Mississippi College Law Review

Volume 29
Issue 2 *Vol. 29 Iss. 2*

Article 9

2010

# The Withering of Our Democratic Principles: Frame v. City of Arlington and Why (for Now) the ADA No Longer Represents Their full Flowering

Robert Quimby



Custom Citation
29 Miss. C. L. Rev. 447 (2010)

# THE WITHERING OF OUR DEMOCRATIC PRINCIPLES: *FRAME V. CITY OF ARLINGTON* AND WHY (FOR NOW?) THE ADA NO LONGER REPRESENTS THEIR FULL FLOWERING

*Robert Quimby**

## I. INTRODUCTION

*Frame v. City of Arlington*[1] evidences a disturbing trend to erode the intended effectiveness of the American with Disabilities Act ("ADA"), ironically at a time when many Americans need its protections the most.[2] In *Frame*, disabled residents of the city of Arlington, Texas ("City"), sought an injunction to force the City to bring over one hundred inaccessible curbs, sidewalks, and parking facilities into compliance with the ADA.[3] Instead of finding a continuing violation or holding that the statute of limitations began to accrue on the date the plaintiffs were actually injured, a majority of the three judge panel held that the two-year statute of limitations began running when the City completed construction or alteration of any of the allegedly noncompliant curbs.[4] In reaching its conclusion, the court applied reasoning from a case that predated the ADA and was distinguishable on key facts.[5]

By examining the remedial intent behind the ADA and case law regarding the application of the statute of limitations to remedial statutes, this note will show that *Frame* should have either applied the continuing violation theory or held that the statute of limitations could not begin accruing before the plaintiffs were actually injured. The Supreme Court should overrule this decision or Congress should act to consistently avoid results such as *Frame*. Fortunately, an examination of recent congressional denunciation of claims similar to *Frame* seems to foreshadow such congressional action.

* The author gratefully acknowledges the guidance of Professor Judith Johnson throughout the drafting of this Note. This Note would not have materialized without her willingness to pass on her knowledge of the subject matter and thoughtfully consider the issues raised herein. I also thank Professor Donald Campbell for his encouragement in the early drafting stages. Lastly, I thank my wife, Ashley, and my parents, James and Alice, for their unwavering support and encouragement in this and all other endeavors.

1. Frame v. City of Arlington, 575 F.3d 432 (5th Cir. 2009).
2. *See infra* note 131.
3. *Frame*, 575 F.3d at 434.
4. *Id.*
5. *See infra* Section V, subsection B.

## II. FACTS AND PROCEDURAL HISTORY

On July 22, 2005, five disabled residents of the City filed suit against the City under the ADA and the Rehabilitation Act.[6] The residents, who depend on motorized wheelchairs for mobility, alleged that more than one hundred curbs and poorly maintained sidewalks in the City made their travel impossible or unsafe and that at least three public parking facilities lacked adequate handicap parking.[7] Therefore, the residents sought an injunction requiring the City to bring its curbs, sidewalks, and parking lots into compliance with the ADA.[8]

The City moved to dismiss the residents' complaint on the grounds that the claims were barred by the applicable two-year statute of limitations.[9] The district court held that the residents' claims accrued on the date the City completed the construction or alteration of any noncompliant curb, sidewalk, or parking lot.[10] Because the residents' complaint did not point to dates of noncompliant construction or alteration within the two years before the filing date, the district court granted the City's motion to dismiss the complaint on the ground that the residents' claims were barred by the applicable two-year statute of limitations.[11]

The residents appealed the dismissal to the U.S. Court of Appeals for the Fifth Circuit.[12] Faced with issues of first impression within the circuit, the majority of a three-judge panel found that the district court correctly held that the plaintiffs' claims were subject to a two-year statute of limitations, which began running when the City completed any noncompliant construction or alteration.[13] However, the dissenting judge disagreed with the majority regarding the date the statute of limitations began to accrue because he felt the majority's holding "ignore[d] the plain text of the statute, fail[ed] to acknowledge the conflict it create[d] with traditional rules of standing, and create[d] a rule at odds with the ADA's broad remedial purpose."[14] To avoid those conflicts and comply with purpose of the ADA, the

6. *Frame*, 575 F.3d at 434. The ADA prohibits public entities from discriminating on the basis of disability. 42 U.S.C. § 12132 (2010). The Rehabilitation Act prohibits recipients of federal funding from discriminating against persons on the basis of disability. 29 U.S.C. § 794 (2010).

