S. 391, 394 (2002) (holding that employer's seniority provision is presumptively reasonable).

67. In California, for example, the legislature responded to the Supreme Court's decisions in *Sutton*, *Albertson's*, and *Murphy* by distinguishing its state-law definition of disability from the federal ADA. The ways in which it did so—rejecting *Sutton*'s mitigation holding, CAL. GOV'T CODE § 12926.1, and providing that "working" is a major life activity and that a plaintiff need not show she is unable to work a broad range of jobs CAL. GOV'T CODE § 12926.1—parallel the ADA reform suggestions made by the NCD. *See* NCD, RIGHTING THE ADA, *supra* note 37, at 44-46 (rejecting *Sutton*'s mitigation holding), 47-51 (arguing that working is major life activity); *see generally* BLANCK ET AL., DISABILITY CIVIL RIGHTS LAW & POLICY Part 7 (West 2002) [hereinafter DISABILITY CIVIL RIGHTS LAW] (discussing state antidiscrimination law); Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597 (2005) (discussing parallels and differences in state and federal disability employment antidiscrimination law).

68. The issue in *Garrett* was not whether Congress had *intended* to waive state sovereign immunity, which both sides conceded that it did, but whether Congress had the constitutional power to do so. The Court concluded that it did not. Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001). Congress could, in theory, achieve constitutionality by adopting a new statute—or amending the ADA—with the proof of unconstitutional state behavior that the Court deemed sufficient. *See id.* at 371.

69. *See supra* note 43, and sources cited therein.

70. *See* Press Release, Democratic National Committee (Feb. 26, 2004) ("The recess appointment of William Pryor to the U.S. Court of Appeals is just the latest confirmation that President Bush's image as a compassionate conservative was nothing more than a farce and that his support to the Americans with Disabilities Act is empty rhetoric.").

their sovereign immunity to Title I lawsuits. So far, this effort has not been very successful.[71]

2. A Policy Approach—Moving Back to Social Welfare

Some commentators, noting the ineffectiveness of the antidiscrimination approach in moving people with disabilities into the workforce, suggest a movement back to social welfare policies.[72] Suggestions include increased litigation under other social welfare laws (like the Medicaid Act), lobbying for expanded access in public health-insurance programs,[73] and expanded tax incentives and assistive technology programs.[74] The economists who are focused on the failure of the accommodation mandate, discussed above, are more dedicated to explaining the problem than to recommending reforms. But, given their arguments about the inherent flaws in the current system, they logically proceed to one of two conclusions: like Bagenstos, they advocate a return to more direct and sustained government intervention in social welfare policies, or they support more aggressive use of economic incentives in the ADA itself.[75]

III. THE PARALLEL (BUT DIFFERENT) STORY OF TITLES II AND III

The emphasis on employment law in ADA research is not necessarily a bad thing, and the above discussion is not intended as a criticism of these authors' scholarship. Their body of work has been important and has yielded important conclusions about the employment provisions of the ADA. Given that Title I has been the most litigated part of the ADA and that increased levels of employment for people with disabilities is such a crucial part of the march toward inclusion into society, the academy and policy groups'

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71. To date, only three states have expressly waived their sovereign immunity to allow ADA claims to be brought against them in federal court: Illinois, 2005 Ill. Legis. Serv. 93-414 (West), Minnesota, MINN. STAT. § 1.05 (2005), and North Carolina, N.C GEN. STAT. § 143-300.35 (2005).

72. Bagenstos, *Future*, *supra* note 13, at 55 ("Solving the problem requires a social welfare approach—that is, sustained and direct government intervention through such specific means as public funding and provision of services.").

73. *Id.* at 56-69.

74. *Testimony of Professor Peter Blanck: Before the Subcomm. on Human Rights and Wellness of the H. Comm. on Governmental Reform* (2004), *available at* http://reform.house.gov/UploadedFiles/Blanck%20testimony.pdf.

75. Examples are increased tax incentives in the ADA or other policy tools to increase employers' profits when they make accommodations. DISABILITY CIVIL RIGHTS LAW, *supra* note 67, Parts 9, 10; *see also* PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES, JOB ACCOMMODATION NETWORK (JAN) REPORTS (Oct.-Dec. 1994) (for every dollar invested in an effective accommodation, companies sampled realized an average of $50 in benefits).

focus on Title I of the ADA is appropriate. My concern is that at the fifteenth anniversary of the ADA, important debates about evaluation and solutions are being skewed toward the ADA's employment law provisions. Below, I suggest that the irony of the overemphasis on Title I in ADA scholarship, and the danger of relying almost completely on Title I to frame the debate of ADA reform, is that Titles II and III may be better tools to remedy their areas of inequality than Title I is for employment.

Title II (requiring nondiscrimination in government programs and services) and Title III (requiring nondiscrimination in places of public accommodations) are just as important to the ADA's goals as Title I. This is readily apparent from the text of the ADA, which finds that people with disabilities have experienced discrimination in such critical areas as "housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services" (all areas covered by Titles II and III);[76] declares that census polls, national polls, and other studies have documented that people with disabilities have an inferior status in our society, and are "severely disadvantaged socially . . . and educationally;"[77] and sets the nation's proper goals as ensuring "equality of opportunity, full participation, . . . [and] independent living" for individuals with disabilities.[78]

This Part seeks to tell the story of Titles II and III of the ADA. First, for the uninitiated reader, I offer a brief introduction to Titles II and III. Second, I show that while Title II and III cases have been more successful in the courts than Title I, the available evidence suggests that they are not performing as well as they can and should. Third, I argue that the explanations offered for Title I's failures do not provide complete and satisfactory explanations for the problems with Titles II and III. Fourth, I suggest that Titles II and III are weak in different areas than Title I; specifically, in the areas of enforcement and implementation. Finally, I present and evaluate suggestions for improving these Titles' public and private enforcement mechanisms. In this way, I hope to both begin and set the stage for future discussions.

76. 42 U.S.C. § 12101 A(3) (2005).

77. *Id.* § 12101 A(6).

78. *Id.* § 12101 A(8).

A. Titles II and III of the ADA

Title II of the ADA covers discrimination by public entities.[79] Generally, this means discrimination by state or local governments. Title II was patterned after Section 504 of the Rehabilitation Act[80] and is divided into two parts. Part A sets forth the general rule of nondiscrimination by public entities. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[81] The DOJ has promulgated regulations for Part A of Title II.[82] Part B of Title II deals specifically with discrimination by public entities in the context of public transportation.[83] The Department of Transportation ("DOT") has promulgated regulations implementing this part.[84]

Individuals can enforce Title II by bringing an administrative claim (which may ultimately lead to litigation, in which the DOJ may be involved) and private lawsuits. The Title II remedies are patterned after the Rehabilitation Act, which is in turn patterned after the remedies in Title VI of the Civil Rights Act of 1964.[85] Courts have interpreted this to mean that individuals may sue for damages under Title II for intentional discrimination but not for disparate impact discrimination.[86] Punitive damages are not available but attorneys' fees are.[87] Although the case law is still developing, the Supreme Court has held that individuals may sue state actors for damages under Title II to vindicate fundamental rights.[88]

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79. 42 U.S.C. §§ 12131-65 (2005).

80. 29 U.S.C. § 794 (2005).

81. 42 U.S.C. § 12132 (2000).

82. *Id.* § 12134. These regulations (42 U.S.C. §§ 12131-34 (2005)) can be found at 28 C.F.R. §§ 35.101-35.190 (2005).

83. 42 U.S.C. §§ 12141-65 (2005).

84. 42 U.S.C. §§ 12149, 12164 (2005). These regulations can be found at 49 C.F.R. pt. 27 (2005).

85. *See* 42 U.S.C. § 12133 (2005) (referencing the applicability of remedies in the Rehabilitation Act); 29 U.S.C. § 794a(a)(1) (2005) (Rehabilitation Act remedies provision, referencing remedies in Title VI of the Civil Rights Act of 1964).

86. In this latter category of cases, individuals may only sue for equitable relief. *See* DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 16-9 to 16-10 (noting that Congress limited relief where it wished to do so, such as in Title III, which does not permit monetary relief to private plaintiffs).

87. *Id.* at 16-11 to 16-12.

88. Tennessee v. Lane, 541 U.S. 509, 509, 516-17 (2004).

Title III of the ADA deals with discrimination in public accommodations and services operated by private entities.[89] The general rule is that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by a person who owns, leases (or leases to), or operates a place of public accommodation."[90] A place of public accommodation must make reasonable modifications in its policies, practices, and procedures, unless that entity can demonstrate that doing so would fundamentally alter the nature of its goods, services, or facilities.[91] Older facilities must remove architectural barriers if it is "readily achievable" to do so,[92] while facilities or alterations that post-date the ADA must be designed to be readily accessible to individuals with disabilities to the "maximum extent possible."[93]

The Attorney General (DOJ) and the DOT are responsible for promulgating regulations to implement Title III of the ADA.[94] Unlike the other two major titles of the ADA, individuals have no private damage remedy for Title III violations.[95] The DOJ, however, is authorized to seek damages and civil penalties in certain cases.[96]

B. The Successes and Failures of Titles II and III of the ADA

Have Titles II and III been successful? To begin to answer this question, I use some of the same approaches as the scholars who have written about Title I. First, I attempt to measure success rates in the courts, with an eye toward seeing if there are any areas where Title II or III claims typically fail. Second, I present and discuss the limited research on whether Titles II and III have improved the lives of people with disabilities in accessing public services and places of public accommodations.

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89. 42 U.S.C. §§ 12181-89 (2005).

90. 42 U.S.C. § 12182(a) (2005).

91. *Id.* § 12182(b)(2)(A)(ii).

92. 42 U.S.C. § 12182(b)(2)(A)(iv) (2005).

93. *Id.* § 12183(a)(2).

94. 42 U.S.C. § 12186(a)(1) (2005) (Department of Transportation); *see also* 42 U.S.C. § 12186(b) (2005) (Attorney General). These regulations can be found at 28 C.F.R. §§ 36.101-36.108 (2005).

95. 42 U.S.C. § 12188(a) (2005) (limiting remedies to injunctive relief).

96. 42 U.S.C. §12188(b)(1)(B) (2005).

1. A Litigation Perspective—Title II and III Claims Have Been More Successful Than Title I Claims

As discussed above, there are several sources of data regarding the success of Title I employment discrimination claims. The ABA conducts regular studies of ADA Title I cases, and in 2003, it found defendants won in 97.3% of cases.[97] In 2001, Professor Colker did a study of Title I ADA appellate cases.[98] She found that defendants prevailed at the trial level in 94% of the cases that were appealed and that defendants are able to obtain reversals of pro-plaintiff trial court decisions in 42% of appellate litigation (as opposed to plaintiffs, who are only able to obtain reversals of pro-defendant trial court judgments in 12% of cases).[99] Colker compared this data to similar data sets in other civil rights statutes and concluded that the success rate of ADA Title I plaintiffs was lower at both the trial and appellate levels.[100]

Building on this approach, my goal was to construct similar databases for ADA Title II and III appellate cases. My research method was to read and code appellate ADA Title II and III cases that were available on Westlaw.[101] For Title II, my database includes 197 cases.[102] For Title III, my database includes 82 cases.[103] My two

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97. *ABA 2003 Employment Decisions*, *supra* note 12, at 319. The ABA study charts all ADA cases, at both the trial and appellate levels (except for those that reach the Supreme Court).

98. *See generally* Colker, *Winning & Losing*, *supra* note 12 (analyzing appellate employment discrimination decisions in ADA cases).

99. *Id.* at 248 (using Title I cases from the Courts of Appeals).

100. *Id.* at 253-54.

101. I found these cases by using two separate searches (one for each of my databases). My search terms were "Americans with Disabilities Act" and "Title II" (or "Title III") in the U.S. Court of Appeals (CTA) database on Westlaw. This created over-inclusive lists, which were then pared down to find appellate cases that actually decided Title II or III issues. I included cases irrespective of whether they were "published" in the federal reporter system. Although there may be some ADA cases that were missed (either due to my errors or the failure of a court to use the term "Americans with Disabilities Act" or "Title II" or "Title III"), I do not believe there are many. I excluded cases that only dealt with attorneys' fees issues because for my purposes, these cases did not resolve the underlying ADA Title II or III claims. Unlike Professor Colker, *see* Colker, *Winning & Losing*, *supra* note 12, at 244 n. 22, I did include cases that were brought *pro se* and cases that were dismissed for suing a defendant that was not a covered entity (Title II) or not a public accommodation within the meaning of the statute (Title III). I made this choice because it was my experience (unlike Professor Colker's experience with Title I cases) that this was a common and important issue area for Titles II and III, and that these cases were not necessarily "patently frivolous." *Id.* I personally made every decision to include or exclude a case from the database, and I read and coded every case in the database. My search ran from the date of the ADA's passage (1990) and ran through the end of 2004.

102. As will be made clear below, for many of the charts I generated based on this database, I excluded certain cases, so my total of cases in those instances will be lower than 197. This primarily happened in cases that involved two discernibly separate ADA Title II claims on

survey instruments (for Titles II and III, respectively) are included in this article as Appendices A and B.[104]

In appellate litigation, there are several conceivable measures of "success."[105] The first, and most obvious, is that a plaintiff has "prevailed" anytime there is a pro-plaintiff outcome on appeal. This includes cases where the plaintiff may have lost at the trial level but convinces an appellate court to reverse, or where the plaintiff successfully defends a favorable decision below. Under this definition, of 189 Title II cases, there was a pro-plaintiff outcome in 63 cases (33.3%), and a pro-defendant outcome in 126 cases (66.7%). Of 79 Title III cases, there was a pro-plaintiff outcome in 29 cases (29.1%), and a pro-defendant outcome in 56 cases (70.9%).[106]

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appeal, which presented coding difficulties and made it impossible to determine, for statistical purposes, which claim received a pro-plaintiff or pro-defendant result. This was a relatively small number—there were only eight of these two-claim Title II cases. I will make clear when these cases are included.

103. *See id.* There were three two-claim Title III cases.

104. There are several caveats to using appellate decisions as representative of overall ADA litigation. Colker discusses these, and they are applicable here (although perhaps less so than in her article. Whereas she runs regression analyses to actually make predictions based on her data, I use my data in a more descriptive fashion). Many cases are not appealed, for a variety of reasons. In particular, cases that are settled (and most cases are) are rarely appealed, so this important category of cases will not show up in my data set. Also, opinions available on Westlaw are not necessarily reflective of all appellate decisions. Colker, *Winning & Losing*, *supra* note 12, at 245; Daniel M. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981), Peter Siegelman & John J. Donahue III, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990). Although both published and unpublished opinions are available on Westlaw, circuits differ in their policies allowing their unpublished opinions to appear on Westlaw. Three circuits (Third, Fifth, and Eleventh) generally do not make their unpublished opinions available on Westlaw. Colker, *Winning & Losing*, *supra* note 12, at 247. This is less of an issue in my research than Colker's, because, at least at this point, I am not comparing results across circuits. Because unpublished opinions overwhelmingly result in affirmances of pro-defendant results at trial, Colker, *Windfall*, *supra* note 18, at 104-05, my findings may overstate plaintiffs' success rates on appeal. Since I am primarily interested in comparing my numbers to Professor Colker's, this is less significant because her study has the same issues. *See* Colker, *Winning & Losing*, *supra* note 12, at 247 (noting that because the Third, Fifth, and Eleventh Circuits do not make unpublished opinions available, "[Colker's] database will overstate the tendency of the Third, Fifth, and Eleventh Circuits to reach pro-plaintiff results").

105. *See* Theodore Eisenberg & Stewart Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 503 (1989) (noting that various observers of the legal system perceive litigation differently and that different observers will define the same class of litigation as either successful or unsuccessful); *see also* Colker, *Winning & Losing*, *supra* note 12, at 246-248 (citing Eisenberg and Schwab for the proposition that law students, professors, appellate judges, and district judges view appellate opinions differently and noting that there are different perceptions of what it means to "win" under a statute).

106. For these numbers, I excluded two-claim cases. *See supra* notes 103 and 104. I believe, however, that this measure overstates the pro-plaintiff outcomes. In some cases where the plaintiff prevails on appeal, it is a little premature to say the plaintiff has "won" in any meaningful sense (aside from convincing the court of appeals to agree on its legal point). In these

Colker uses a slightly different measure of success in her research. She looks at the relative rates of reversals in appellate litigation between plaintiffs and defendants. As to Title I cases, Professor Colker found that defendants were far more likely to attain a reversal on appeal than plaintiffs. Defendants attain a full reversal in 42% of appellate litigation and obtain a reduction in the damages award in an additional 17.5% of cases. In comparison, Plaintiffs only obtained a reversal of pro-defendant judgments in 12% of cases. A chart demonstrating Colker's findings on this point, reproduced from her article, is presented below:

***Table 1*—From Colker, *Winning and Losing* ("Judicial Outcome—All [Title I] Cases")[107]**

		Court of appeals disposition of lower court's ADA decision			
		Affirmed	Reversed	Reversed in part, damages lowered	Total
Lower Outcome	Pro-Defendant	594 (87.5%)	81 (12%)	n/a	675 (94%)
	Pro-Plaintiff	18 (40%)	19 (42%)	8 (17.5%)	45 (6%)
Total		612	100	8	720

Because I wanted to compare my findings with Colker's, I constructed the same tables with my Title II and III datasets. There was no "reduction in damages award" category in either Title II or III because this did not happen in any Title II or III cases that I reviewed. Charts 1 and 2 below summarize my results:

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cases, there will be more litigation before there is any resolution of the plaintiff's claim. One example is Title II qualified immunity issues. If a plaintiff brings a claim for damages under Title II against a local official in his individual capacity, the defendant may raise the defense of qualified immunity, and if the defendant loses that claim at the trial level, he may take an interlocutory appeal. *See, e.g.*, Key v. Grayson, 179 F.3d 996, 998 (6th Cir. 1999) (allowing defendant local official to file an interlocutory appeal after the district court judge denied his motion for summary judgment on the basis of qualified immunity). Even if the appellate court agrees with the trial court (thus affirming the lower court), the case will get remanded back to the trial court for resolution of the merits of the claim. Other examples include where the trial court disposed of the case on some type of pre-trial motion (under Federal Rule of Civil Procedure 12 or on a motion for summary judgment), or where the appellate court remands with instructions for a new trial. In all of these cases, there is significant litigation left before the plaintiff can be said to have "won." *See* Colker, *Winning & Losing*, *supra* note 12, at 247 (noting that parties who receive "a reversal of a trial court dismissal may not ultimately prevail in litigation"). I do not present these numbers as my primary numbers because the data set to which I am comparing my numbers—primarily Colker's—does not use this measure of success.

107. Colker, *Winning & Losing*, *supra* note 12, at 248.

Chart 1—Judicial Outcome—All Title II Cases

		Court of appeals disposition of lower court's ADA decision		
		Affirmed	Reversed	Total
Lower Outcome	Pro-Defendant	111 (76%)	34 (24%)	145 (77%)
	Pro-Plaintiff	29 (66%)	15 (34%)	44 (23%)
Total		140	49	189

Chart 2—Judicial Outcome—All Title III Cases

		Court of appeals disposition of lower court's ADA decision		
		Affirmed	Reversed	Total
Lower Outcome	Pro-Defendant	48 (76%)	15 (24%)	63(80%)
	Pro-Plaintiff	8 (50%)	8 (50%)	16(20%)
Total		56	23	79

To summarize, for Title I of the ADA, Professor Colker found that defendants attain a reversal in 42% of appellate litigation and plaintiffs attain a full reversal in 12% of cases. In addition, defendants receive a reduction in the damages award in 17.5% of cases. For Title II of the ADA, I found that defendants attain a full reversal in 34% of cases and plaintiffs attain a reversal in 24% of cases. For Title III of the ADA, I found that defendants attain a full reversal in 50% of cases and plaintiffs attain a reversal in 24% of cases. Although by looking at the court of appeals level both of our samples are subject to a pro-defendant bias,[108] the results under Title II are not as pro-defendant as under Title I, and Titles II and III are more pro-plaintiff than Title I.

Similarly, success at trial is noticeably less pro-defendant for Titles II and III than Title I. Of Title I cases that were appealed, Professor Colker found that 94% had a pro-defendant outcome at the trial level, and 6% had a pro-plaintiff outcome.[109] Drawing from the

108. *See id.* at 249 ("Because summary affirmances tend to reflect affirmances of pro-defendant trial court outcomes, it may not be surprising that the pro-defendant bias in the trial courts is replicated in the appellate courts . . . ."). "Pro-defendant" bias means that pro-defendant outcomes may be overstated.

109. *Id.* at 248.

same pool (Title II and III cases that were appealed), in Title II, there was a pro-defendant outcome in 76% of cases and a pro-plaintiff outcome in 24%. For Title III, there was a pro-defendant outcome in 80% of cases and a pro-plaintiff outcome in 20% of cases.[110] These findings are demonstrated in Chart 3.

***Chart 3*—Outcome at Trial**

Title	Pro-Plaintiff	Pro-Defendant
Title I	6%	94%
Title II	24%	76%
Title III	20%	80%

Although more study is certainly needed, Colker's research has been the basis for many observations about success rates in ADA Title I cases.[111] My parallel research shows that, at both the trial and appellate levels, the results under Titles II and III are less pro-defendant and more pro-plaintiff than under Title I, with the exception of pro-defendant Title III appellate outcomes.

Why is this the case? One explanation may be that the theoretical underpinnings of Titles II and III—that people with disabilities have the right to participate equally in government programs, and in privately owned places of public accommodations—are less troubling to judges than placing people with disabilities into the private workforce. As a historical matter, it is certainly less revolutionary. Consider participation in government programs. The

110. I included all cases—including cases with two claims at the court of appeals—to calculate these numbers.

111. To be sure, Colker is very forthright in explaining the limitations of her data set. I have attempted to do the same. But qualifications aside, it has been a useful tool for scholars to discuss ADA Title I success rates. *See, e.g.*, Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 910-11 (2003) (citing Colker for the proposition that "ADA plaintiffs have the lowest success rate of any class of plaintiffs in the federal system except prisoners"); Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 966 (2004) (citing Colker for the proposition that many appellate courts have interpreted the ADA narrowly); Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1270 (2003) (citing Colker for the proposition that the type of disability alleged can affect significantly the amount of judicial sympathy afforded the plaintiff); Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise For Employment Discrimination Plaintiffs*, 6 U. PA. J. LAB. & EMP. L. 735, 736 (2004) (citing Colker in noting that "employers prevail in over ninety percent of ADA Title I cases at the trial court level and in eighty-four percent of cases at the appellate level"); Seam Park, *Curing Causation: Justifying A "Motivating Factor" Standard Under the ADA*, 32 FLA. ST. U. L. REV. 257, 275 (2004) (noting that Colker's study considered the type of discrimination claims brought and the type of disabilities alleged).

precursor of the "civil rights" model that the ADA represents was the "medical model," the whole basis of which was to use medical professionals as the guardians of government entitlement programs.[112] Many of these government programs were vocational in nature or special job set-asides for people with disabilities.[113] So at its root, taking disability into account in government programs is not a new or novel idea.[114] Discrimination in places of public accommodation invokes images of lunch counters and segregated drinking fountains[115] that are even more powerful than images of discrimination in the private employment market. Perhaps Title III has received the benefit of some of that history.[116] Also, the integration of people with disabilities into places where the public gathers predates the ADA.[117] Private employment, however, was only introduced to the disability civil rights movement with the ADA. These ideas will be explored more below in Part III.C.3, where I suggest that the supposed limitations of the accommodation mandate, while a valid explanation

112. *See* DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 1-2 to 1-3 (noting that the medical model "established physicians as the gatekeepers of disability benefits" and "aimed to address the 'needs' of people with disabilities rather than recognize their civil rights"); *see also* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1371-74 (1993) (discussing the failures of rehabilitation through medical and social pathology models).

113. *See* DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 1-5, 1-6 (discussing vocational rehabilitation and benefits); *see also* Randolph-Sheppard Act of 1936, 20 U.S.C. § 107 (2005) (creating federal program employing "qualified blind people" as vendors on federal property); Don F. Nicolai & William J. Ricci, *Access to Buildings for the Disabled*, 50 TEMP. L. Q. 1067, 1069 (1977) (showing that by 1977, over half of the states had statutes prohibiting disability discrimination in state and locally funded buildings and facilities).

114. With the exception of the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.* (2005), and the Air Carrier Access Act, 49 U.S.C. § 41705 (2005), every federal disability antidiscrimination law that predates the ADA dealt with some form of public services or programs. *See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (current version at 29 U.S.C. § 794 (2005)) (addressing nondiscrimination regarding federal financial assistance for programs or activities and re-drafted in 2002 in response to Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001), which held the statute unconstitutional); Education for All Handicapped Persons Act, 20 U.S.C. § 1400 *et seq.* (2005) (later renamed "Individuals with Disabilities and Education Act") (pubic education); Voting Accessibility for the Elderly and Handicapped Act of 1964, 42 U.S.C. §§ 1973ee *et seq.* (2005) (voting).

115. *See* ROY BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 297-98 (Carolina Academic Press, 2d ed. 2000).

116. *See* JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 41-42 (1994) (drawing parallels between James Meredith's integration of the University of Mississippi in 1962 and Ed Roberts entering the University of California at Berkeley in the same year, marking the start of the Independent Living movement).

117. *See* MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE, AND THE CASE AGAINST DISABILITY RIGHTS 85-89 (2003) (discussing the integration of the disabled into public places and the labeling of the disabled as "special").

for Title I's failures, do not work as well in the Title II and III contexts.

2. A Social Science Perspective—People with Disabilities Are Still on the Margins of Society in Title II and III-covered Areas

In contrast to the extensive analyses on Title I's impacts on employment levels for people with disabilities, there has been a real lack of study as to what extent Titles II and III have improved access to government programs and privately-owned places of public accommodation. Scholars and policy bodies seem to have some sense that these Titles have improved the lives of people with disabilities,[118] and certainly they have. But survey data still shows that people with disabilities are on the margins of society in areas that are covered by Titles II and III.

The 2004 National Organization on Disability/Harris Poll Survey shows that people with disabilities still lag behind people without disabilities on most quality of life factors covered by Titles II and III of the ADA.[119] In many, the ADA has not made any progress in closing the gaps. There are significant disparities in the following areas:

Education—The gap between people with disabilities and those without disabilities who have completed high school education is 10%. Although this gap has significantly narrowed since 1986 (when it was 24%), it has not gotten much smaller since 1994 (when it was 12%).[120] Although the primary federal civil rights statute dealing with the educational rights of individuals with disabilities is the Individuals

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118. *See* NCD, RIGHTING THE ADA, *supra* note 37, at 1 ("The provisions of the ADA addressing architectural, transportation, and communication accessibility have changed the face of American society in numerous concrete ways, enhancing the independence, full participation, inclusion, and equality of opportunity for Americans with disabilities"); *see also* Tucker, *Revolving Door*, *supra* note 35, at 382-83 (discussing the positive effects of the ADA); Rulli & Leckerman, *supra* note 26, at 605-09 (discussing how the non-employment provisions of the Americans with Disabilities Act have changed American culture).

119. NAT'L ORGANIZATION ON DISABILITY, 2004 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES (2004) [hereinafter N.O.D./HARRIS SURVEY]. The N.O.D. Survey had a sample of 2,255 respondents (a nationally representative sample of 1,038 people with disabilities and 988 people without disabilities). Interviews were conducted between May 7th and May 28th of 2004. The purpose of the research was to re-examine ten important indicators of the quality of life and standard of living of Americans with disabilities, to measure the size of the gaps on these ten indicators between people with and without disabilities, and to determine which gaps are closing—and by how much—compared to surveys in 2000, 1998, 1994, and 1986.

120. *Id.* at 13.

with Disabilities Education Act,[121] Titles II and III of the ADA also address discrimination in education.[122]

Socializing—The gap between people with disabilities and those without disabilities who socialize with close friends, relatives, or neighbors at least twice a month is 10% (and was 11% in 2000).[123] Although a term as amorphous as "socialization" covers a range of behaviors that may or may not be included in the ADA, clearly one of the ADA's goals was to increase opportunities for socializing through increasing access to transportation and recreation,[124] both squarely within the province of Title III.

Eating Out—The gap between people with disabilities and those without disabilities who go to restaurants at least twice a month is 16%.[125] Although this has fallen from 1986 when it was 25%,[126] it is still significant. And while there could be a variety of factors here (financial well-being probably high on the list, as people with disabilities have been shown to be more vulnerable to shifts in the economy than others), [127] the physical accessibility of restaurants, covered by Title III, plays a part.[128]

Transportation—The gap between people with disabilities and those without disabilities who consider inadequate transportation a problem is 18%.[129] This is actually up from 13% in 1988, the first year that Harris measured this variable.[130] Improving transportation access for people with disabilities was one of the major goals of the ADA,[131] and Titles II and III in particular.[132]

Health Care—The gap between people with disabilities and those without disabilities who have gone without needed medical care at least once in the past year is 11%.[133] This has increased from 5% in

121. 20 U.S.C. §§ 1400 *et. seq* (2005).

122. 42 U.S.C. § 12181(7)(J) (2005) (Title III); *see also* McPherson v. Mich. High School Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997) (Title II); Sandison v. Mich. High School Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995) (Title II); Pottgen v. Mo. High School Athletic Ass'n, 40 F.3d 926 (8th Cir. 1994) (Title II).

123. N.O.D./HARRIS SURVEY, *supra* note 119, at 15.

124. *See* 42 U.S.C. § 12101A(3) (2005) (stating that discrimination against people with disabilities continues in many areas, including recreation and transportation).

125. N.O.D./HARRIS SURVEY, *supra* note 119, at 17.

126. *Id.*

127. *See* Edward H. Yelin & Patricia P. Katz, *Labor Force Trends of Persons With and Without Disabilities*, 117 MONTHLY LAB. REV. 36, 38-41 (Oct. 1994).

128. *See* 42 U.S.C. § 12181(7)(B) (2005).

129. *See* N.O.D./HARRIS SURVEY, *supra* note 119, at 18.

130. *Id.*

131. *See* 42 U.S.C. § 12101A(3) (2005).

132. *See id.* §§ 12141-12148 (Title II), 12184 (Title III).

133. *See* N.O.D./HARRIS SURVEY, *supra* note 119, at 19.

1994, the first year Harris measured it.[134] People with disabilities have more trouble obtaining and keeping effective public or private health insurance.[135] Title II of the ADA covers public health care programs, services, and activities,[136] and Title III regulates accessibility and nondiscrimination in the professional offices of health care providers and hospitals.[137]

Political Participation—The 2004 Harris Poll does not yet have data on political participation for people with disabilities. Other studies confirm that people with disabilities have more difficulty participating in the political process. A 1999 survey showed that among people voting in the past ten years, 8% of people with disabilities encountered or expected to encounter difficulties at polling places, compared to less than 2% of people without disabilities.[138] A 2000 National Organization on Disability/Harris Survey found that voter registration is lower for people with disabilities than for people without disabilities (62% to 78%, respectively).[139] People with disabilities are also more likely to feel politically isolated or marginalized.[140] Voting is covered by Title II of the ADA.[141]

Clearly, more study is needed to evaluate how, and to what extent, Titles II and III have improved the lives of people with disabilities. I am currently engaged in that issue in another research project and I hope that other scholars are doing the same.

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134. *Id.*

135. *See* Bagenstos, *Future, supra* note 13, at 29-34 (discussing difficulties facing people with disabilities in obtaining effective private and public insurance); *see also* NATIONAL REHABILITATION HOSPITAL CENTER FOR HEALTH & DISABILITY, HEALTH & DISABILITY BRIEF: INDIVIDUALS WITH DISABILITIES FACE MORE CONSTRAINED HEALTH CARE CHOICES—ESPECIALLY IN MANAGED CARE (May 2001) (illustrating that people with disabilities are especially limited in their choice of doctors).

136. Olmstead v. Zimring, 527 U.S. 581, 591 (1999).

137. *See* 42 U.S.C § 12181(7)(F) (2005).

138. *See* KRUSE ET AL., EMPOWERMENT THROUGH CIVIC PARTICIPATION: A STUDY OF THE POLITICAL BEHAVIOR OF PEOPLE WITH DISABILITIES 4 (1999) [hereinafter KRUSE, EMPOWERMENT].

139. *See* NAT'L ORGANIZATION ON DISABILITY, 2000 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES 83 (2000).

140. People with disabilities are less likely to be contacted by political parties. They are less likely to view the political system as responsive to people "like them." They are less likely to contribute money to a political party or candidate, write or speak to an elected official, attend a political meeting, write a letter to a newspaper, contribute money to an organization trying to influence governmental policy or legislation, or work with others on a community problem. *See* KRUSE, EMPOWERMENT, *supra* note 138, at 5.

141. *See* 42 U.S.C. § 12101(a)(3) (2005); *see also* People *ex rel.* Spitzer v. County of Schoharie, 82 F. Supp. 2d 19, 25 (N.D.N.Y. 2000) (holding that accessibility to polling places qualifies as a "service, program, or activity"); Am. Ass'n of People with Disabilities v. Hood, 310 F. Supp. 2d 1226, 1234 (M.D. Fla. 2004) (same).

3. Have Titles II and III Worked As Well As Hoped?

Have Titles II and III, like Title I, been limited in their ability to improve the lives of people with disabilities? The survey and other studies above, though incomplete, suggest that like Title I, Titles II and III have had limited success (despite higher litigation success rates).[142] If this is true, what parts of Titles II and III can and should work better? Below, I argue that these Titles have been most limited by under-enforcement at both the private and public levels. This is evidenced by dramatically fewer Title II and III cases as compared to Title I. But first, I show that the explanations for what is "wrong" with Title I provide at times incomplete, and at other times inaccurate, explanations for the problems with Titles II and III.

C. The Title I Explanations for What Is "Wrong" with the ADA Do Not Work as Well for Titles II and III

In this Section, I argue that the explanations, described above, for the limitations of Title I are unsatisfactory in the Title II and III context. Therefore, I contend that the suggestions for reform based on these explanations are an imperfect fit for Titles II and III.

1. Court Hostility

As discussed above, commentators have shown that Title I claims do poorly in court. Much of the blame is put on the courts (in particular, the Supreme Court) for their restrictive decisions in ADA cases, especially cases involving the ADA's definition of disability.[143] A typical response, therefore, is to urge Congress to overturn these unpopular decisions. But a closer look reveals that these explanations and attendant suggestions are less persuasive in the Title II and III contexts.

First, as shown above, Title II and III cases have done better at the trial (of cases that are appealed) and appellate levels than Title I cases. As part of her study, Professor Colker found that published Title I cases fared worse on appeal than published decisions of other

142. *See* Colker, *Fragile Compromise*, *supra* note 18, at 379 ("This paper argues that ADA Title III has been less successful than was originally hoped."); *see also* Milani, *Wheelchair Users*, *supra* note 21, at 71-73 (arguing that Title II and III have been limited by courts' interpretations of standing requirements).

143. *See supra* note 34.

civil rights statutes.[144] In Chart 4, presented below, I have reproduced Professor Colker's findings comparing Title I success rates with other civil rights statutes. I include my own findings on Title II and III success rates for published opinions.