7. *Id.*

8. *Id.*

9. *Id.* The City also moved to dismiss the complaint on the grounds that the plaintiffs lacked standing under either Title II of the ADA or Section 504 of the Rehabilitation Act and that the alleged facts did not state a legal claim of discrimination. *Id.* The court's disposition regarding these grounds is briefly discussed in *infra* Section IV, subsection A, though they are not the focus of this Note.

10. *Id.*

11. *Id.* The district court also noted that Frame has filed 14 lawsuits under the ADA in the past 5 years and stated that it "is growing weary of Frame's ADA grievances." Order Granting Third Renewed Mot. To Dismiss at 2, *Frame v. City of Arlington*, No. 4-05CV-470-Y (N.D. Tex. Mar. 31, 2008). The fact that this statement suggests the district court had its mind made up before hearing the facts is worth noting, though it is not discussed further in this note.

12. *Id.* at 433.

13. *Id.* The court's ultimate holding was to vacate and remand the dismissal because it found the district court erred in placing the burden of proving accrual on the plaintiffs. *Id.* at 441. However, this Note's primary focus is on the court's affirmation that the two-year statute of limitations began accruing when any noncompliant facilities were constructed or altered.

14. *Id.* at 441 (Prado, J., concurring in part and dissenting in part).

dissenting judge concluded the better approach would have been to hold that a plaintiff's cause of action accrues when he or she suffers an actual injury under the Act – that is, when the plaintiff is actually unable to access the noncompliant facility.[15]

## III. BACKGROUND AND HISTORY OF THE LAW

### *A. The American with Disabilities Act of 1990*

On July 26, 1990, President George H. W. Bush signed the American with Disabilities Act of 1990 ("Act"), which comprehensively prohibited discrimination on the basis of disability.[16] Upon signing the Act, President Bush stated that the broad scope of the Act was necessary because "the barriers faced by individuals with disabilities are wide-ranging,"[17] and that the Act therefore "promises to open up all aspects of American life to individuals with disabilities[.]"[18] President Bush also stated that "[i]t is altogether fitting that the American people have once again given clear expression to our most basic ideals of freedom and equality. The American with Disabilities Act represents the full flowering of our democratic principles[.]"[19]

The President's remarks were well reflective of congressional intent; Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[20] With that in mind, Congress announced the purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with

---

15. *Id.* at 442.

16. The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327 (current version at 42 U.S.C. §§ 12101 -12213 (2010)). Title II of the Act reads as follows: "Subject to the provisions of this title, 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." 42 U.S.C. § 12132 (2010).

17. "Statement by President George Bush Upon Signing S. 993" 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990) (as reprinted in 1990 U.S.C.C.A.N. 601, 601).

18. *Id.*

19. *Id.*

20. 42 U.S.C. § 12101(a)(2) (2010). § 12101, which outlines the findings of Congress and the purpose of the ADA, reads as follows:

> (a) Findings
> The Congress finds that –
>
> (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination . . .
>
> (3) discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations . . .
>
> (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of . . . failure to make modifications to existing facilities . . .

disabilities[.]"[21] To achieve its goals, Title II of the Act explicitly provides that local and state governments are required to install curb cuts on public streets.[22] The Act further states as follows:

> [e]ach facility or part of a facility altered . . . for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.[23]

Congress also stated that Title II should be interpreted consistent with other Titles of the Act, § 504 of the Rehabilitation Act, and *Alexander v. Choate*.[24] In *Choate*, the U.S. Supreme Court stated that § 504 of the Rehabilitation Act should prohibit discriminatory architectural barriers because congressional findings and statements regarding the need to ban such barriers "would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect[.]"[25]

### *B. Prior Supreme Court Case Law's Clouding Effect upon the Judicial Determination of Accrual Dates for Statute of Limitations in ADA and Similar Claims*

The United States Supreme Court has acknowledged the congressional intent for the ADA to be a broad, sweeping mandate.[26] Additionally, soon after the enactment of the ADA, the Supreme Court explicitly reiterated the soundness of the general rule announced in 1946 that when:

---

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged . . .

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity [and] full participation . . .

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . .

(b) Purpose
It is the purpose of this Act —

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . .

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. § 12101.