Chart 4—Publisbed Appellate Data

	Plaintiff Appeals (% reversed)	Defendant Appeals (% reversed)
ADA Employment Discrimination cases (Title I)[145]	(64 of 310) 21%	(21 of 35) 60%
ADA Title II cases[146]	(26 of 81) 32%	(14 of 41) 34%
ADA Title III cases[147]	(12 of 43) 30%	(7 of 15) 47%
Title VII of the Civil Rights Act of 1964[148]	(34 of 100) 34%	(12 of 29) 41%
Defamation Litigation[149]	(82 of 315) 26%	(66 of 126) 52%
Nonprisoner Constitutional Tort Litigation[150]	(150 of 395) 38%	(43 of 89) 48%
Prisoner Constitutional Tort Litigation[151]	(53 of 111) 48%	(11 of 16) 69%
Control Group (Non-Civil Rights Litigation)[152]	(144 of 411) 35%	(73 of 222) 33%

Colker concluded that the ADA Title I results were more pro-defendant than other areas of civil rights law, with the exception of

144. Colker, *Winning & Losing*, *supra* note 12, at 254, tbl. 5 ("Published Appellate Data"). Colker used published Title I decisions because the databases for other civil rights statutes only used published decisions. *Id.* at 253.

145. Colker, *Winning & Losing*, *supra* note 12, at 254, tbl. 5. Colker explains that this data reflects the published decisions in her database. *Id.* at 254 n.38.

146. Like Colker, I used published Title II opinions in constructing this chart. I removed two-claim cases. *See supra* note 102.

147. I removed two-claim cases. *See supra* note 102.

148. Colker, *Winning & Losing*, *supra* note 12, at 254, tbl. 5. Colker explains that this data reflects published Title VII decisions from January 1, 1999, to July 1, 1999. She gathered this data from the headnotes of published decisions available on Westlaw. *Id.* at 254 n.39.

149. *Id.* at 254, tbl. 5. Colker explains that this data reflects published defamation cases from 1976 to 1979. *Id.* at 254 n.40. Professor Marc Franklin gathered this data. *See* Marc Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 468 (1980).

150. Colker, *Winning & Losing*, *supra* note 12, at 254, tbl. 5. Colker explains that this data reflects published decisions from October 1, 1980, to December 31, 1985, in three circuits. *Id.* at 254 n.41; *see also* Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 525, tbl. III (1989).

151. Colker, *Winning & Losing*, *supra* note 12, at 254, tbl. 5. Colker explains that this data also comes from the Eisenberg & Schwab article, *supra* note 150, at 525 tbl. III. *Id.* at 254 n.42.

152. Colker, *Winning & Losing*, *supra* note 12, at 254, tbl. 5. Colker explains that this data also comes from the Eisenberg & Schwab article, *supra* note 150, at 518, fig. 2 & n.53. *Id.* at 24 n.43.

prisoner constitutional tort litigation.[153] Her strongest evidence in this regard is the 60% rate of defendant reversals from pro-plaintiff trial outcomes.[154] But the outcomes of litigation under Titles II and III (34% and 47% defendant reversal rates), in contrast, appear more in line with outcomes of litigation under other civil rights statutes. In particular, the Title II defendant reversal rate (34%) is lower than any other civil rights statute (and is closest to the control group for non-civil rights litigation). And plaintiffs are able to get pro-defendant trial outcomes in Title II and III (32% and 30%, respectively) cases reversed at a greater rate than in Title I cases (21%).

The first tenet of the "court hostility" view of Title I—overwhelming litigation failure—does not hold true for Titles II and III. Also, as discussed above, most of the criticism directed at ADA decisions involves courts' interpretation of the definition of disability. But, unlike what has been suggested for Title I, most Title II and III cases that are lost at the appellate level are not based on the plaintiff's inability to meet the definition of disability. Charts 5 and 6, presented below, offer breakdowns of the ways in which Title II and III cases that have a pro-defendant outcome at the appellate level (defined as defendant obtaining either an affirmance of a pro-defendant trial outcome or a reversal of a pro-plaintiff outcome) are decided.[155]

Chart 5—Breakdown of Courts' Decisions In Pro-Defendant Title II Cases

Definition of disability	(8 of 126) 6%
Federalism issues[156]	(22 of 126) 17%
Fundamental alteration/undue burden	(7 of 126) 6%
Not covered service, program, or activity	(3 of 126) 2%
Standing issues	(6 of 126) 5%
No discrimination on basis of disability	(33 of 126) 26%
Defendant not covered entity	(3 of 126) 2%
Other[157]	(44 of 126) 35%

153. Colker, *Winning & Losing*, *supra* note 12, at 253.

154. *Id.*

155. Two-claim cases have been removed. *See supra* notes 102 and 103.

156. I defined "federalism issues" as cases where the court based its decision on qualified immunity or Eleventh Amendment sovereign immunity.

157. I found no discernable pattern or concentration of cases in the "other" category. This category included cases decided on the grounds of insufficiency of tbe complaint, no adverse action in retaliation cases, no statutory requirement to make reasonable accommodations in paratransit, constitutional issues, claims being released, claims being mooted, abstention issues, remedial issues (e.g., plaintiff only sued for compensatory damages and could not prove intentional discrimination), no refusal to make reasonable accommodation, education cases

***Chart 6*—Breakdown of Courts' Decisions in Pro-Defendant Title III Cases**

Definition of disability	(2 of 56) 4%
Fundamental alteration/ undue burden	(3 of 56) 5%
Modification in existing facilities not readily achievable	(1 of 56) 2%
Standing	(4 of 56) 7%
Direct threat	(1 of 56) 2%
No discrimination on basis on disability	(12 of 56) 21%
Problems with DOJ regulations	(1 of 56) 2%
Defendant not public accommodation[158]	(14 of 56) 25%
Other[159]	(18 of 56) 32%

Commentators must take care in assuming that a major way in which the courts have limited the ADA is with their interpretation of the definition of disability. Although this may be true as to Title I cases,[160] my research suggests that this is not the case in Title II and III appellate litigation. Only 6% of Title II cases and 4% of Title III cases that were lost on appeal were decided on this basis.

The attention visited upon unpopular Supreme Court decisions is also an unsatisfactory explanation for any Title II and III limitations. While Title I claimants have suffered a string of high-profile losses (*Albertsons,*[161] *Sutton,*[162] *Murphy,*[163] *Toyota,*[164] *Barnett,*[165]

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where there was no gross misjudgment (the standard for ADA liability in education cases in some circuits), statute of limitations, lack of jurisdiction, and cases that did not reveal their bases for decision.

158. This category included the defendant not being an owner and operator of a place of public accommodation and the defendant not being a place of public accommodation.

159. As was the case for Title II decisions, I found no apparent patterns or concentration of cases in the "other" category. Cases in this category included cases decided on the grounds of insufficiency of the pleadings, statute of limitations issues, dismissal of the appeal for making arguments not preserved on appeal, failure to meet the preliminary injunction standard, failure to request non-damage relief, lack of jurisdiction, and cases that did not reveal their bases for decision.

160. The 2003 ABA study of Title I cases found that "[a] clear majority of the employer wins in this survey were due to employees' failure to show that they had a protected disability." *ABA 2003 Employment Decisions*, *supra* note 12, at 320. More research on this, in the Title I context, would be useful. Besides the general statement in the 2003 ABA study, I know of no studies that isolate how many Title I cases are lost, either at the trial or appellate levels, on the "definition of disability" issue.

161. 527 U.S. 555 (1999).

162. 527 U.S. 471 (1999).

163. 527 U.S. 516 (1999).

164. 534 U.S. 184 (2002).

165. 535 U.S. 391 (2002).

and *Garrett*[166]) that have given lower courts a license to be even more restrictive of ADA claims, Titles II and III have actually been fairly successful in the Supreme Court.

In *Pennsylvania v. Yeskey,* the Supreme Court took a broad interpretation of "programs, services, or activity" for purposes of Title II,[167] instead of an interpretation that could have drastically curtailed Title II's reach. After *Yeskey,* courts have held that programs, services, or activities of public entities include farmers' practices of burning wheat stubble,[168] meetings at state courthouses,[169] municipal wedding ceremonies,[170] use of telephones in prisons,[171] and Lamaze classes in hospitals.[172]

In *Olmstead v. Zimring,* the Court confirmed that Title II of the ADA contained an "integration mandate" requiring individuals with disabilities to be placed in community-based settings, instead of institutions, where appropriate.[173] This case was significant for several reasons. It countenanced judicial recognition of what social scientists had been saying for years: "[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[174] Just as important was the policy shift and commitment to integration that *Olmstead* helped precipitate. In July of 2001, President George W. Bush entered an Executive Order reinforcing *Olmstead* and providing guidance to the relevant administrative agencies.[175] As part of the Administration's "New Freedom" initiative, the Centers for Medicare and Medicaid Services distributed over $120 million in grants in 2001 and 2002 to help states

166. 531 U.S. 356 (2001).

167. 524 U.S. 206, 212 (1998) (holding that prison boot camp program was a program, service, or activity for Title II purposes).

168. Save Our Summers v. Wash. St. Dep't of Ecology, 132 F. Supp. 2d 896, 907 (E.D. Wash. 1999).

169. Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998).

170. Soto v. City of Newark, 72 F. Supp. 2d 489, 493-94 (D.N.J. 1999).

171. Niece v. Fitzner, 922 F. Supp. 1208, 1217 (E.D. Mich. 1996).

172. Bravin v. Mt. Sinai Med. Ctr., 186 F.R.D. 293, 304-05 (S.D.N.Y. 1999).

173. 527 U.S. 581, 592 (1999).

174. *Id.* at 600-01.

175. Exec. Order No. 13,217, 66 Fed. Reg. 33155 (June 18, 2001).

increase community based integration for people with disabilities.[176] Although these efforts have been criticized as not extensive enough, and there are no doubt challenges remaining,[177] at the very least *Olmstead* is an example of the Supreme Court pushing disability law and policy towards protecting disability rights.

Most recently, with *Tennessee v. Lane*, disability rights advocates and commentators were fearful that the sky was going to fall. Several years earlier, in *Garrett* (a Title I case), the Court had elevated state sovereign immunity over the discrimination claims of public employees.[178] But in *Lane*, the Court changed course, holding that Title II of the ADA validly abrogates the states' sovereign immunity insofar as it relates to the fundamental right of access to courts.[179] Although *Lane* can be partially explained as a doctrinal byproduct of a Byzantine federalism jurisprudence,[180] it signals an unprecedented level of commitment to and understanding of disability rights on the part of certain Justices.[181]

Title III cases have also done more to advance the cause of disability rights than impair it. In *Bragdon v. Abbott*, the Court held that being HIV-positive substantially limited the plaintiff in the major life activity of reproduction. [182] Therefore, she was disabled for purposes of Title III of the ADA.[183] *Bragdon* set forth such a relaxed view of "impairment" that it is rarely an issue in ADA litigation.[184]

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176. *See* Johanna M. Donlin, *Moving Ahead With* Olmstead*: To Comply with the Americans with Disabilities Act, States are Working Hard to Find Community Placements for People with Disabilities*, 29 ST. LEGISLATURES 28, 30 (Mar. 1, 2003).

177. *Id.*

178. 531 U.S. 356, 374 (2001).

179. 541 U.S. 509, 533-34 (2004).

180. *See* Michael Waterstone, Lane, *Fundamental Rights, & Voting*, 56 ALA. L. REV. 793 (2005) [hereinafter Waterstone, Lane, *Fundamental Rights*].

181. *See* 541 U.S. at 536 ("Including individuals with disabilities among people who count in composing 'We the People,' Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.") (Ginsburg, J. concurring).

182. 524 U.S. 624, 639 (1998).

183. *Id.* at 641. It should be noted, however, that *Bragdon's* holding was significantly cut back in *Toyota* (a Title I case), where the Court moved back to more of a subjective definition of "substantially limited." *See* Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002) (holding that the existence of a disability should be determined on a case-by-case basis).

184. *See* 524 U.S. at 632-37 (holding tbat HIV satisfies the definition of impairment even in the earliest stages of infection); *see also* DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 3-5 ("An impairment will be found whenever physiological or psychological changes result from an illness or injury. As a result, the question of whether a plaintiff has an impairment is rarely an issue in ADA case law.").

PGA Tour, Inc. v. Martin is another Supreme Court Title III case resolved in favor of disability rights.[185] In *Martin,* the Court held that the PGA Golf Tour is a public accommodation within the meaning of ADA Title III and that the Tour had to "reasonably accommodate" Casey Martin by allowing him to ride a golf cart in Tour play. Both of these rulings are significant. The first enlarged the meaning of "public accommodation" in a way that is not clearly mandated by the statute and countered a narrowing trend among some lower courts.[186] And, by holding that the Tour had to reasonably accommodate Martin, the Court rejected the defendant's argument that any modification that affected a rule of competition was a "fundamental alteration."[187] Since the Tour creates and controls the rules, the Tour's argument would have given the Tour (and other public accommodations by extension), not the courts, ultimate authority over the propriety of accommodations.[188] Because the Title I undue burden defense is similar to the Title III fundamental alteration defense,[189] *Martin's* significance extends beyond Title III cases.[190]

The most recent Title III case to reach the Supreme Court was *Spector v. Norwegian Cruise Line Ltd.*[191] This case involved the issue of whether Title III of the ADA applies to foreign-flag cruise ships. The Fifth Circuit held that Title III did not apply because of a presumption that absent clear indication of congressional intent general statutes do not apply to foreign-flag cruise ships. The Court, noting that the Fifth Circuit's holding would be a "harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled,"[192] held that Title III does apply to foreign-

185. 532 U.S. 661 (2001).

186. *See* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1014 (6th Cir. 1997) (holding that disability insurance is not a public accommodation because it is not a physical place); Elliot v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (holding that membership in a youth hockey league is not a public accommodation because it is not a physical place); Leonard F. v. Israel Discount Bank of N.Y., 967 F. Supp. 802, 804 (S.D.N.Y. 1997) (holding that terms and conditions of employment are not a public accommodation).

187. *See* 532 U.S. at 683 (holding that the waiver of the walking rule in golf is not a fundamental alteration of the game).

188. *Id.*

189. *See* Michael Waterstone, *Let's Be Reasonable Here: Why the ADA Will Not Ruin Professional Sports,* 2000 BYU L. REV. 1489, 1502-10 (2000) (highlighting similarities in the way that courts analyze Title I and Title III claims).

190. *See* Tsombanidis v. City of W. Haven, 180 F. Supp. 2d 262, 298 (D. Conn. 2001) (Title II case citing *Martin* for proposition that "to allow a municipal or state entity to exempt itself . . . would allow it to avoid compliance with the ADA altogether"); *see also* McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004) (demonstrating *Martin*'s applicability to a Title II action).

191. 125 S. Ct. 2169 (2005).

192. *Id.* at 2178.

flag cruise ships so long as it does not impose requirements that would conflict with international obligations or threaten shipboard safety.

In short, in nearly every Title II and III case before it, the Supreme Court has expanded rather than narrowed the ADA. Viewing this phenomenon, at least one commentator has suggested that Title III has been a victim of its own success because these victories mask larger failures.[193] Be that as it may, these cases show that blaming the Supreme Court, a common Title I explanation, does not work for Titles II and III.[194] And the strategy articulated by advocates and scholars—mostly a legislative fix centered on amending the definition of disability in both the ADA and state statutes—is at best an incomplete and ill-suited response to the real problems facing Titles II and III.

To be sure, the Supreme Court has decided several cases in the larger civil rights universe that have effectively limited the ADA's remedial provisions. In *Buckhannon v. West Virginia Department. of Health and Human Resources*,[195] the Court rejected the "catalyst theory" for attorneys' fee awards. And in *Barnes v. Gorman*, the Court held that punitive damages may not be awarded in Title II cases.[196] Below, I argue that of all Supreme Court decisions on the ADA, these two cases have had the largest adverse impact on Titles II and III.

2. Move to Social Welfare Policies

As discussed above, several scholars, disenchanted with the ADA's ability to improve the lives of people with disabilities, especially the law's failures to move people with disabilities into the workforce, have advocated a return to social welfare policies. The leading voice in this movement, Professor Bagenstos, suggests that the ADA is poorly suited to knock down the barriers (transportation, access to insurance, home health) that are keeping people with disabilities out of the workforce. [197] Hence, the need for a return to social welfare policies.

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193. Colker, *Fragile Compromise*, *supra* note 18, at 380.

194. It is possible that the Title I definition of disability decisions may be impacting the number of Title II and III cases that are brought, i.e., these decisions may be causing potentially meritorious Title II and III claims not to be brought. But this is much harder, if not impossible, to demonstrate.

195. 532 U.S. 598, 605 (2001).

196. 536 U.S. 181, 189 (2002).

197. *See* Bagenstos, *Future*, *supra* note 13, at 34-41 (arguing that these barriers are not effectively circumvented by an antidiscrimination model). For an earlier view, *see* Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889 (2000).

Bagenstos suggests that one of the reasons for the ADA's failure is that courts and administrative agencies graft "job-relatedness" and "access/content" distinctions onto the text.[198] When referring to the "job-related" rule, Bagenstos means that ADA Title I accommodations must be "job related" rather than personal items.[199] By "access/content" distinction, Bagenstos means that accommodations can only be required if they provide people with disabilities "access" to the same benefits received by non-disabled individuals.[200] If an accommodation alters the content of the benefit, it will not be required, even if it can be provided at a reasonable cost and without undue hardship.[201]

Courts use these principles because they are uncomfortable departing from traditional antidiscrimination principles, grounded in the idea of punishing culpable employers.[202] Although the job-relatedness rule is an employment law concept, Bagenstos's articulation of the access/content distinction applies to Titles II and III of the ADA. Bagenstos offers *Alexander v. Choate*[203] as the genesis of the access/content distinction.[204] In *Alexander,* the Court rejected the plaintiff's argument that Tennessee's reduction in Medicaid coverage of annual inpatient hospitalization from twenty to fourteen days violated Section 504 of the Rehabilitation Act, the predecessor to Title II of the ADA.[205] The Court viewed the essential requirement of Section 504 to be that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the

198. Bagenstos, *Future, supra* note 13, at 34-41.

199.

> Under this rule, an employer might be required to provide a disabled individual with an accommodation that "specifically assists the individual performing the duties of a particular job" (so long as the accommodation is reasonable and can be provided without undue hardship). But the employer will never be required to provide "an adjustment or modification that assists the individual throughout his or her daily activities, on and off the job."

Id. at 35-36. This has ruled out a range of accommodations that may provide off-the-job benefits—things like assistive technology, medical treatment, or rehabilitation.

200. *Id.* at 37-38. Besides the Title III insurance example in Doe v. Mutual of Omaha Insurance Co., 179 F.3d 557 (7th Cir. 1999), Bagenstos uses to demonstrate the access/content distinction, there is another, simpler example that I use in class (also used by Posner in *Mutual of Omaha*): a camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such person.

201. Bagenstos, *Future, supra* note 13, at 37.

202. *Id.* at 50-54.

203. 469 U.S. 287 (1985).

204. *See* Bagenstos, *Future, supra* note 13, at 46 (discussing the Supreme Court's first endorsement of the access/content distinction).

205. *Alexander*, 469 U.S. at 289-92.

grantee offers."[206] The fourteen day limitation did not jeopardize meaningful access because "the reduction in inpatient coverage will leave both handicapped and non-handicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation."[207]

Bagenstos ultimately uses *Alexander* to show the indeterminacy of the access/content distinction.[208] The Court defined the relevant program as the precise package of coverage Tennessee offered. If this is the level of generality at which the state must provide access, "then any package of health care services—no matter how poorly it serves the needs of people with disabilities—will comply with disability discrimination law, so long as that package is offered to everyone."[209] Bagenstos argues that the Court need not have used this level of generality; rather, it chose the same level that the state had because it seemed to meet some basic needs of members of a target population at an affordable cost.[210] The justification for choosing this level of generality rests on a "reluctance to second-guess the state's resource allocation decisions."[211]

But as Bagenstos points out, in *Olmstead v. Zimring*[212] the Court departed from *Alexander*, holding that Title II required alteration of the state's health services program. In *Olmstead*, this required the creation of community-based treatment alternatives. Justice Thomas's dissent noted that by reading the ADA to require something that did not currently exist, the Court departed from *Alexander* by going further than just requiring access—it altered the content of the state's program.[213] Bagenstos suggests that *Olmstead* is in this way irreconcilable with *Alexander*. Under the latter case, the court should have focused on whether the disabled had access to the particular package of health care services offered by the state of Georgia, "mental health treatment in an available bed in a state hospital or one of the community treatment settings the state provided."[214] Because plaintiffs still had access to this system (even though it did not well suit their needs), under *Alexander*, they should have lost.

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206. *Id.* at 301.
207. *Id.* at 302.
208. *See* Bagenstos, *Future*, *supra* note 13, at 46-50.
209. *Id.* at 47.
210. *Id.* at 47-48.
211. *Id.* at 48.
212. 527 U.S. 581 (1999).
213. *Id.* at 615-26 (Thomas, J., dissenting).
214. *See* Bagenstos, *Future*, *supra* note 13, at 50.

Bagenstos's view is that the courts' application of the access/content distinction at a high level of generality has limited the effectiveness of Titles II and III of the ADA. My own survey of the Title II and III case law confirms that this is at least partially true, particularly in the issue areas that Bagenstos himself uses as examples—Medicaid and insurance. Of the 17 Title III cases in my database that were brought against insurance companies, 14 had pro-defendant outcomes (82%). By way of contrast, the overall rate of pro-defendant outcomes on appeal for all Title III cases was 71%. In many of these cases, the courts' decisions rest on what could fairly be cast as a reluctance to change the content of insurance policies.[215] Similarly, my review of the Title II case law reveals a growing body of Medicaid and health care litigation where courts, applying *Alexander,* decline to change the content of what states offer under Medicaid or other health services programs.[216] This reinforces Bagenstos's idea that in these types of cases, courts have applied the access/content distinction at a high level of generality.

But my review of the Title II and Title III case law leaves me more optimistic than Bagenstos about the potential effectiveness of Titles II and III (or at least less pessimistic that application of the access/content distinction at a high level of generality stands in the way of meaningful change, pursuant to these statutes, for people with disabilities). First, there is a parallel body of Title II case law involving Medicaid where courts have applied the access/content distinction at a lower level of generality, more in line with *Olmstead* than *Alexander*. In *Rodde v. Bonta*, a county sought to reduce health care spending by closing a rehabilitation center dedicated primarily to providing inpatient and outpatient rehabilitative care to severely disabled individuals.[217] Plaintiffs challenged this under Title II of the ADA. Defendants argued that under *Alexander*, they did not have to

215. I found three ways in which these cases are typically decided. First, in some cases, courts reasoned that an insurance policy was not a "public accommodation" for purposes of Title III of the ADA. *See* Kolling v. Blue Cross, 318 F.3d 715 (6th Cir. 2003); *see also* Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998). Second, courts reasoned that differentiation in insurance policies was not actionable discrimination on the basis of disability. *See* Soshinksy v. First Unum Life Ins. Co., No. 99-36187, 2001 WL 50535 (9th Cir. Jan 19, 2001); *see also* McNeil v. Time Ins. Co., 205 F.3d 179 (5th Cir. 2000); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999). Third, courts found that the ADA's exemption for insurance policies applied and controlled the outcome of the case. *See* Fitts v. Nat'l. Mortgage. Ass'n, 236 F.3d 1 (D.C. Cir. 2001).

216. *See, e.g.*, Meyers v. Colorado Dep't of Health Servs., No. 02-1054, 2003 WL 1826166 (10th Cir. Jan 6, 2003); Smith v. Moorman, No. 02-339, 2002 WL 31182451 (6th Cir. Sept. 30, 2002); Doe v. Pfrommer, 148 F.3d 73 (2d Cir. 1998); Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996).

217. 357 F.3d 988, 990 (9th Cir. 2004).

offer special services to individuals with disabilities to meet their unique needs for adequate medical care.[218] The county argued that it did not have to change the services it provided; rather, it only needed to offer people with disabilities the same opportunities under any program it offered, even if the practical effect was leaving people with disabilities out in the cold. The court declined to read *Alexander* so broadly. It held that the county violated Title II because the proposed cuts would leave a certain category of people with disabilities so underserved.[219]

Similarly, in *Lovell v. Chandler*,[220] the state of Hawaii sought to exclude a category of people with disabilities and the elderly from a Medicaid waiver program. The court could have followed a vigorous reading of *Alexander* and held that, because it still offered services to people with disabilities, this was a "neutral" cut. But it did not. Like *Olmstead* and *Rodde,* the court moved to a lower level of generality and held that the proposed cuts violated Title II because they would leave a certain category of people with disabilities with unequal access to Hawaii's healthcare system.[221]

This is admittedly a small and new body of case law, and it is too soon to say if it will be widely followed. But these cases show that at least some courts are moving away from the *Alexander* idea that disability antidiscrimination law cannot alter the content of existing programs.

Another Title II area where the access/content distinction has been applied at both a high and low level of generality is voting. Some courts have viewed the ADA's requirements regarding voting to be that states only have to make some form of access to the ballot available, even if it is unequal to that provided to other voters (the

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218. *Id.* at 995-96.

219. *Id.* at 997 ("*Alexander* may allow the County to step down services equally for *all* who rely on it for their healthcare needs, but it does not sanction the wholesale elimination of services relied upon disproportionately by the disabled because of their disabilities.").

220. 303 F.3d 1039 (9th Cir. 2002).

221. *Id.* at 1053-54.

> Although a State is not obliged to create entirely new services or to otherwise alter the substance of the care that it provides to Medicaid recipients in order to accommodate an individual's desire to be cared for at home, the integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adapt them to community-integrated settings.

Radaszewski *ex rel.* Radaszewski v. Maram, 383 F.3d 599, 611 (7th Cir. 2004); *see also* Weaver v. New Mexico Human Servs. Dep't, 945 P.2d 70 (N.M. 1997) (holding that HSD regulation providing that persons receiving general assistance benefits due to disabilities would receive them for only nine months was discrimination in participation in public programs barred by ADA).

access/content distinction at a high level of generality).[222] But other courts have come closer to a "meaningful" access standard, holding that the state must provide a certain voting experience for voters with disabilities, even if that is different from what the state was already providing (the access/content distinction at a lower level of generality).[223]

There are also reasons that Title III's potential effectiveness may not be completely undercut by application of the access/content distinction at a high level of generality. To be sure, after reviewing the Title III case law, I am convinced that certain categories of cases (primarily insurance cases) basically are no longer useful Title III issue areas, in part because of the concerns that Bagenstos articulates. But there is also a large universe of Title III cases—those involving architectural barriers—that are not as affected by the access/content distinction.

For existing facilities (constructed before January 26, 1993), Title III requires that architectural barriers to access be removed "where such removal is readily achievable,"[224] which has been interpreted as "easily accomplishable and able to be carried out without much difficulty or expense."[225] For changes to meet the barrier removal obligation, they must generally comply with the requirements of altered accessible elements set out in the ADA Accessibility Guidelines ("ADAAG").[226] Buildings constructed for first occupancy after January 26, 1993 (new facilities) or alterations to existing facilities must be "readily accessible to and usable by individuals with disabilities."[227] This means that such facilities must be fully accessible and in compliance with the ADAAG standards.[228] The exception to this is if the entity can demonstrate that it would be "structurally impracticable to meet the requirements" of the ADAAG guidelines.[229] This will be found "only in those rare circumstances

222. *See* Benavidez v. Shelley, 324 F. Supp. 2d 1120 (C.D. Cal. 2004) (holding that the ADA does not provide the right to a secret and independent vote for people with disabilities); *see also* Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999) (holding that Michigan did not have to provide accessible ballots for blind voters).

223. *See* Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001); *see also* Am. Ass'n of People with Disabilities v. Hood, 278 F. Supp. 2d 1345 (M.D. Fla. 2003).

224. 42 U.S.C. § 12182(b)(2)(A)(iv) (2005).

225. 28 C.F.R. § 36.304(a) (2005).

226. 28 C.F.R. §36.304(d)(1) (2005). Those standards are set out in 28 C.F.R. §§ 36.402, 36.404, 36.405 (2005), and in 28 C.F.R. pt. 36, app. A (2005).

227. 42 U.S.C. § 12183(a)(1) (2005).

228. 29 C.F.R. § 36.401 (2005).

229. 42 U.S.C. § 12183(a)(1) (2005).

when the unique characteristics of the terrain prevent the incorporation of accessibility features."[230]

These parts of the statute and regulations provide an element of clarity that is missing elsewhere in Title III. This gives courts less room to impose a high-level access/content distinction to defeat accessibility. In my survey of Title III cases, I only found one case where the court held that a modification to an existing facility was not "readily achievable."[231] The rate of pro-plaintiff outcomes on appeal was higher in cases involving requests for modifications of physical facilities (8 pro-plaintiff outcomes out of 21 cases, or 38%), than modifications of policies (14 pro-plaintiff outcomes out of 53 cases, or 26%). The biggest problem with physical access cases is not that courts negate claims through an application of the access/content distinction at a high level of generality, but, as I argue below, that potentially meritorious and winnable claims are simply not brought.

A return to a social welfare model can raise the level of certain programs, services, or activities for people with disabilities in a way that the ADA probably cannot. So while I do not doubt the ultimate wisdom of Bagenstos's suggestions, his arguments may not fully explain Title II and III's shortcomings. An over-reliance on the welfare model may give short shrift to the ADA's ability, through Titles II and III, to equalize opportunity for people with disabilities in government programs, services, and activities, and access to places of public accommodation.

3. Limits of the Accommodation Mandate

While not completely identifying a viable alternative, commentators have argued that the accommodation mandate is economically flawed (or at least of limited utility) in the employment sphere. Because the ADA places additional costs on employers who hire individuals with disabilities, they will be less likely to do so.[232] The increased cost for employers explains why employment rates for certain categories of people with disabilities have fallen, or at least remained stagnant, since the passage of the ADA.[233]

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230. 29 C.F.R. § 36.401(c) (2005).

231. *See* Colorado Cross Disability Coal. v. Hermanson Family Ltd. Partnership I, 264 F.3d 999 (10th Cir. 2001) (holding that removal of an architectural barrier is not readily achievable because plaintiff failed to present sufficient evidence on the issue).

232. *See* Acemoglu & Angrist, *supra* note 54, at 924; *see also* DeLeire, *supra* note 51, at 694; Jolls, *Accommodation Mandates*, *supra* note 15, at 273-76.

233. *See supra* notes 51-58 and accompanying text.

One variant of this argument is that it offers an explanation for Title I's low success rates. Courts, consciously or unconsciously, have picked up on the difficulty, and undesirability, of requiring employers to make accommodations for disabled employees at their own cost. Courts either reject these cases on definition of disability grounds (with ample cover from the Supreme Court), or, if they reach the reasonable accommodation stage of the analysis, insist on narrow "job-related" accommodations.[234]

But, as demonstrated above, the success rates of Titles II and III are better than Title I. As applied to the accommodation mandate issue, there are two possible explanations. Either courts are not as troubled by the accommodation mandate in the Title II and III contexts, or, if courts do have similar apprehensions about the accommodation mandate in the Title II and III contexts, they use other ways to come to pro-defendant results.

There are several reasons to believe that the former explanation is correct. If courts were as concerned about the accommodation mandate in the Title II and III contexts as they are in Title I, the definition of disability provides a tried and true measure to dispose of these cases, and one for which the Supreme Court has proved receptive. But, as demonstrated above in Charts 5 and 6, this has simply not happened. Only 6% of Title II cases and 4% of Title III cases, that have pro-defendant outcomes on appeal, have been decided on the grounds that the plaintiff did not meet the ADA's definition of disability.

Also, the accommodation mandate in Titles II and III is less revolutionary (at least in a judicial sense) than Title I. Title II rests on the idea that public entities have to make reasonable accommodations, and provide equal access, to people with disabilities in public programs, services, and activities. This rests not just on a negative duty not to exclude, but at times, on a positive duty to take affirmative steps. As applied to public services, this approach was not

234. This is essentially the argument that Bagenstos is making. He suggests that his job-relatedness rule is a result of judicial discomfort in departing from traditional antidiscrimination principles, grounded on the idea of punishing culpable employers. *See* Bagenstos, *Future*, *supra* note 13, at 50-54. Courts have applied this doctrine "to confine the reach of the ADA's accommodation requirement to something very close to that of a classic antidiscrimination requirement." *Id.* at 50. As Bagenstos offers, the reasons for this are very salient in the employment arena. The classic conception of antidiscrimination law is to provide a remedy for the defendant's own wrongful conduct, rather than to punish a defendant for a broader societal wrong. The job-relatedness rule and access/content distinction protect an employer from being vulnerable scapegoats for larger societal problems, and the vehicles for ad hoc wealth distribution to individuals with disabilities. *Id.* at 50-52. Other commentators have also suggested that the accommodation mandate has influenced courts in their Title I decisionmaking. *See supra* notes 59, 60.

entirely created by the ADA. Title II essentially extended an approach that had already taken hold under the Rehabilitation Act. The regulations to Section 504 of the Rehabilitation Act, issued in 1978, went further than classic nondiscrimination principles requiring equal treatment. Rather, these regulations required recipients of federal funds to "make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."[235] The next year, in *Southeastern Community College v. Davis*,[236] the Court recognized that Section 504 could require more than even-handed treatment: "[Section 504 embodies] a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps."[237]

The same basic argument can be made for Title III. Extending the reasonable accommodation requirement with its necessity for affirmative steps (which Title III does) into the private arena goes further than the Rehabilitation Act, which only applied to recipients of federal funds.[238] But it is still less revolutionary than in the Title I context. The ADA was not the first federal statute to extend an accommodation mandate for disability discrimination into the private arena. Three years before the ADA was passed, Congress passed the Fair Housing Amendments Act ("FHAA"), which makes it unlawful to discriminate on the basis of disability in the sale or rental of

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235. 45 C.F.R. § 84.12(a) (2005).

236. 442 U.S. 397 (1979).

237. *Id.* at 410. In *Tennessee v. Lane*, the Court's most recent ADA case, it continued to show this type of understanding (at least in the Title II context): "Including individuals with disabilities among people who count in composing 'We the People,' Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation." 124 S.Ct. 1978, 1996 (2004) (Ginsburg, J., concurring).

238. As a background principle, several well established bodies of law have long limited the ability of property owners to exclude certain groups of people. For example, Title VI of the Civil Rights Act of 1964 took away the property right to exclude from private actors who had opened their establishments to the public. 42 U.S.C. § 2000a(a) (2005) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."). State property law doctrines had been doing the same thing for years before. *See, e.g.*, Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996). And First Amendment law curtails the ability of private actors to limit speech once they open their doors to the public. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

housing.[239] The FHAA defines discrimination in much the same way as the ADA: a "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[240] Very quickly, courts acknowledged that the reasonable accommodation provision required affirmative efforts, even if these imposed costs on the housing operator.[241]

Regarding alterations of premises, the FHAA defines discrimination as "a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises."[242] This provision, which requires that tenants use their own funds to physically modify facilities,[243] is different from Title III of the ADA, which requires that owners and operators of places of public accommodation bear the cost of making reasonable accommodations. So although the economics of the two statutes may be different on this point, they both stand for the idea that private actors must make reasonable accommodation, going beyond a negative duty not to exclude.

In addition to being used to explain low success rates in courts, the failure of the accommodation mandate can also be offered as a stand-alone explanation for the ADA's failures. Title I will not meet its objectives, regardless of what courts do, because it is based on flawed theoretical premises. A complete discussion of this principle applied to Titles II and III of the ADA requires extensive economic analyses that are beyond the scope of this Article. But there are several preliminary reasons to think that as a theoretical and economic matter, an accommodation mandate may be a better fit for

239. 42 U.S.C. §§ 3601-31 (2005).

240. *Id.* § 3604(f)(3)(b).

241. *See* United Veterans Mut. Hous. No. 2 Corp. v. New York City Comm'n on Human Rights, 616 N.Y.S.2d 84 (N.Y. 1994) (policy of refusing to expend corporate funds to modify, maintain, or insure improvements to common grounds or other common areas of housing complex violated FHAA); *see also* United States v. Village of Marshall, Wisconsin, 787 F. Supp. 872, 878 (W.D. Wis. 1991) (stating that a "reasonable accommodation is one which would not impose an undue hardship or burden upon the entity making the accommodation").