21. 42 U.S.C. § 12101(b)(2) (2010).
22. H.R. REP. No. 101-485(II) at 367.
23. 28 C.F.R. § 35.151 (1991).
24. 469 U.S. 287 (1985). *See supra* note 22.
25. *Choate*, 469 U.S. at 297.
26. PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) ("In the ADA, Congress provided that broad mandate [that discrimination against disabled people should be eliminated]. In fact, one of the

> federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where . . . a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[27]

The continuing violation theory, which rescues a plaintiff's claim from the statute of limitations because the defendant's continuing misconduct justifies doing so, is one tool courts use to achieve the above remedial principles.[28] The Supreme Court has narrowly confined the application of the continuing violation theory to exclude its use in instances that involve isolated, easily identifiable acts,[29] in large part because it is clear the plaintiffs in such suits are notified of their claim when the act occurred.[30]

In cases such as *Frame*, however, the identification of when the plaintiff is notified of his or her potential claim is more problematic, which bolsters the case for applying the continuing violation theory. The following cases decided prior to the enactment of the ADA have severely clouded courts' determination of the applicable accrual date for statute of limitations purposes in cases such as *Frame* where the date of notice is not easily identifiable.

1. *Del. State Coll. v. Ricks*,[31] *Chardon v. Fernandez*,[32] and *Lorance v. AT&T Tech., Inc.*[33]

The reasoning that the majority in *Frame* relied upon in determining the statute of limitations issue – that the proper focus for accrual purposes is on the discriminatory act, not the discovery of the discriminatory effect – was first announced by the United States Supreme Court in 1980 in *Del. State Coll. v. Ricks*.[34] In *Ricks*, which was a Title VII employment discrimination suit, the Court was faced with deciding whether the statute of limitations began running when the plaintiff was officially notified he would be

---

Act's 'most impressive strengths' has been identified as its 'comprehensive character.'") (internal citations omitted).

27. Bell v. Hood, 327 U.S. 678, 684 (1946) (reaffirmed by Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992)).

28. Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 272-73 (2008). While this definition seems straightforward, "[c]ourts have failed to develop a coherent test for distinguishing continuing violations from claims governed by other accrual and tolling rules. Without exception, the methodologies that have been produced offer little help to judges and litigants. The[ ] prevailing approaches are framed in vague and generic terms, often fail to identify themselves as tests of limited or general applicability . . . , and universally cannot be squared with how courts actually apply . . . the doctrine." *Id.* at 283-84.

29. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002).

30. *See, e.g.*, Del. State Coll. v. Ricks, 449 U.S. 250 (1980), discussed *infra*.

31. 449 U.S. 250 (1980).

32. 454 U.S. 6 (1981).

33. 490 U.S. 900 (1989).

34. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980) (citing Abramson v. Univ. of Haw., 594 F.2d 202, 209 (9th Cir. 1979)).

offered a "terminal contract" or whether it began running when the contract expired.[35] The Court determined the former was appropriate, and Rick's claim was time-barred because the only alleged discrimination occurred when Rick's tenure determination was made and communicated to him.[36] To the Court, Rick's abundant forewarning of his employer's decision justified the shorter limitations period, even though it "recognize[d], of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."[37]

The next year in *Chardon v. Fernandez* a majority of the Court reaffirmed its reasoning in *Ricks*.[38] This time, however, three justices vigorously dissented from the "particularly ill-conceived" result.[39] As one dissenter pointed out, *Ricks* and *Chardon* were analytically distinct with regards to the interplay between the timing of statutory injury and notice.[40] Ricks was notified of the discriminatory act (which comprised the alleged injury) precisely when it occurred,[41] but "it is quite another to hold, as the Court does here, that a cause of action for damages resulting from an unconstitutional termination of employment accrues when the plaintiff learns that he *will be* terminated."[42] Furthermore, the dissenters noted that the majority's decision would increase the number of claims in the federal courts that are "unripe" and "anticipatory," and opined that claims should instead be filed after some "concrete" harm is suffered.[43] Lastly, the dissenters cogently concluded "[n]o actual harm is done until the threatened action is consummated. Until then, the act which is the central focus of the plaintiffs' claim remains incomplete. Such was not the situation in *Ricks*, where the denial of tenure was itself the completed act being challenged."[44]

In *Lorance v. AT&T Tech., Inc.*, the plaintiffs contended that the seniority system at their work was altered to protect male workers by discouraging the promotion of women.[45] Citing *Ricks*, in addition to the special treatment afforded to seniority systems, the majority determined there was no continuing violation, and the limitations period began to run

35. *Id.* at 255.

36. *Id.* at 259.

37. *Id.* at 262 n.16.

38. Chardon v. Fernandez, 454 U.S. 6, 8 (1981).

39. *Id.* at 9 (Brennan, J. dissenting).

40. *Id.*

41. *Ricks,* 449 U.S. at 258.

42. *Chardon*, 454 U.S. at 9 (Brennan, J., dissenting) (emphasis in original).

43. *Id. See also* O'Shea v. Littleton, 414 U.S. 488, 494-97 (1974) ("It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute . . . . The injury or threat of injury must be both real and immediate, not conjectural or hypothetical . . . . [A]ttempting to anticipate whether and when these respondents will be [able to state a claim in the future] takes us into the area of speculation and conjecture . . . . [W]e doubt that there is sufficient immediacy and reality to respondents' allegations of future injury to warrant invocation of the jurisdiction of the District Court.") (internal citations omitted).

44. *Chardon*, 454 U.S. at 13 (Stevens, J., dissenting).

45. Lorance v. AT&T Tech., Inc., 490 U.S. 900, 903 (1989).

when the system was adopted.[46] Dissenters chastised the majority's continued application of *Ricks* to a case that differs on key facts.[47] The dissenters reiterated many of the problematic issues caused by the majority's holding that were elucidated in the dissents in *Chardon*. Specifically, they came back to the anticipatory nature required under the majority's decision: "the harsh reality of today's decision requir[es] employees to sue anticipatorily or forever hold their peace, [which is] so glaringly at odds with the purposes of Title VII[.]"[48] The dissenters also distinguished the case from *Ricks* as it pertained to notice; there was no indication that any employee was so affected by the new plan as to create an incentive to sue, whereas in *Ricks* the employee affected knew the impact it would have on him.[49]

The dissenters further predicted the majority's result would come as a surprise to Congress, which presumably did not intend to grant discriminatorily adopted seniority systems immunity as long as they survived their first three hundred days.[50] Thus, they concluded their dissent by noting the "increasingly hollow ring" to the Court's pronouncement that limitations periods should not begin to run so early as to make it difficult for a layman to seek the remedies provided by the civil rights statutes.[51] Congress agreed with them and legislatively reversed *Lorance* by amending § 112 in the 1991 Civil Rights Act to allow employees to challenge a seniority system not only when the system was adopted, but also "when a person aggrieved is injured by the application of the seniority system[.]"[52]

The Supreme Court implicitly adopted the reasoning of the dissenters in *Chardon* and *Lorance* in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferber*.[53] In that case, the Court rejected the appellate court's determination that, in an action brought by a pension plan for recovery of unpaid withdrawals, the statute of limitations runs from the date the employer withdraws from the plan – arguably the date of the discriminatory act – rather than the first date a scheduled payment was missed (and the discriminatory effects became apparent).[54] The Court's reasoning was that, "on [the Court of Appeals'] view, the limitations period commences at a time when the plan could not yet file suit. Such a result is inconsistent with basic limitations principles . . . [because] the plaintiff has [to have] a complete and present cause of action."[55] Other courts have justified *Bay Area's* reasoning by pointing out such a result makes sense given that a

46. *Id.* at 911.

47. *Id.* at 913-199 (Marshall, J., dissenting).

48. *Id.* at 914.

49. *Id.* at 918-19.

50. *Id.* at 914 ("This severe interpretation of § 706(e) will come as a surprise to Congress, whose goals in enacting Title VII surely never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days.").

51. *Id.* at 919.

52. Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305 n.11 (N.D. Cal. 1992).

53. 522 U.S. 192 (1997).

54. *Id.* at 200-01.

55. *Id.*

requirement for standing under Article III is concrete and particularized injury in fact.[56]

2. *Havens Realty Corp. v. Coleman*[57] as an Outlier to the Above Analysis

Between *Chardon* and *Lorance*, the Court decided *Havens Realty Corp. v. Coleman*, in which the plaintiffs alleged the defendants violated the Fair Housing Act of 1968 ("FHA") because the defendants allegedly practiced racial steering.[58] Ignoring its prior holdings, the Court decided not to apply the applicable 180-day statute of limitations.[59] Instead, the Court applied the continuing violation theory, noting that the intention for statutes of limitations to keep stale claims out of the courts is of no concern when the alleged violation is a continuing one.[60] Additionally, to hold otherwise would have cut against the broad remedial effect Congress intended the FHA to have.[61] Thus, according to the Court, "where a plaintiff . . . challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice."[62]

3. The Effect of the Above Conflicting Analyses on Later Courts' Determinations of ADA and Similar Cases

The following cases highlight the varying and conflicting nature in which courts have applied the above referenced case law in ADA and similar suits involving other statues designed to eliminate discrimination.[63] Some follow the majority's reasoning in *Ricks* and *Chardon*, while others either take the dissenting Justices' approach and find factual distinctions or apply the continuing violation theory.