242. 42 U.S.C. § 3604(f)(3)(a) (2005).

243. *See* United States v Freer, 864 F. Supp. 324 (W.D.N.Y. 1994) (holding that owners of a trailer park were in violation of the FHAA where they refused to allow reentry to install a wheelchair ramp at the resident's own cost). At least one court showed a willingness to consider making the housing operator pay for a facilities accommodation. *See* Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992) ("[W]here everyone is provided with 'equal access' to a building in the form of a staircase, reasonable accommodation to those in wheelchairs may require building a ramp.").

Titles II and III than Title I. Regarding Title II, the party that is responsible for making modifications is the unit of state or local government. These costs are less personal and spread out among a larger pool. In the end, society is being taxed, not any given employer. The fear of redistributive justice should be lessened when public money is at stake.[244] Although state and local government officials may fight to protect their resource allocation decisions, the idea that they are subject to certain requirements in how they administer their programs, services, or activities is hardly novel; it is part and parcel of the business of government. Theoretically, Title II is at least one step away from the most objected-to part of the Title I accommodation mandate—that it requires employers to fix a societal problem that they did not create.[245]

There are also arguments that Title III's accommodation mandate is less theoretically troubling than Title I's. The accommodations requested are often less personal and can apply to a range of customers.[246] Hence, owners and operators of public accommodations are less likely than Title I employers to perceive that an individual or employee whom they see on a day-to-day basis is getting some type of special perk. Furthermore, one-time accommodation expenses (which may be representative of a large body of Title III requested accommodations)[247] may not have the same harmful economic effects as ongoing ones.[248]

The two highest profile ADA Title III cases—*Bragdon v. Abbott*[249] and *PGA Tour v. Martin*[250]—did not require significant

244. Certainly in *Lane* the battleground was not on the injustice of requiring the State of Tennessee to pay for an accessible courthouse, or whether Tennessee was the proper party to do so if it was required by the ADA. Rather, the case was decided on the technical intricacies of sovereign immunity law. *See* Tennessee v. Lane, 541 U.S. 509 (2004).

245. *See* Bagenstos, *Future*, *supra* note 13, at 51.

246. The DOJ regulations, for instance, offer the following examples as barrier removal obligations: installing ramps; making curb cuts in sidewalks and entrances; repositioning shelves, rearranging tables, chairs, vending machines, display racks, and other furniture; repositioning telephones, widening doors, etc. *See* 28 C.F.R. § 36.304 (2005) (providing a comprehensive list of examples).

247. *Id.*

248. *See* Jolls, *Accommodation Mandates*, *supra* note 15, at 276 ("[U]nder my framework, each disadvantaged worker hired creates new costs for the employer. Where the mandated accommodation in question is, say, a reader for a blind employee, this framework clearly makes sense. However, in the case of accommodations with no incremental cost, such as a wheelchair ramp or a lower sink in an employee kitchen, the framework would not apply. Such accommodations entail a one-time cost . . . .").

249. 524 U.S. 624 (1998).

250. 532 U.S. 661 (2001).

expenditures by owners and operators of public accommodations.[251] My research shows very few Title III cases have been decided against plaintiffs at the appellate level because the requested accommodation was too expensive. Only 7% of Title III cases (4/55) that were decided against defendants were on the ground that the requested accommodation was not readily achievable (for an existing facility), or that it was an undue burden or fundamental alteration.[252] Therefore, there are reasons to believe that inefficient accommodations, such a crucial tenant of theory of economically flawed accommodation mandates, happen less often under Title III than Title I.[253]

D. Titles II and III—Different Problems, Explanations, and Responses

1. Titles II and III Are Under-enforced

The starting point in analyzing Titles II and III is the low number of cases. For Title I of the ADA, Colker found 720 court of appeals cases (published and unpublished) from 1991 to 2001.[254] My research, which includes three additional years (through 2004), yields only 197 Title II appellate cases and 82 appellate Title III cases.[255] There is clearly less case law under Titles II and III than Title I.[256]

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251. In *Bragdon*, an HIV-positive woman requested that a dentist treat her at his office. There were no real financial costs of doing so evident from the case. In *Martin*, the issue was whether walking was essential to the game of golf (and who ultimately had the authority to decide that issue – courts or the PGA Tour), not financial sacrifice.

252. To the extent that Title III modifications require the owner or operator to spend money, research needs to be done to see if she can more easily pass on those costs to her entire customer base than an employer in Title I.

253. The market power of people with disabilities also needs to be part of this analysis. *See* Shapiro, *supra* note 116, at 105-41 (describing the "hidden army of civil rights").

254. Colker, *Winning & Losing*, *supra* note 12, at 245. Although Colker is not explicit in her article about the closing date of her data set, I have assumed 2001, the year in which her article was published.

255. For these numbers, I include two-claim cases.

256. When Congress passed the ADA it was not working from a clean slate in terms of enforcement of existing disability rights statutes. In fact, there is a long history of under-enforcement of predecessor statutes such as the Rehabilitation Act and other statutes affecting the access to public services for people with disabilities. *See* NATIONAL COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 2 (2000) [hereinafter NCD, PROMISES TO KEEP] (noting the historical patterns of poor enforcement of disability civil rights laws before ADA); *see also* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 469 (1991) (arguing that if the ADA is administered and enforced in a fashion similar to earlier analogous civil rights statutes, the legacy of discrimination and segregation on grounds of disability will not be dealt with "root and branch" as Congress intended).

Combined with survey data and other social science research showing that people with disabilities are still at the margins of society in areas covered by Titles II and III, these low numbers demonstrate under-enforcement of these Titles, rather than lack of a need or desire by potential plaintiffs to bring cases. If this suggestion is correct, one would expect to see a lack of compliance with Title II and III obligations. Although broader range studies are needed,[257] I will attempt to show that in certain areas covered by Titles II and III, there is demonstrated noncompliance.

The first area is voting. I have written elsewhere about voting and the ADA, and I will not rehash all of those arguments here.[258] It is an area of disagreement among courts and commentators as to what the ADA actually requires insofar as the voting rights of people with disabilities. Some commentators (including me) argue that Title II, properly interpreted, guarantees a secret and independent vote to people with disabilities.[259] If the ADA is viewed in this way, election administrators are in utter noncompliance with Title II. The General

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257. *See* Martin Gould, *Commentary: Assessing the Impact of the Americans with Disabilities Act*, DISABILITY STUDIES QUARTERLY, Spring 2004, at 3.

> The ADA is comprehensive, covering: (1) the public and private sectors; (2) various levels of government; (3) much of our nation's infrastructure from the physical or built environment to the communications environment; (4) millions of individual Americans with disability. Any effort to determine whether the ADA is "working" must be robust yet flexible, using a range of research methodologies to take all major elements into account. No ADA research endeavor has even approximated such an evaluation scheme or framework.

Id. The General Accounting Office (GAO), the investigative arm of Congress, did a study in 1994 (three years after the ADA's passage) on whether the ADA had improved access for people with disabilities to goods and services provided by businesses and state and local governments. *See* GENERAL ACCOUNTING OFFICE, AMERICANS WITH DISABILITIES ACT: EFFECTS OF THE LAW ON ACCESS TO GOODS AND SERVICES 1, *available at* http://www.gao.gov/docsearch/abstract.php?rptno=PEMD-94-14AC. The GAO looked at four issues: changes in accessibility in the 15 months after the ADA took effect, the common barriers still remaining, awareness of owners and managers in that same 15-month span, and the nature of barrier removal efforts during that time. *Id.* at 3-4. The GAO found that accessibility for people with disabilities, and managers' and owners' awareness of the ADA, had considerably and steadily increased. Some important barriers remained, however, and barrier removal efforts were not always consistent with the ADAAG standards. *Id.* at 5-7. Half of the owners and managers had not made any changes to be more ADA compliant, and had no immediate plans to do so. *Id.* This study is far from conclusive about anything. It only studies a narrow range of issues covered by Titles II and III (it is exclusively focused on physical accessibility), and by this point it is extremely dated.

258. *See generally* Michael Waterstone, *Constitutional and Statutory Voting Rights For People with Disabilities*, 14 STAN. L. & POL'Y REV. 353 (2003) [hereinafter Waterstone, *Constitutional and Statutory Voting Rights*]; Michael Waterstone, *Civil Rights and the Administration of Elections – Toward A More Universal Voting Standard*, 8 J. OF GENDER, RACE, & JUST. 101, 105-13 (2004); Waterstone, Lane, *Fundamental Rights*, *supra* note 180.

259. Waterstone, *Constitutional and Statutory Voting Rights*, *supra* note 258, at 360; *see also* Kay Schriner & Andrew I. Batavia, *The Americans with Disabilities Act: Does It Secure the Fundamental Right to Vote?*, 29 POL'Y STUD. J. 663-73 (2001).

Accounting Office ("GAO") did a study of the voting experiences of people with disabilities in the November 2000 election.[260] It found that none of the polling places surveyed provided a secret and independent vote for blind voters.[261]

Under a more modest view of Title II's requirements, a state or local body's voting system must be readily accessible to people with disabilities, unless making it readily accessible would result in a fundamental alteration or cause an undue financial or administrative burden.[262] Title III also applies to voting. Some structures used for polling places, like private schools and recreational centers, are covered by Title III independent of their use as polling places. Even private residences can fall within Title III if they are used as polling places on Election Day.[263]

Various sources cast doubt on whether even this more lenient standard of ADA compliance is being met. In 2000, for example, the GAO found that only half of the polling places surveyed with sit-down voting spaces had sufficient room for a wheelchair.[264] This triggers Title II concerns.[265] This same study found that 84% of polling places surveyed had one or more features that could present challenges to physical access for voters with disabilities.[266] Although this report did not purport that all of these barriers violated Title III of the ADA, some of the barriers the GAO reported—high door thresholds, ramps with steep slopes, and lack of accessible parking—certainly appear to

260. UNITED STATES GENERAL ACCOUNTING OFFICE, VOTERS WITH DISABILITIES: ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS 1 (2001) [hereinafter GAO REPORT], *available at* http://www.gao.gov/special.pubs/d02107.txt.

261. *Id.* at 32 (noting that among the study's sample of 496 polling places in thirty-three states, not one location had equipment that was adapted to blind voters).

262. *See* 28 C.F.R. § 35.130 (2005); *see also* Waterstone, Lane, *Fundamental Rights*, *supra* note 180, at 829-33.

263. *See* UNITED STATES DEP'T. OF JUSTICE, TITLE III TECHNICAL ASSISTANCE MANUAL § 1.2000, at 4.

264. GAO REPORT, *supra* note 260, at 32.

265. This type of voting system would not be "readily accessible" to individuals with disabilities and would therefore violate Title II, unless the state or local government could show that designing accessible counters was a fundamental alteration or undue burden. *See* 28 C.F.R. § 35.150 (2005) (requiring a public entity's activities to be "readily accessible" to disabled persons unless so being would fundamentally alter the activity's nature or impose an undue financial and administrative burden).

266. *See* GAO REPORT, *supra* note 260, at 7 (estimating that 56 percent of polling places have at least one feature that could potentially impede a disabled voter's access to the polling location but offer curbside voting, while 28 percent have similar impediments but do not have a curbside option).

do so.[267] This noncompliance is hardly surprising when one realizes that over a quarter of the counties that are responsible for choosing polling places did not use accessibility as a criterion in making their selections.[268] In 2000, a federal district court in New York found that 100% of a New York county's polling places were inaccessible to people with disabilities.[269]

Although more will be clear once additional data is available from the 2004 presidential election, at the present it is apparent that there is a problem with ADA compliance in the area of voting. As an "exclamation point," consider the situation in Memphis, Tennessee before the 2004 presidential election. Under Tennessee state law, it is the state legislature's "intent" to improve access for handicapped and elderly voters.[270] But envisioning that there will be noncompliance with this standard, Tennessee law provides that forty-five days before any election, the county election commission shall publish in a newspaper of general circulation a notice advising elderly and handicapped voters that if their polling place is inaccessible, they can vote by absentee ballot or at the election commission office.[271]

Leaving aside the argument that absentee ballots are a poor substitute for polling place voting,[272] and even assuming that it is fair and legal to require people with disabilities to travel significantly farther to vote than their fellow citizens, it was still shocking to see the half-page advertisement in the Memphis Commercial Appeal on Sunday, October 2, 2004.[273] In bold letters, the advertisement proclaimed: "Notice of Polling Locations That Do Not Meet All ADA Standards, November 2, 2004, Election." It then listed 139 polling place locations.[274] One can only imagine such brazen flouting of the

267. *Id.* at 29; *see also* 28 C.F.R. § 36.304 (2005) (requiring public accommodations to remove barriers when doing so is "readily achievable" by "creating designated accessible parking spaces" and "widening doors," for example).

268. GAO REPORT, *supra* note 260, at 18.

269. *See* New York v. County of Schoharie, 82 F. Supp 2d 19, 21 (N.D.N.Y. 2000) (citing survey findings that all twenty-five of Schoharie County's polling places were inaccessible to the disabled).

270. TENN. CODE ANN. § 2-3-109 (2005). One would expect this because federal law requires it. In addition to Titles II and III of the ADA, see Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee (2005) (requiring that "all polling places for Federal elections [be] accessible to handicapped and elderly voters").

271. TENN. CODE ANN. § 2-3-109(e)(1) (2005).

272. *See* Waterstone, *Constitutional and Statutory Voting Rights*, *supra* note 258, at 364-69 (voting absentee is not "equal" to voting at a polling location because it forces voters to make an earlier decision without the benefit of "late-breaking campaign information" and prevents voters from fully participating in a community function, i.e., voting at a polling location).

273. Advertisement, MEMPHIS COM. APPEAL, Oct. 2, 2004 (on file with author).

274. *Id.*

law in other contexts. Yet despite this noncompliance, there has not been much litigation relating to Titles II and III of the ADA and voting,[275] and I could find none in Tennessee relating to the 2004 election.

Another area where there has been significant noncompliance with ADA Title II involves courthouse access.[276] Title II requires that courthouses and the programs that take place within them be accessible. A 1997 survey by the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee lists many instances of inaccessibility in the California state court system.[277] In 2000, the state of Washington issued a similar report, with approximately twenty courts identifying access problems under the ADA.[278] The Texas Civil Rights Project conducted a survey of Texas courts in 1996 which found that "accessibility of courtrooms for jurors, litigants, members of the

275. A Westlaw search only revealed thirteen ADA cases involving voting rights claims. *See* Lightbourn v. Garza, 127 F.3d 33 (5th Cir. 1997), *vacating* 928 F. Supp. 711 (W.D. Tex. 1996); Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999); Am. Ass'n of People with Disabilities v. Hood, 278 F. Supp. 2d 1345 (M.D. Fla 2003); Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001); Am. Ass'n of People with Disabilities v. Shelley, 324 F. Supp. 2d 1120 (C.D. Cal. 2004); Jacobs v. Phila. County Bd. of Elections, No. Civ.A. 94-6666, 1995 WL 639747 (E.D. Pa. Oct. 30, 1995); Nat'l Coal. for Students with Disabilities Educ. and Legal Def. v. Allen, 152 F.3d 283 (4th Cir. 1998); McKay v. County Election Comm'rs for Pulaski County, Ark., 158 F.R.D. 620 (E. D. Ark. 1994); Troiano v. Supervisor of Elections in Palm Beach County, Fla., 382 F.3d 1276 (11th Cir. 2004); Westchester Disabled on the Move, Inc. v. County of Westchester, 346 F. Supp. 2d 473 (S.D.N.Y. 2004); Am. Ass'n of People with Disabilities v. Smith, 227 F. Supp. 2d 1276 (M.D. Fla. 2002); Nat'l Org. of Disability v. Tartaglione, No. Civ. A. 01-1923, 2001 WL 1258089 (E.D. Pa. Oct. 22, 2001); New York *ex rel.* Spitzer v. Schoharie County, 82 F. Supp. 2d 19 (N.D.N.Y. 2000). In the aftermath of the 2000 election, Congress passed the Help America Vote Act. 42 U.S.C.S. § 15301-15545 (2005). Among other things, this law makes a stronger statement about the need for access to polling places for people with disabilities and guarantees a secret and independent right to vote. *See id.* §§ 15421(b), 15481(a)(3)(A) (addressing access to polling places and secrecy and independence in voting). While tbis is a positive step, it should be viewed as further evidence that the ADA has failed to create the necessary changes in the voting rights of people with disabilities.

276. In the briefing for *Tennessee v. Lane*, both respondent Lane's brief and the *amicus* brief of the American Bar Association show widespread state-specific inaccessibility to courts and the judicial process post-dating the ADA. Brief for the Private Respondents, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667), 2003 WL 22733904; Brief for the American Bar Association as Amicus Curiae Supporting Respondents, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667), 2003 WL 22733905. The ensuing discussion is drawn largely from these two briefs.

277. *See* JUDICIAL COUNCIL OF CALIFORNIA SUBCOMM. ON ACCESS FOR PERSONS WITH DISABILITIES, ACCESS TO CALIFORNIA STATE COURTS: A SURVEY OF COURT USERS, ATTORNEYS AND COURT PERSONNEL (1997), *available at* http://www.courtinfo.ca.gov/programs/access/documents/dis_surv.pdf (concluding, however, that California courts have been "at least partially successful" in providing disabled access). Fifty-nine percent of the 148 speakers testified that there were problems with physical access to California courts.