In 1999, the Northern District of Ohio decided *Deck v. City of Toledo*[64] and adopted the reasoning from *Havens*. The plaintiffs in *Deck* were disabled persons who relied upon motorized wheelchairs for transportation.[65] They brought suit seeking to bring the streets and sidewalks into

56. *See, e.g.*, S.D. v. Access 4 All, Inc., 458 F. Supp. 2d 160 (S.D.N.Y. 2006).
57. 455 U.S. 363 (1982).
58. *Id.* at 368.
59. *Id.* at 380-81.
60. *Id.* at 380.
61. *Id.*
62. *Id.* at 380-81.
63. *See, e.g.*, Toney v. U.S. Healthcare, 840 F. Supp. 357 (E.D. Pa. 1993). (The plaintiff alleged a doctor denied him service because of his disability. With regard to the accrual date of the applicable statute of limitations, the court cited *Chardon* for the proposition that the concern was with the date of the discriminatory act, not when the consequences of that act became apparent. Notwithstanding that citation, however, the court stated that a claim accrues, and the applicable statute of limitations begins to run, when a plaintiff knows or has reason to know of her injury and held that the statute of limitations began to run when the doctor informed the plaintiff he would not be treated because of his HIV status).
64. 56 F. Supp. 2d 886 (N.D. Ohio 1999).
65. *Id.* at 888.

compliance with the ADA.[66] Toledo moved for partial summary judgment, alleging that the statute of limitations had run.[67] *Deck* offered a conflicting analysis on when the claim accrued for statute of limitation purposes. While it stated, "[o]f course, 'the limitations period is measured beginning only from the time when the plaintiff knew or should have known of the injury,'"[68] it nonetheless concluded that the statute of limitations was triggered when the alleged discriminatory act occurred.[69]

The court allowed the plaintiffs' case to continue, however, by finding a continuing violation.[70] The court cited *Havens* for the proposition that staleness concerns disappear when the alleged violation is a continuing one.[71] Specifically, the court applied a category of continuing violations that occurred as a result of "a longstanding" and "over-arching policy of discrimination."[72] The court determined that the continuing violation theory applied because the plaintiffs were not complaining of "individual, unrelated discreet events," or "'passive inaction' of a 'continuing ill effect.'"[73] While the court did admit that determining whether the failure to install curb cuts amounted to a continuing violation of the ADA was "somewhat arduous," it concluded that Toledo's "benign neglect in the oversight of curb ramp construction creates an adverse impact on disabled individuals who live or frequently travel within Toledo."[74]

The Court of Appeals for the Ninth Circuit initially followed *Toledo's* reasoning. In 2002, the Ninth Circuit decided *Pickern v. Holiday Quality Foods Inc.*,[75] in which the plaintiff sought injunctive relief because a store did not have adequate access to and from the parking lot, among other things.[76] The court held the plaintiff's complaint was not time-barred because, "under the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury."[77] "So long as the discriminatory conditions continue," the court elaborated, "and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues."[78] The court reached its conclusion that the ADA clearly makes a continuing violation of the ADA an injury within its meaning because it affords injunctive relief to

66. *Id.*
67. *Id.*
68. *Id.* at 892 (citing Stewart v. CPC Int'l, Inc., 679 F.2d 117, 120 (7th Cir. 1982)).
69. *Id.*
70. *Id.* at 895.
71. *Id.* at 892.
72. *Id.* at 893.
73. *Id.* (citing Tolbert v. Ohio Dep't. of Transp. 172 F.3d 934, 940 (6th Cir. 1999)). The court also cited Schonfeld v. City of Carlsbad, 978 F. Supp. 1329 (S.D. Cal. 1997), for the same rationale regarding the existence of a continuing violation. *Id.* at 894.
74. *Id.* at 895.
75. 293 F.3d 1133 (9th Cir. 2002).
76. *Id.* at 1136.
77. *Id.* at 1136-37.
78. *Id.* at 1137.

"any person who *is being subjected to* discrimination on the basis of disability,"[79] in addition to the fact that Congress sought to avoid unreasonable burdens on ADA plaintiffs.[80]

Six years later, however, the Ninth Circuit completely reversed its stance regarding the statute of limitations in civil rights suits when it reheard *Garcia v. Brockway*[81] en banc. In *Garcia*, the disabled plaintiff contended that the apartment she rented failed to comply with the FHA.[82] The court followed the reasoning from *Ricks* and held that the statute of limitations did apply, barring the plaintiff's claim, because the discriminatory act – the building of the apartments in 1993 – was the point of accrual, and when the effects of that act affected the plaintiff did not matter.[83] In finding so, the majority gave strong deference to the policy behind the statute of limitations, noting that "[w]ere we to now hold the contrary, the FHA's statute of limitations would provide little finality for developers[.]"[84]

The decision in *Garcia* was met with two lengthy and vigorous dissents, the first of which found "the majority's decision well illustrates how statutes of limitations have been twisted by courts to limit the scope and thrust of civil rights laws."[85] The dissenters initially noted the fact that the majority's approach gives developers complete immunity from suit two years after the certificate of completion is issued, regardless of the fact that a disabled person may be the first to know or have reason to know of failure to comply with the FHA outside of initial two years.[86] The dissenting judges believed that Congress intended quite the opposite; that is, they believed a disabled person injured by a developer's violation of the FHA should be able to sue within two years of his or her injury.[87]

The dissenters also noted that, "[i]ronically, by invoking provisions Congress inserted into the FHA to expand disabled persons' access to the courts and to facilitate private enforcement, the majority transforms a statute of limitations into a highly unusual statute of repose for the benefit of real estate developers and landlords."[88] The dissenters also pointed out that the statute of limitations does not begin to run until the plaintiff actually experiences the discrimination and that developers could share exposure through contractual rights to indemnity when selling houses that violate the FHA.[89] Lastly, the concern over hearing the case while relevant

79. *Id.* at 1136 (citing 42 U.S.C. § 12188(a)(1) (2010)) (emphasis in original).
80. *Id.*
81. 526 F.3d 456 (9th Cir. 2008).
82. *Id.* at 459.
83. *Id.* at 459-62.
84. *Id.* at 463.
85. *Id.* at 466 (Pregerson, J., and Reinhardt, J., dissenting).
86. *Id.* at 466-67.
87. *Id.* at 467.
88. *Id.* at 468 (Fisher, J., dissenting).
89. *Id.* at 473, 477 (upholding the "general rule that statutes of limitations are not triggered at least until a plaintiff's cause of action has accrued." *Garcia*, 526 F.3d at 473 (Fisher, J., dissenting); and suggesting as policy that "developers might seek to shift or share their exposure through contractual

evidence is still available is nonexistent because developers' intent does not matter – "defendant's architectural plans and apartment complexes can themselves speak to the alleged construction violations."[90]

In *HIP (Heightened Independence and Progress), Inc. v. Port Auth. of N.Y. and N.J.*,[91] the court reached the same result as the court in *Pickern* and found a continuing violation of the ADA when the Port Authority failed to make a public transportation station accessible to disabled persons.[92] Because "[t]he general rule is that the statute of limitations begins to run as soon as a right to institute and maintain suit arises," the court reasoned, "[p]laintiffs' ADA cause of action accrued when they knew, or had reason to know, of the injury that is the basis of the action."[93] Additionally, the court noted that the beginning of the defendant's duty – and when that duty is "breached by. . . a discriminatory act. . . is [analytically] distinct from. . . when a plaintiff's. . . cause of action begins to accrue."[94] Thus, the accrual date for the plaintiffs' ADA claim did not automatically begin to run on the date the new entrance opened.[95] Rather, the date the claim began accruing was the date the plaintiffs knew or should have known of the station's inaccessible entrance, and the defendant had not proved that the plaintiffs knew or should have known the entrance was inaccessible the day it opened.[96]

The court also discussed three factors to consider when analyzing whether or not a continuing violation exists, all of which favored the plaintiff: (1) whether the violations are connected because they are all the same type of discrimination; (2) whether the violations are isolated or recurrent; and (3) the permanent nature of the violations (that is, even in the absence of intent, would the consequences of the violations continue).[97]

## IV. INSTANT CASE

### A. *Circuit Judge Jolly's Majority Opinion*

Judge Jolly delivered the opinion of the Court in *Frame v. City of Arlington*, joined by Judge Southwick and, in part, by Judge Prado. The Court first held that Title II of the ADA authorized the plaintiffs' claims, as the City's curbs, sidewalks, and parking lots fell within the meaning of a "service, program, or activity" in Title II.[98] Second, the Court held that the

provisions when they sell dwellings under which the new owners would indemnify the developers against any suits brought under § 3604." *Id.* at 477).