278. *See* CIVIL AND LEGAL RIGHTS SUBCOMM. OF GOVERNOR'S COMM. ON DISABILITY ISSUES AND EMPLOYMENT, INTERIM COURT AND COURTHOUSE ACCESS PROJECT 3 (2000).

general public, and attorneys with disabilities [to be] abysmal and unjustifiable."[279] A New York study showed even worse results: only 8% of all courtrooms were fully accessible, more than 80% of state courts had no assistive listening systems or TDDs available, and 65% of the courts did not provide accessible parking spaces.[280] In Tennessee, the state commission on the future of its judicial system noted that "[f]or persons with significant physical or mental impairment, the system can be quite literally inaccessible."[281] Studies with similar results have been done in Missouri and Florida.[282]

There is also an illuminating Title III trend relating to ADA noncompliance. Newly constructed or altered places of public accommodation and commercial facilities have to comply with Title III of the ADA, including the ADA Standards for Accessible Design.[283] The DOJ has been authorized, since the passage of the ADA, to certify that state and local accessibility requirements (often established through building codes) meet or exceed the ADA's accessibility requirements.[284] If a state or local code is certified, an entity that has complied with it can offer this certification as rebuttable evidence of compliance with the ADA.[285] One would think that owners and operators of public accommodations would be attracted to this provision and would lobby their state and local governments to obtain certification. So far, this has not happened. The DOJ has certified the accessibility codes of only five states (Washington, Texas, Maine,

279. *See* TEX. CIVIL RIGHTS PROJECT, COURTS CLOSED TO JUSTICE: A SURVEY OF COURTHOUSE ACCESSIBILITY IN TEXAS FOR PEOPLE WITH DISABILITIES 4 (1996).

280. *See* N.Y. STATE COMM'N ON QUALITY OF CARE FOR THE MENTALLY DISABLED & THE N.Y. STATE BAR ASS'N COMM. ON MENTAL AND PHYSICAL DISABILITY, SURVEY OF ACCESS TO NEW YORK STATE COURTS FOR INDIVIDUALS WITH DISABILITIES 13 (Feb. 1994).

281. *See* COMM'N ON THE FUTURE OF THE TENN. JUDICIAL SYS., REPORT ON THE FUTURE OF THE TENNESSEE JUDICIAL SYSTEM 31 (1996), *available at* http://www.tsc.state.tn.us/geninfo/publications/futures.pdf.

282. *See* BURTON D. DUNLOP & MARISA E. COLLETT, JURY SERVICE ACCESSIBILITY FOR OLDER PERSONS AND PERSONS WITH DISABILITIES IN FLORIDA (1999) (study by Florida International University's Center on Aging stating that "some of Florida's courts remain clearly out of compliance with some of the basic requirements for accommodating persons with disabilities," including the fact that more than 40% of sampled courts did not have even a single accessible jury box); *see also* PHYLLIS S. LAUNIUS, REMOVING PUBLIC ACCESS BARRIERS TO THE COURTS IN THE NEW MILLENNIUM: A SAMPLING AND ANALYSIS OF MISSOURI'S TRIAL COURTS 3-4 (2000) (study for the Missouri Office of State Courts Administrator finding "many barriers limiting access to those individuals with physical disabilities," and noting that "only 26 percent of the sample's accessed areas are compliant with ADA standards.").

283. 42 U.S.C. § 12183 (2005); *see also* 28 C.F.R. § 36 app. A §§ 4.1.2, 4.1.6 (2005) (providing the ADA Standards for Accessible Design).

284. 42 U.S.C. § 12188(b) (2005).

285. *Id.*

Florida, and Maryland) and has pending requests from six states (California, Indiana, New Jersey, North Carolina, and Utah).[286]

These examples show noncompliance with at least certain Title II and III-covered areas, which supports the idea that these Titles are under-enforced. Why is this? Building on the work of other commentators and policy bodies, the next Section examines this issue. My goals are to explain why various enforcement principles have limited Title II and/or III's effectiveness and to expand the discussion of what ADA reform on these issues might look like.

2. Private Enforcement of Title II of the ADA–Damages and Attorneys' Fees

Title II of the ADA has public and private enforcement mechanisms. Private citizens may bring suits to vindicate Title II rights in one of two ways. First, an individual may sue in federal court. The legislative history is clear that Congress did not intend individuals to have to exhaust administrative remedies,[287] and courts have by and large honored that history.[288] Private individuals may also pursue administrative remedies. As this may ultimately lead to DOJ involvement, I will discuss it below in the public enforcement section.

There are several obstacles, both in the statute and in courts' interpretation of it, to Title II private enforcement. The first is the remedial structure. Title II's remedial provision looks deceptively simple: "The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 shall be the remedies, procedures, and rights that this title provides to any person alleging discrimination on the basis of disability in violation of section 202."[289]

The first problem is that Section 505 does not contain any remedies provisions. It punts to the "remedies, procedures, and rights

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286. *See* DISABILITY RIGHTS SECTION, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE 13 (2005), *available at* http://www.usdoj.gov/crt/ada/oct04mar05scrn.pdf.

287. *See* H.R. REP. NO. 101-485, at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 381 ("As with section 504, there is also a private right of action . . . which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action.").

288. *See* Petersen v. Univ. of Wis. Bd. of Regents, 818 F. Supp. 1276 (W.D. Wis. 1993) (holding that a plaintiff can bring Title II claims in court before exhausting administrative remedies); *see also* Greater L.A. Council on Deafness, Inc. v. Cmty. Television of S. Cal., 719 F.2d 1017, 1021 (9th Cir. 1983) (Rehabilitation Act case); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1380-82 (10th Cir. 1981) (Rehabilitation Act case).

289. 42 U.S.C. § 12133 (2005).

set forth in section 717 of the Civil Rights Act of 1964."[290] Regarding non-employment disputes, Section 505 provides that "the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."[291] But Title VI of the Civil Rights Act of 1964 does not spell out any remedies either.

Left to fill this gap, courts have reasoned as follows. Because Title VI of the Civil Rights Act of 1964 was passed pursuant to the Constitution's Spending Clause,[292] Title VI's remedies flow from Congress's Spending Clause power; namely, remedies that would flow from a contract, expressed or implied, between the United States and the defendant.[293] Because courts are directed to use Title VI (via the Rehabilitation Act) to find remedies for Title II of the ADA, courts have ultimately held that Title II is limited by the same Spending Clause contract theory as Title VI, even though Title II was passed pursuant to the Commerce Clause and Section 5 of the Fourteenth Amendment.[294] The practical effect of this has been to foreclose certain types of non-contract remedies, such as tort damages, from Title II coverage.[295]

As a result of this legislative game of chutes and ladders, courts have had to develop case law about the specific remedies available to private individuals in Title II cases. Although the case law is not crystal clear, several principles have emerged. First, individuals may receive injunctive relief for Title II violations.[296] The only possible exception to this rule is in suits against states, which may trigger sovereign immunity federalism issues limiting the availability of certain types of injunctive relief.[297] At a minimum, an

290. 29 U.S.C. § 794a(a)(1) (2005).

291. *Id.* § 794a(a)(2).

292. U.S. CONST. art. I., § 8, cl. 1.

293. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 711-12 (1979).

294. *See* 42 U.S.C. § 12101(B)(4) (2005) (delineating sources of congressional power in enacting the ADA as powers to enforce the Fourteenth Amendment and the Commerce Clause); *see, e.g.*, Barnes v. Gorman, 536 U.S. 181, 189 (2002) (holding punitive damages unavailable under Title II because of contractual nature of remedies to effectuate Title VI of the Civil Rights Act).

295. DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 16-2.

296. *See Barnes*, 536 U.S. at 187 (comparing Title VI to Title IX, under which a recipient of federal funds can be sued for compensatory damages or an injunction).

297. *See* Tennessee v. Lane, 541 U.S. 509 (2004) (holding that states are not immune from suit under Title II when the suit deals with access to courts).

individual or the federal government may receive prospective injunctive relief under the doctrine of *Ex Parte Young*.[298]

Another general rule is that plaintiffs may recover compensatory damages in Title II cases.[299] This includes damages for emotional distress, pain and suffering, and economic loss.[300] This general rule is subject to two important qualifications. First, after *Tennessee v. Lane*, an individual's ability to recover damages from a violating state employer depends on whether or not that individual is suing to vindicate a "fundamental right."[301] If the right is "fundamental"—like access to courts, or voting—Title II of the ADA is viewed as a valid waiver of the states' sovereign immunity, and damages are allowed.[302] If the right is not "fundamental," courts are split on whether Title II validly abrogates state sovereign immunity and, therefore, allows for damages.[303] The Supreme Court avoided this question in *Lane*.[304]

This is a crucial private enforcement issue. Because many Title II cases are against state actors (in my appellate database, 63 of

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298. 209 U.S. 123, 155-56 (1908) (holding that the Eleventh Amendment does not protect state officials from suit if the suit would enjoin the official from enforcing an unconstitutional statute); *see also* Armstrong v. Wilson, 124 F.3d 1019, 1025-26 (9th Cir. 1997) (holding plaintiffs' ADA Title II claims for prospective injunctive relief fell within the *Ex Parte Young* exception to state sovereign immunity).

299. Again, this is because courts have generally found that plaintiffs may recover compensatory damages in Title VI cases. *See* Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 602-03 (1983) (holding that compensatory damages are only availahle to private plaintiffs under Title VI when there is evidence of discriminatory intent); *see also* Matthews v. Jefferson, 29 F. Supp. 2d 525, 535 (W.D. Ark. 1998) (holding that prevailing plaintiffs in section 504 cases are entitled to the "full spectrum of legal and equitahle remedies needed to redress their injuries").

300. *See* Niece v. Fitzner, 922 F. Supp. 1208, 1219 (E.D. Mich. 1996) (holding that plaintiffs could recover for mental anguish and humiliation under Title II because, under the Rehahilitation Act, "plaintiffs are afforded the full range of legal remedies"); *see also* DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 16-8.

301. *See Lane*, 541 U.S. at 518, 533-34 (2004) (holding that Title II, "as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment," meaning Congress can "abrogate the state's sovereign immunity"). A Title II plaintiff's ability to receive compensatory damages against local officials is also limited by the doctrine of qualified immunity. *See, e.g.*, Torcasio v. Murray, 57 F.3d 1340, 1343 (4th Cir. 1995) (holding that correctional officers had qualified immunity from prisoner's suit).

302. *Lane*, 541 U.S. at 518, 533-34.

303. For example, *compare* Wroncy v. Oregon Dep't of Trans., 9 F. App'x 604, 605-06 (9th Cir. 2001) (holding that the Eleventh Amendment does not preclude monetary damages against states under Title II), *with* Angel v. Kentucky, 314 F.3d 262, 264-65 (6th Cir. 2002) (holding that Title II does not validly abrogate states' sovereign immunity).

304. The Court has just granted *certiorari* in Goodman v. Ray, 120 F. App'x 785 tbl. (11th Cir. 2004), *cert. granted sub nom.* Goodman v. Georgia, 125 S. Ct. 2266 (2005), a case involving the ability of prisoners to sue state prisons for damages for violating Title II of the ADA.

197 Title II cases, or 32%, named the state or some agent of the state as a defendant), how courts decide this issue impacts whether compensatory damages are available in a significant number of Title II cases. In one sense, the Court's decision in *Lane* represents a plaintiff victory on the issue of sovereign immunity. But *Lane* was a narrow decision, and it only held that Title II protects the exercise of fundamental rights under the Due Process Clause. As a result, *Lane* leaves lower courts uncertain on how to treat rights that are not as fundamental under the Due Process Clause as access to courts or rights guaranteed under the Equal Protection Clause. Lower courts may use this uncertainty as a signal that in cases involving these types of rights, Title II does not represent a valid abrogation of state sovereign immunity. Some courts have already started this process.[305]

Given the direction of the federal courts, these federalism issues are the hardest to conceive of changing. Congress literally has nothing left in its toolbox (absent passing a new statute with the *Garrett*, or at least *Lane* level of evidentiary support) by which to change these federalism rulings. Renewed attention on state level litigation and advocacy may be the best answer.

The second qualification to a plaintiff's ability to recover compensatory damages depends on whether the discrimination complained of is the result of the disparate impact of facially neutral actions or discriminatory intent. Although there is not complete uniformity, a consensus among courts has developed that a plaintiff seeking compensatory damages must show that the defendant has intentionally discriminated, as opposed to engaging in a practice that has a discriminatory effect.[306] In order to recover damages, the plaintiff must show that the defendant acted with at least "deliberate indifference."[307] The entity must know that an accommodation is required and must fail to make the accommodation in a way that

305. *See, e.g.*, Miller v. King, 384 F.3d 1248 (11th Cir. 2004) (holding that Title II did not validly abrogate states' sovereign immunity insofar as it regulates treatment of state prisoners); Haas v. Quest Recovery Servs., 338 F. Supp. 2d 797, 800-03 (N.D. Ohio 2004) (holding that Title II does not validly abrogate states' sovereign immunity insofar as it affords people with disabilities access to accommodations in prison-type situations).

306. DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 16-9, 16-10. Although the case law has developed in Title XI of the Civil Rights Act, which also uses the remedy structure of Title VI, see Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that a school district cannot be liable for damages under Title XI for the sexual harassment of its teachers "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct"), the same analysis should apply to ADA Title II. *See* Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998) (holding "that compensatory damages are not available under Title II or § 504 absent a showing of discriminatory intent").

307. *See* Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001).

bespeaks more than negligence and has an "element of deliberateness," by, for example, failing to consider an individual's needs.[308]

In *Barnes v. Gorman,* the Supreme Court held that punitive damages are not available in Title II cases. Again, the basis for this is the contractual nature of remedies under Title VI of the Civil Rights Act.[309] To appreciate the legal fictions going on here, note that the Court is deciding on the basis of a Spending Clause theory (for a statute that is not based on the Spending Clause) dealing with a conditional grant of federal monies (that never happened).

Strengthening Title II's private remedial structure would likely require legislative action. As a legal matter, doing so would not be hard: there are no constitutional barriers to Congress making a clearer statement of these types of damage remedies for Title II. The National Council on Disability has suggested "restoring" the ADA by allowing compensatory damages for all forms of discrimination (discriminatory effect and intent) and allowing punitive damages for cases involving intentional discrimination.[310] There is legislative precedent for such an approach. The Fair Housing Act, which had always provided for compensatory and punitive damages,[311] was amended in 1988 (based in part on concerns of continuing discrimination and under-enforcement)[312] to remove the cap on punitive damages.[313] There are also sound policy justifications for such an approach. The ADA has been in effect for over ten years, and noncompliance with its access requirements is no longer innocent. Empowering plaintiffs with additional, Fair Housing Act-type incentives could send a strong wake-up call to state and local

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308. *Id.*; *see also* Lovell v. Chandler, 303 F.3d 1039, 1057 (9th Cir. 2002) (holding that, in cases involving facial discrimination, "the public entity is, at the very least, 'deliberately indifferent'").

309. *See* Barnes v. Gorman, 536 U.S. 181, 186-87 (2002).

> Just as a valid contract requires offer and acceptance of its terms, "[t]he legitimacy of Congress's power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract' . . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." . . . A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract.

Id.

310. NCD, RIGHTING THE ADA, *supra* note 37, at 115-16.

311. Fair Housing Act of 1968, 42 U.S.C. § 3613(c) (2005).

312. *See* H.R. REP. No. 100-711, at 40 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2201 ("[T]he limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law.").

313. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613(c) (2005). As discussed above, the statute was also amended to include discrimination on the basis of handicap. *Id.* §§ 3602-04.

governments that they need to take violations of ADA Title II rights seriously.

A second area limiting the private enforcement of Title II is the limitations courts have put on obtaining attorneys' fees. In *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources* ("*Buckhannon*"),[314] plaintiffs claimed that West Virginia's regulations requiring residents to be sufficiently ambulatory to get out of burning buildings violated Title II of the ADA and the FHAA. After the litigation commenced, the West Virginia Legislature enacted two bills eliminating this requirement and moved to dismiss the case as moot.[315] The district court granted this motion. Plaintiffs then requested attorneys' fees as the prevailing party under the FHAA and ADA, arguing that under the "catalyst theory," they achieved a desired result by bringing about a voluntary change in the defendant's conduct. At the time, most courts of appeals recognized the catalyst theory.[316]

The Court, however, rejected the catalyst theory, holding that it allowed an award when there is no judicially sanctioned change in the legal relationship of the parties.[317] The Court rejected plaintiffs' argument that the catalyst theory was necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorneys' fees, thus deterring plaintiffs with meritorious but expensive cases from bringing suit.[318] As both the Court[319] and commentators[320] have recognized, *Buckhannon* issues only arise in the "perfect storm" scenario where plaintiffs challenge a policy that (a) the legislative or regulatory body can correct during the life of the lawsuit, and (b) there are no claims for damages. But this will often be the case in Title II cases, where the defendants are state or local actors who can change their policies, and there are no claims for damages (either for federalism reasons or the difficulty of

314. 532 U.S. 598 (2001).

315. *Id.* at 601.

316. *Id.* at 601-02.

317. *Id.* at 605 ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.").

318. *Id.* at 608 ("We are skeptical of these assertions, which are entirely speculative and unsupported by any empirical evidence."). But see id. at 622-23 (Ginsberg, J., dissenting) ("[T]he Court's constricted definition of 'prevailing party,' and consequent rejection of the 'catalyst theory,' [will] impede access to court by the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.").

319. *Id.* at 608.

320. *See* STEPHEN YEAZELL, CIVIL PROCEDURE 311 (6th ed. 2004).

obtaining damages based on intentional conduct).[321] Preliminary injunctive relief, which is often a goal of ADA Title II plaintiffs, also may not be sufficient for an attorneys' fees award.[322]

Since the Supreme Court has recently spoken on this issue, the courts seem an inhospitable forum to argue the point that Title II's attorneys' fees provisions need to be strengthened. While there may be substantial political barriers, there are no constitutional barriers to Congress acting to restore and reinvigorate the ADA's attorneys' fees provision.[323] The Leadership Conference on Civil Rights has developed and introduced a bill known as the "Fairness Act" that does this for several civil rights statutes, and this bill is currently pending before Congress.[324] The NCD has also suggested an ADA-specific approach.[325]

3. Public Enforcement of Title II—The Role of The DOJ

Under Title II, private individuals may also pursue administrative remedies, which may ultimately lead to DOJ involvement. Within 180 days of the violation, an individual must file a complaint with any appropriate agency or the DOJ.[326] Subpart G of the DOJ Title II regulations designates different agencies that exercise responsibilities, regulate, or administer services, programs, or activities in specified areas.[327] These agencies are the Departments of Agriculture, Education, Health and Human Services, Housing and

321. *See* NCD, RIGHTING THE ADA, *supra* note 37, at 76 ("The risk to attorneys of not being able to get attorney's fees is greater in cases in which potential compensatory damages are small or where the plaintiff is primarily seeking an injunction ordering the defendant to stop its discriminatory actions."); *id.* at 78 ("One publicly funded advocacy agency, for example, complained that it had spent hundreds of thousands of dollars litigating a case involving alleged inhumane conditions at a state residential center for people with mental retardation, but lost its chance to recover attorney's fees and litigation expenses when the state decided to close the facility."); NAT'L COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, NO. 17: THE SUPREME COURT'S REJECTION OF THE "CATALYST THEORY" IN THE AWARDING OF ATTORNEY'S FEES AND LITIGATION COSTS 16 (2003), *available at* http://www.ncd.gov/newsroom/publications/pdf/catalyst_theory.pdf.

322. *See* Race v. Toledo-Davila, 291 F.3d 857, 858-59 (1st Cir. 2002) (holding that the plaintiff, who obtained preliminary injunctive relief, was not a prevailing party for purposes of awarding attorneys' fees).

323. *See* NCD, RIGHTING THE ADA, *supra* note 37, at 114 ("From a legislative drafting standpoint, undoing the harm to ADA remedies caused by . . . *Buckhannon* . . . is a fairly straightforward matter.").

324. *Id.* at 115 n.186; S. 20088; H.R. 3809, 108th Cong. (2004) ("Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004").

325. *See* NCD, RIGHTING THE ADA, *supra* note 37, at 115-16 (detailing new subsections to be added to the remedies provision of Title II of the ADA).

326. 28 C.F.R. § 35.170(b) (2005).

327. *Id.* § 35.190(b).

Urban Development, Interior, Justice, Labor, and Transportation.[328] This means that there are currently eight separate cabinet-level agencies involved in handling Title II complaints.

The regulations provide guidance on how agencies should process complaints. All designated agencies (including the DOJ) must investigate a complaint and attempt informal resolution.[329] If this fails, the agency issues findings of fact and conclusions of law, a description of the appropriate remedy, and a notice to the complainant and public entity.[330] If it finds noncompliance, it issues a letter of noncompliance, notifies the Assistant Attorney General in charge of the Civil Rights Division of the DOJ, and attempts to negotiate to secure compliance.[331] If that fails, the matter is referred to the Assistant Attorney General for litigation. Oftentimes, the DOJ's litigation efforts lead to settlements or consent decrees.[332] Fairly recently, the DOJ has embarked on its "Project Civic Access Program," an effort to work with state and local governments.[333] The DOJ reports that it has just entered into its hundredth such consent decree under this program.[334]

The National Council on Disability has issued a report critical of the DOJ's enforcement efforts.[335] While making the point that enforcement is crucial to meeting Title II's goals, the NCD notes (referring to the entire ADA) that "[f]ederal agencies charged with enforcement and policy development under the ADA, to varying degrees, have been overly cautious, reactive, and lacking any coherent and unifying national strategy."[336] NCD criticizes the DOJ's Title II proactive efforts, like the Project Civic Access Program, as not being

328. *Id.*

329. *Id.* § 35.172(a).

330. *Id.*

331. *Id.* § 35.173(a).

332. DISABILITY RIGHTS SECTION, UNITED STATES DEP'T OF JUSTICE, ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE (2004) (summarizing DOJ settlements and consent decrees for relevant period).

333. *See* Disability Rights Online News, *Civil Rights Division Commemorates 100th Agreement Milestone For Project Civic Access*, http://www.ada.gov/newsltr0804.htm (last visited Nov. 16, 2005) (describing Project Civic as "municipalities work[ing] cooperatively with the federal government to bring local physical spaces, emergency services, employment practices, polling places, and other aspects of public life into compliance with the Americans with Disabilities Act").

334. *Id.*

335. *See* NCD, PROMISES TO KEEP, *supra* note 256, at 3 (examining the enforcement of the Americans with Disabilities Act between 1990 and 1997 by using statistical and other federal agency data).

336. *Id.* at 2.

sufficiently frequent or visible.[337] It also suggests that the DOJ has not taken sufficiently strong positions in important litigation, in contrast with the EEOC's role under Title I.[338]

My own data set provides some limited support for these claims. Like EEOC participation in Title I litigation, DOJ participation in Title II cases increases the likelihood of an appellate victory.[339] In researching Title I, Professor Colker found that plaintiff's predicted success rate increased from 2.8% to 18% when the EEOC intervened as an amicus.[340] Although I have not run a parallel regression analysis, my research does show that there is a higher percentage of pro-plaintiff outcomes in cases where the DOJ intervenes as a party or amicus (19 of 33 cases - 57%) than pro-plaintiff outcomes in all cases (33%). DOJ participation is a crucial component of Title II enforcement because the statute's private remedial structure, as set forth above, disincentives individuals from bringing cases.

One proposal to improve the DOJ's Title II enforcement efforts is to streamline the DOJ's complaint organizing mechanisms. As shown above, there are currently eight separate cabinet-level agencies involved in Title II complaint handling. The NCD has argued that these agencies do things in different ways, leading to insufficient collaboration between the different agencies in complaint handling. The DOJ could be the first place for these complaints to arrive, thus enabling it to more quickly identify and litigate important cases.

Recently, however, the DOJ has issued an Advanced Notice of Proposed Rule Making relating to its mandatory duty to investigate complaints.[341] In this Notice, the DOJ proposes that its duty to investigate complaints be changed from a mandatory to a discretionary one. The DOJ bases its request on the fact that "the Department has received many more complaints alleging violations of Title II than its resources permit it to investigate," which has the effect of delaying investigation of meritorious and time-sensitive complaints.[342] In the DOJ's view, this discretion will allow it to "dispose of complaints with inadequate legal or factual bases quickly, and, thus, dedicate more of its enforcement resources to complaints

337. *Id.* at 5-8.

338. *Id.*

339. I do not suggest this is a causal matter, just an observational one. It is certainly possible, for example, that the EEOC (or DOJ) chooses to participate in cases that have a better chance of victory.

340. *See* Colker, *Winning & Losing*, *supra* note 12, at 276-77.

341. 69 Fed. Reg. 58768, 58777-78 (Sept. 30, 2004) (to be codified at 28 C.F.R. pt. 35 & 36).

342. *Id.*

with stronger allegations," which will in turn allow it to "set high-profile precedents that will . . . facilitate local resolution of the types of complaints the Department is unable to pursue."[343]

The DOJ's position has force. A review of all Title II appellate decisions shows that many of these are not what anyone would consider "serious" ADA cases, especially involving prison litigation. All the DOJ is really asking for is that its Title II obligations parallel its Title III obligations,[344] and my research shows that the DOJ's participation rate in appellate litigation is actually higher in Title III cases than Title II.[345] Any consideration of this proposal must include serious discussion of the DOJ's ability and intentions regarding the number of cases it takes. If this number goes down, it could cause serious harm to an already fragile scheme so dependent upon public enforcement.

4. Private Enforcement of Title III of the ADA—Damages, Attorneys' Fees, and Standing

Like Title II, Title III is enforceable by private parties. Title III, however, does not provide a damage remedy for private litigants. The relevant provision states that the "remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 are the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this title."[346] The referenced remedies in the Civil Rights Act of 1964 only include prospective injunctive relief.[347] *Buckhannon*, discussed above, also applies to Title III, and there are already several Title III cases applying *Buckhannon* to deny attorneys' fees.[348] As Title III cases do not afford the opportunity for damages, attorneys' fees often offer the only hope of payment for lawyers taking these cases.[349]

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343. *Id.*

344. *See* 28 C.F.R. 36.502 (2005) (providing that the department has the discretion to not investigate complaints alleging discrimination on the basis of disability).

345. The DOJ participated in Title II cases either as an *amicus* or intervenor in 33 cases out of 197 (17%) and in 22 Title III cases out of 82 (27%). For these numbers, I included two-claim cases. *See supra* notes 102 and 103.

346. 42 U.S.C. § 12188(a) (2005).

347. 42 U.S.C. § 2000a-3(a) (2005).

348. *See* Iverson v. Sports Depot, Inc., No. Civ.A. 00-10794-RWZ, 2002 WL 745824, at *3 (D. Mass. Feb. 20, 2002) (reducing plaintiff's attorney's fee award because plaintiff was only successful on one of his many claims); Dorfsman v. Law School Admissions Council, Inc., No. CIV.A. 00-0306, 2001 WL 1754726 (E.D. Penn. Nov. 28, 2001) (finding plaintiff is not a prevailing party under *Buckhannon* and is not eligible to recover attorneys' fees).

349. *See* NCD, RIGHTING THE ADA, *supra* note 37, at 76-77.

Professor Colker has suggested that Title III's broad scope was a legislative trade-off for its relatively weak remedy structure.[350] Congress could have modeled Title III's remedy structure after another statue that regulated the conduct of private actors—the Fair Housing Amendments Act of 1988 ("FHAA").[351] FHAA contains a damage remedy,[352] provides for mandatory enforcement by the Attorney General when the Secretary of Housing and Urban Development determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur,[353] and has recently been amended to remove caps on punitive damages.[354] But instead, Congress chose the approach embodied in Title II of the Civil Rights Act of 1964, which only allows private individuals to seek injunctive relief.[355]

To the extent that courts, commentators, and activists have focused on Title III enforcement, one major interpretative issue has involved making it *more* difficult for private litigants to bring an ADA claim. The part of Title III dealing with private lawsuits states that "the procedures set forth in section 204(a) of the Civil Rights act of 1964 are the . . . procedures this title provides . . ."[356] Although neither the ADA nor section 204(a) of the Civil Rights Act contains a requirement that plaintiffs notify defendants before filing suit, various parties sought such a requirement.[357] Initially some courts agreed and grafted a notice requirement onto Title III.[358] These courts held that even though the statute only refers to section 204(a) of the Civil Rights Act of 1964 (which contains no notice provision), Congress intended to import a notice requirement from section 204(c).[359]

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350. *See* Colker, *Fragile Compromise*, *supra* note 18, at 377-78.

351. 42 U.S.C. §§ 3602-04 (2005).

352. 42 U.S.C. § 3614(d) (2005).

353. 42 U.S.C. § 3610(g)(2)(A) (2005).

354. 42 U.S.C. § 3613(c) (2005). The FHAA also extended the FHA to discrimination on the basis of handicap. *Id.* at §§ 3602-04.

355. *See* 42 U.S.C. § 2000a-3 (2005).

356. 42 U.S.C. § 12188(a)(1) (2005).

357. *See supra* note 117, at 1-5 (describing campaign by Clint Eastwood to require notification for Title III accessibility claims against businesses); *see also* Adam A. Milani, *Go Ahead. Make My 90 Days: Should Plaintiffs Be Required to Provide Notice to Defendants Before Filing Suit Under Title III of the Americans with Disabilities Act*, 2001 WIS. L. REV. 107, 118-25 (2001) (discussing cases where parties sought a notification requirement under Title III).

358. Mayes v. Allison, 983 F. Supp. 923, 925-26 (D. Nev. 1997); Daigle v. Friendly Ice Cream Corp., 957 F. Supp. 8, 10 (D.N.H. 1997); Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148, 1150 (D. Colo. 1996).

359. *Mayes*, 983 F. Supp. at 925-26; *Daigle*, 957 F. Supp. at 10; *Howard*, 935 F. Supp. 1150.

Despite these early cases, it is now reasonably clear that notice is not required under Title III.[360]

Considering the convergence of no damage remedy and the increasingly doubtful prospects for attorneys' fees, the low number of Title III cases at the appellate level (79) makes sense. Individual plaintiffs have very few incentives to bring these cases. The numbers bear this out: only 17 of 79 cases in my Title III database were brought solely by private plaintiffs—i.e., where a public interest organization was not involved as a plaintiff or as counsel for plaintiff, or the DOJ was not a participant as an *amicus* or intervener. This places tremendous pressure on public interest organizations, which, in the aftermath of *Buckhannon*, will have a harder time doing their work. [361] This could also concentrate ADA Title III litigation (and compliance) in urban areas where there are established and adequately-funded disability rights public interest groups, leaving rural areas behind.

States have generally not responded to fill this remedial gap. A study in 2000 showed that only twenty-one states have disability discrimination public accommodation statutes that provide for compensatory damages.[362] Given the current disincentives to private individuals litigating Title III cases, serious consideration needs to be given to revisiting its remedial structure. Similar to Title II, a legislative approach would be to amend Title III to allow for compensatory and appropriate punitive damages.[363] The approaches

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360. DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 17-4. This may change. On June 9, 2005, Congressmen Mark Foley and Clay Shaw of Florida announced that they have reintroduced the ADA Notification Act. The Foley/Shaw legislation would give businesses 90 days to comply with the ADA once alerted to the violations, before courts could take jurisdiction.

361. *See* NATIONAL COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, NO. 7: THE IMPACT OF THE SUPREME COURT'S ADA DECISIONS ON THE RIGHTS OF PERSONS WITH DISABILITIES (2003), *available at* http://www.ncd.gov/newsroom/publications/pdf/decisionsimpact.pdf ("[W]e are obtaining fewer fees, which impacts on our ability to hire additional staff, and pay current staff sufficiently, both of which decrease our ability to serve more people with disabilities.") (quoting E-mail from Jeff Spitzer-Resnick, Managing Attorney, Wisconsin Coalition for Advocacy, to Sahron Masling (Oct. 4, 2003)).

> Buckhannon . . . has had a dampening effect on our work in recruiting pro bono attorneys. . . . In the past, we have been able to recruit private pro bono attorneys with the promise of recouping their time through attorney fee statutes. Unfortunately, the current reality is that if the attorney makes a persuasive case, the defendant can then change [its] policy or practice and moot out the case, thereby defeating the plaintiff's claim for attorney's fees.

Id. (quoting Correspondence from Lauren Young, Legal Director, Maryland Disability Law Center, to Sharon Masling (November 11, 2002) (on file with the author)).

362. *See* Colker, *Fragile Compromise*, *supra* note 18, at 408.

363. One argument against this is that juries will award large verdicts to plaintiffs, putting public accommodations out of business. Professor Colker suggests that this ignores the

suggested above by the Leadership Conference on Civil Rights and the NCD could also work to restore Title III's attorneys' fees provisions.[364] The barriers to doing this are again political, not constitutional.

Courts have also taken a limited view of standing under Title III, which has made it more difficult for Title III plaintiffs to obtain injunctive relief—the only form of relief available to private individuals.[365] In addition to showing "injury in fact" as an invasion of a legally protected interest that is concrete and particularized as well as actual and imminent (not conjectural or hypothetical),[366] ADA plaintiffs must meet the continuing violation doctrine.[367] This means that a plaintiff must also show that there is a risk of the harm happening to him again.[368]

Another limiting interpretation of Title III standing is that a plaintiff's standing is tied to his or her disability. A wheelchair user suing a stadium can only obtain an injunction with respect to the parts of the stadium in which he encountered difficulty and cannot

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experiences of state law public accommodations statutes that allow for compensatory and punitive damages. In these states, by and large this has not happened. *Id.* at 400-01.

364. H.R. 3809, 108th Cong. (2004); *see* NCD, RIGHTING THE ADA, *supra* note 37, at 14-15.

365. *See* Jairath v. Dyer, 154 F.3d 1280, 1283 (11th Cir. 1998) (noting that plaintiff could not pursue injunctive relief because he does not have standing to pursue such an action); Delil v. El Torito Restaurants, No. C94-3900-CAL., 1997 WL 714866, at *4-6 (N.D. Cal. June 24, 1997) (dismissing plaintiff's action for injunctive relief because plaintiff has not demonstrated continuing, present adverse effects that would warrant injunctive relief); Hoepfl v. Barlow, 906 F.Supp. 317, 323 (E.D. Va. 1995) (holding that "a plaintiff who cannot demonstrate a likelihood that she will ever again suffer discrimination at the hands of a defendant, even one who has discriminated against her in the past, does not have standing to obtain an injunction under the ADA"); Atakpa v. Perimeter Ob-Gyn Assocs., 912 F. Supp. 1566, 1574 (N.D. Ga. 1994) (holding that the plaintiff did not have standing to sue the defendant ob-gyn clinic for injunctive relief because she "has not alleged that she will ever seek services from defendants in the future"). In my survey, I found a limited number of cases (4 of 54 pro-defendant outcomes on appeal), where this happened.

366. *See* Deck v. Am. Haw. Cruises, Inc., 121 F. Supp. 2d. 1292, 1296-97 (D. Haw. 2000) ("[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent', not 'conjectural' or 'hypothetical.'") (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)); *see also* DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 17-7 ("A plaintiff seeking relief under Title III must have not only the traditional level of standing—injury-in-fact—but must also show that the harm is likely to occur to him again.").

367. DISABILITY CIVIL RIGHTS LAW, *supra* note 67, at 17-8; Colker, *Fragile Compromise*, *supra* note 18, at 395-99.

368. *See Deck*, 121 F. Supp. 2d. at 1298-99 (holding that a plaintiff who did not plan to use defendant's cruise line in the future lacked standing because she failed to establish a real and immediate threat). One could argue that the significance of this doctrine should not be overstated because the issue of whether a plaintiff will return to an accommodation often is a question of fact, so summary judgment for the defendant is inappropriate where the plaintiff can assert an intention to return. *See* Access Now, Inc. v. South Florida Stadium Corp., 161 F. Supp. 2d 1357 (S.D. Fla. 2001) (plaintiff had standing where he had previously gone to stadium, continued to reside in the area, and stated that he would visit the stadium in the future).

seek relief for individuals with vision impairments.[369] And while one court has held that a person who used a wheelchair had standing to attack all barriers that affected the use of a wheelchair, whether or not previously encountered,[370] another has held that a wheelchair user who was suing a stadium could only obtain an injunction with respect to those aspects of the stadium with which he "encountered difficulty."[371]

Commentators have suggested applying a different interpretation of standing doctrine to Title III. Professor Milani, in particular, argued that people with disabilities should not have to show the imminence of future injuries in accessibility cases because they have an actual and present injury—they are currently deterred from visiting a building.[372] If the defendant refuses to change policies, standing should be assumed because it shows that the injury is likely to occur again in the future. Based on the ADA's purpose and language, Milani challenges the idea that standing should be limited to portions of the facility actually visited. This loosening of traditional standing and mootness requirements is not unprecedented. It has happened in other disability law statutes.[373] And courts have done it in other areas where a public policy issue is likely to evade review, like abortion and election law.[374]

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369. *See* Parr v. L & L Drive-In Rest., 96 F. Supp. 2d 1065, 1082 (D. Haw. 2000) (denying plaintiff standing to sue for barriers that do not affect plaintiff's specific disability); *see also* Steger v. Franco, 228 F.3d 889, 893-94 (8th Cir. 2000) (holding that plaintiff has standing to sue for barriers discovered after complaint is filed).

370. *See id.* at 1081 (finding a disabled person had standing to sue for barriers that were not initially encountered but could be encountered in subsequent visits).

371. *See Access Now*, 161 F. Supp. 2d at 1363-66 (noting that the plaintiff's entry into the facilities at issue did not automatically confer upon him a presumption of injury); *see also* White v. Divine Investments, Inc., No. Civ.S-04-0206, 2005 WL 2491543 (E.D. Cal. Oct. 7, 2005) (holding that plaintiffs cannot challenge barriers discovered after filing of lawsuit).

372. *See generally* Milani, *Wheelchair Users*, *supra* note 21; *see also* Colker, *Fragile Compromise*, *supra* note 18, at 395-99.

373. In Honig v. Doe, 484 U.S. 305 (1988), an IDEA case, the Court declined to apply standing doctrine in its strictest sense (in which it will not assume repeated police misconduct, for example, *see id.* at 320), and instead held that that plaintiff had standing for his IDEA claim because he was likely to face future unlawful actions due to his disability. "It is respondent Smith's very inability to conform his conduct to socially acceptable norms that renders him 'handicapped' within the meaning of the [Education for All Handicapped Children Act.]." *Id.* at 320.

374. *See* Colker, *Fragile Compromise*, *supra* note 18, at 397 (noting that the Supreme Court will dilute mootness requirements when the issue is of public policy that is likely to evade review); *see also* Anderson v. Celebrezze, 460 U.S. 780, 784 n.3 (1983) ("Even though the 1980 election is over, the case is not moot."); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973) ("Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is 'capable of repetition, yet evading review.'"); Belloti v. Baird, 428 U.S. 132,

5. Public Enforcement of Title III of the ADA—The Role of the DOJ

Viewed against this backdrop, there is tremendous pressure on the Title III public enforcement mechanisms. Unfortunately, the current public enforcement system is simply not up to the task. Like Title II, Title III gives the DOJ broader powers than individual litigants. The DOJ can investigate complaints, and it *may* commence a civil action if it believes that any person or group of persons is engaged in a pattern or practice of discrimination, or any person or group of persons has been discriminated against and such discrimination raises an issue of general public importance.[375] The DOJ is also authorized to obtain compensatory damages in addition to the equitable relief available when individuals sue on their own behalf.[376] In cases the DOJ deems important to "vindicate the public interest," it may also seek civil penalties (not to exceed $50,000 for the first violation and $100,000 for subsequent violations).[377] The DOJ can choose to litigate cases, obtain consent decrees, or settle. The evidence suggests that the DOJ rarely resorts to litigation, focusing more on obtaining consent decrees and settlement agreements.[378] As discussed above, the DOJ also offers to certify state codes so that public entities that rely on them can get a presumption in their favor in litigation.[379] States have not widely used this service.[380]

The existing private enforcement system places too much responsibility on the DOJ's public enforcement mechanisms. To be sure, the DOJ has entered into many important settlements and consent decrees on Title III issues,[381] and participated in some high-

137 n.7 (1976) ("We note that the fact the pregnancy of Mary Moe has been terminated . . . in no way moots the case.").

375. 42 U.S.C. § 12188(b)(1)(B) (2005).

376. *Id.* § 12188(b)(2)(A).

377. *Id.* § 12188(b)(2)(C).

378. *See generally* UNITED STATES DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE (2004), *available at* http://www.usdoj.gov/crt/ada/aprjun04prt.pdf (listing only one instance of Title III litigation, two examples of consent decrees and six examples of settlement agreements). *See also* Colker, *Fragile Compromise*, *supra* note 18, at 403 (reporting that as of September 1998, the DOJ had reported 46 ADA Title III settlements).

379. 42 U.S.C. § 12188(b)(1)(A)(ii) (2005).

380. *See* UNITED STATES DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE 9 (2004), *available at* http://www.usdoj.gov/crt/ada/aprjun04prt.pdf (indicating that only Washington, Texas, Maine, Florida, Maryland, California, Indiana, New Jersey, North Carolina, and Utah have taken steps toward certification).

381. *See* UNITED STATES DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, ENFORCING THE ADA: LOOKING BACK ON A DECADE OF PROGRESS 14 (2000), *available at* http://www.usdoj.gov/crt/ada/pubs/10thrpt.pdf (discussing DOJ Title III settlements and consent decrees).

profile Title III appellate cases. Of the 82 Title III cases in my database, the DOJ was involved, as either a party or *amicus*, in 22 cases. Like Title II, Title III cases had a dramatically higher percentage of pro-plaintiff results on appeal when the DOJ was involved (9 of 22 cases, 40.9%) than in cases where the DOJ was not involved (27.8%). But the DOJ only gets involved in a limited number of cases and, if anything, it appears it is reducing the number of complaints it investigates.[382] In my Title III database, I found only one case in which the DOJ was involved that had a damage award at the trial level. The emphasis on settlement creates less public law that businesses will pay attention to when creating accessibility policies.

Congress should consider increasing DOJ funding to investigate complaints, or, contrary to what the DOJ is requesting for Title II litigation, making Title III investigation mandatory. A more aggressive suggestion would be to create a new agency tasked with Title III enforcement, along the lines of the EEOC's role under Title I of the ADA. Again, the FHAA provides an example of what can and should be done. The Civil Rights Division of the DOJ has recently launched a high-profile campaign to make landlords and builders compliant with the Fair Housing Act.[383] But with Title III—a statute with dramatically weaker private enforcement mechanisms—there has been no parallel effort.

IV. CONCLUSION

The ADA's non-employment provisions have been credited with some of the statute's largest successes: allowing people with disabilities to move around their communities with greater ease, to access places that are open to the public, and to participate in government programs on an equal basis with other citizens. This,

382. *See* Shannon McCaffrey, *Civil Rights Division Backs Away From Its Initial Activism*, PHILADELPHIA INQUIRER, Nov. 23, 2003, at A8, *available at* 2003 WL 66947781 (reporting that the Disability Rights Section of the DOJ initiated 701 investigations in 2002, down 181 from 2001).

383. *See* Press Release, Dep't of Justice, Chicago Area Condominium Association Pays $83,500 to Settle Disability Discrimination Lawsuit with the Justice Department (Sept. 9, 2004), *available at* http://www.usdoj.gov/03press/03_1_1.html (noting that "fighting illegal housing discrimination is a top priority of the Division. This year, the Civil Rights Division will file a near-record number of lawsuits challenging patterns or practices violating the Fair Housing Act. The Division has already filed more fair housing lawsuits in 2004 than all of 2003."); *see also* Press Release, Dep't of Justice, Justice Department Settles Its Largest Lawsuit Alleging Disability-Based Housing Discrimination (Sept. 29, 2004), *available at* http://www.usdoj.gov/03press/03_1_1.html (since January 1, 2001, the DOJ has filed 136 lawsuits alleging discrimination in housing, including 60 based on disability discrimination).

along with the encouraging news that Title II and III cases have more pro-plaintiff outcomes than their Title I counterparts, offers cause for optimism.

But this Article suggests that Titles II and III can and should do better. In evaluating the ADA, it is dangerous to rely too much on the large body of Title I scholarship and accompanying reform proposals. Many of the assumptions as to what is wrong with the ADA—court hostility, devastating effects of decisions relating to the definition of disability, and fear of the theoretical weaknesses in the accommodation mandate—are less persuasive in the Title II and III contexts. Rather, Titles II and III need strengthening in their enforcement and remedies provisions so that they may better achieve the overall ADA goal of allowing people with disabilities "to boldly go where everyone else has gone before."[384]

384. *See* Kristina Hughes, *Michigan State U.: Michigan Rally Lauds Disabilities Act,* U-WIRE, July 27, 2000, *available at* 2000 WL 24488557 (quoting Al Swain, director of Center for Independent Living). One interesting question is what would happen if more Title II and III cases were brought? Would they raise the success level of Title I cases, as courts became comfortable with the accommodation mandate in a less threatening environment? Or would courts fear a flood of litigation, and decide cases against plaintiffs definition of disability grounds, driving down Title II and III success rates? These intriguing questions will have to wait for another day and another article.

APPENDIX A – SURVEY FOR TITLE II CASES

1.Reviewer:
2. Case Name:
Case Citation (including date):
3. Publication Status
__ [1] Published
__ [2] Unpublished
4. Court of Appeal #: [1-12]
Brief description of case:

TRIAL LEVEL

5. Who won on Title II claim at trial level?
Plaintiff
__ [1] Damages (after trial – bench or jury)
__ [2] Injunctive relief (after trial-preliminary or permanent injunction)
__ [3] Both
__ [4] Injunctive relief (pre-trial – preliminary or permanent injunction)
__ [5] Favorable sovereign immunity decision only
Defendant
__ [6] 12(b)(6) motion
__ [7] Summary judgment
__ [8] J. as Matter of law
__ [9] Won at trial (jury or bench)
__ [10] Other: __ [11] Can't tell
6.a If damages were awarded in #5, what were they: $
6.b Indicate damage amount (if applicable)
Compensatory: $_____Punitive: $_____
7. If there was a separate discernable Title II claim with a different result, indicate outcome:
Plaintiff
__ [1] Damages (jury verdict)
__ [2] Damages (bench trial)
__ [3] Injunctive relief (preliminary or permanent injunctions)
__ [4] Both
__ [5] Can't tell

Defendant
__ [6] 12(b)(6) motion
__ [7] Summary judgment
__ [8] J. as Matter of Law
__ [9] Won at trial
__ [10] Other:
__ [11] Can't tell

8. Were there more than 2 discernable TII claims with outcomes not reflected above?
__ [1] No
__ [2] Yes (Explain):

9. Were there class allegations?
__ [1] Yes
__ [2] No
__ [3] Can't tell

9.a If yes to #9:
__ [1] Alleged in complaint;
__ [2] Class certified

10. Was the DOJ clearly involved at the trial level?
__ [1] Yes
__ [2]No

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11. DOJ Involvement:
__ [1] Yes
___ [2] No

12. Ps at COA level (mark all that apply)
__ [a] Public interest organization
__ [b] Individual plaintiff(s), Pro se
__ [c] Individual plaintiff(s), represented by counsel, public interest organization
__ [d] Individual plaintiff(s), represented by counsel, private law firm
__ [e] Individual plaintiff(s), represented by counsel, can't tell specifics
__ [f] Class
__ [g] DOJ plaintiff/ intervenor
__ [h] DOJ Amicus
__ [i]Other: _____

13. Ds at the COA level

__ [1] Entity of state government, government named
__ [2] Entity of state government, individual named in official capacity
__ [3] Both above
__ [4] Local government, government named
__ [5] Local government, individual named in official capacity
__ [6] Both above
__ [7] Entities of state and local government
__ [8] Other public entity (school, hospital, etc):
__ [9] Other combination not reflected in above: _____

14. Issue area of case

__ [1] Voting
__ [2] Transportation
__ [3] Healthcare (including Medicare)
__ [4] Facilities modifications
__ [5] Prisons
__ [6] Education
__ [7] Other: _____

15. Who won on appeal?

Pro-P result

__ [1] COA affirmed lower court on TII claim
__ [2] COA reversed lower court on TII claim (includes reversed or remanded)
__ [3] Other:

Pro-D result

__ [4] COA affirmed lower court on TII claim
__ [5] COA reversed lower court on TII claim (includes reversed or remanded)
__ [6] Other:

16. If there was more than one discernable TII claim with a different result:

Pro-P result

__ [1] COA affirmed lower court on TII claim
__ [2] COA reversed lower court on TII claim (includes reversed or remanded)
__ [3] Other:

Pro-D result

__ [4] COA affirmed lower court on TII claim
__ [5] COA reversed lower court on TII claim (includes reversed or remanded)
__ [6] Other:

17. Of all cases on appeal with Pro-D response (#15), on what grounds did the COA decide?

__ [1] Definition of disability
__ [2] Federalism
__ [3] Fundamental alteration/ undue burden
__ [4] Not covered service, program or activity
__ [5] Standing issues
__ [6] No private right of action
__ [7] No discrimination on basis of disability
__ [8] D not covered entity
__ [9] Other:

18. Of all cases on appeal with Pro-P response (#15), characterize victory:

__ [1] Victory on merits, no significant issues left on remand
__ [2] Victory on sovereign immunity issues–court remands on merits
__ [3] Victory on merits, significant issues left on remand

19. If damage award at trial, what happened to the damage award at COA level?

__ [1] Did not change
__ [2] Lowered (Amount _____)
__ [3] Reinstated or raised (Amount _____)
__ [4] Not applicable; P lost on appeal
__ [5] Other:

APPENDIX B – SURVEY FOR TITLE III CASES

1. Case Name:
Case Citation (including date):
2. Publication Status
__ [1] Published
__ [2] Unpublished
3. Court of Appeal #: [1-12]
Brief description of case:

TRIAL LEVEL

4. Who won on Title III claim at trial level?
Plaintiff
__ [1] Damages (after trial – bench or jury)
__ [2] Injunctive relief (after trial - preliminary or permanent injunction)
__ [3] Both
__ [4] Injunctive relief (pre-trial – preliminary or permanent injunction)
__ [5] Other: _____
Defendant
__ [6] Motion to dismiss (e.g., 12(b)(6))
__ [7] Summary judgment
__ [8] J. as Matter of law
__ [9] Won at trial (jury or bench)
__ [10] Other:
5. If damages were awarded in #4, what were they: $
6. If tbere was a separate discernable Title III claim with a different result, indicate outcome:
Plaintiff
__ [1] Damages (after trial – bench or jury)
__ [2] Injunctive relief (preliminary or permanent injunctions)
__ [3] Both
__ [4] Injunctive relief (pre-trial–preliminary or permanent injunction)
__ [5] Other:_____

Defendant
__ [6] 12(b)(6) motion
__ [7] Summary judgment
__ [8] J. as Matter of Law
__ [9] Won at trial
__ [10] Other:

7. Were there class allegations?
__ [1] Yes
__ [2] No
__ [3] Can't tell

7.a If yes to #7:
__ [1] Alleged in complaint
__ [2] Class certified

COURT OF APPEALS

8. DOJ Involvement:
__ [1] Yes
__ [2] No

9. Ps at COA level (mark all that apply)
__[a]Public interest organization
__[b]Individual plaintiff(s), Pro se
__[c]Individual plaintiff(s), represented by counsel, public interest organization
__[d]Individual plaintiff(s), represented by counsel, private law firm
__[e]Individual plaintiff(s), represented by counsel, can't tell specifics
__[f]Class
__[g]DOJ plaintiff/ intervenor
__ [h] DOJ Amicus
__ [i]Other: _____

10. Ds at the COA level (check all that apply)
__[a]Owner/Operator - Retail establishment (Type:_____)
__ [b]Owner/Operator - Sports/entertainment venue (Type: _)
__ [c] Housing provider
__ [d] Transportation provider (including airlines)
__ [e] Association (Type: _____)
__ [f] Insurance company
__ [g] Educational institution
__ [h] Other: _____

11. Issue area of case
__ [1] Physical Facilities modification
__ [2] Modification of policies
__ [3] Other: _____
12. Who won on appeal?
Pro-P result
__ [1] COA affirmed lower court on TII claim
__ [2] COA reversed lower court on TII claim (includes reversed or remanded)
__ [3] Other:
Pro-D result
__ [4] COA affirmed lower court on TII claim
__ [5] COA reversed lower court on TII claim (includes reversed or remanded)
__ [6] Other:
13. If there was more than one discernable TII claim with a different result:
Pro-P result
__ [1] COA affirmed lower court on TII claim
__ [2] COA reversed lower court on TII claim (includes reversed or remanded)
__ [3] Other:
Pro-D result
__ [4] COA affirmed lower court on TII claim
__ [5] COA reversed lower court on TII claim (includes reversed or remanded)
__ [6] Other:
14. Of all cases on appeal with Pro-D response (#12), on what grounds did the COA decide?
__ [1] Definition of disability
__ [2] Fundamental alteration/ undue burden
__ [3] Modification in existing facility not readily achievable
__ [4] Structural impracticability in new or renovated facilities
__ [5] Not covered service, program or activity
__ [6] Standing issues
__ [7] Direct threat
__ [8] No discrimination on basis of disability
__ [9] Problems with Access Board/DOJ architectural regulations
__ [10] D not public accommodation (includes D not being operator of PA)
__ [11] Other:

15. Of all cases on appeal with Pro-P response (#12), characterize victory:

__ [1] Victory on merits, no significant issues left on remand.
__ [2] Victory on merits, significant issues left on remand.

16. If damage awards at trial, what happened to the damage award at COA level?

__ [1] Did not change
__ [2] Lowered (Amount _____)
__ [3] Reinstated or raised (Amount _____)
__ [4] Not applicable; P lost on appeal
__ [5] Other:

***