90. *Id.* at 477 (quoting Silver State Fair Housing Council, Inc. v. ERGS, Inc., 362 F.Supp. 2d 1218, 1222 n. 1 (D.Nev. 2005)).

91. No. 2:07cv02982(JAG), 2008 WL 852445 (D.N.J. Mar.28, 2008).

92. *Id.* at *1, *3.

93. *Id.* at *3 (citing Burkhart v. Widener Univ., Inc., 70 F. App'x 52,53 (3d Cir. 2003)).

94. *Id.* at *4 (citing Voices for Independence (VFI) v. Penn. Dept. of Trans., No. 06-78 Erie, 2007 WL 2905887, at *13 (W.D.Pa. Sept. 28, 2007)).

95. *Id.*

96. *Id.*

97. *Id.* at *3 (citing *VFI*, 2007 WL 2905887, at *4 (W.D.Pa. Sept. 28, 2007)).

98. *Frame*, 575 F.3d at 433.

plaintiffs' claims were subject to a two-year statute of limitations that accrued when the City completed any noncompliant construction or alteration.[99] The Court based its second holding on the fact that the alleged violations were not latent, and it gave strong deference to the policies underlying the statute of limitations.[100] However, the Court also concluded that the burden was on the City to prove the accrual and expiration of the limitations period.[101]

The opinion first addressed whether the City's curbs, sidewalks, and parking lots were a "service, program, or activity" within the meaning of Title II.[102] After discussing the policy behind the ADA, specifically Title II,[103] the Court noted its sister circuits have broadly interpreted "services, programs, or activities" to include public sidewalks because cities maintain them.[104] While explicitly declining to go as far as the Ninth Circuit and hold that "services, programs, or activities" include "anything a public entity does," the Court determined that the language encompassed curbs, sidewalks, and parking lots due to the plain meaning of "service," which included a "facility supplying some public demand."[105] Lastly, the Court noted its interpretation of "services, programs, or activities" was harmonious with legislative history.[106]

The Court then turned to the issue of when the applicable two-year statute of limitations began to run.[107] The plaintiffs' contended that their claims accrued on the date they encountered a noncompliant barrier and, in the alternative, that their claims were not subject to the statute of limitations because they only sought injunctive relief and the noncompliant

99. *Id.*

100. *Id.* at 440.

101. *Id.* at 433.

102. *Id.* at 435.

103. *Id.* (holding "[t]he ADA was passed '[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' 42 U.S.C. § 12101(b)(1)[,]". . .while, "Title II 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.'42 U.S.C. § 12132.").

104. *Frame*, 575 F.3d at 436. (noting that the Ninth, Sixth, Second, and Third Circuit Courts of Appeals have interpreted "services, programs, or activities" very broadly as well. *See, e.g.* Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002), Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997) (holding that "services, programs, or activities" to be "anything a public entity does."); *see also* Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir. 1998) (holding that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does."), Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44 (2d Cir. 1997) (referring to "services, programs, or activities" as "a catch-all phrase that prohibits all discrimination by a public entity, regardless of context.")).

105. *Frame*, 575 F.3d at 436-37.

106. *Id.* at 437 (citing the legislative history: "[t]he employment, transportation, and public accommodation sections of [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets.") (quoting H.R. Rep. No. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367).

107. *Frame*, 575 F.3d at 437.

curbs, sidewalks, and parking lots were continuing violations of the ADA.[108]

The Court swiftly rejected the plaintiffs' argument that their claims were not subject to the statute of limitations.[109] The Court noted that other courts – including the U.S. Supreme Court – routinely applied statutes of limitations to Title III claims, for which injunctive relief was the only remedy available, and reasoned that Title II claims should not be treated differently.[110] The Court also dismissed the contention that the noncompliant curbs, sidewalks, and parking lots were continuing violations of the ADA because the alleged violations were not related, and holding so would be inconsistent with its ultimate disposition of the case.[111]

Next, the majority addressed the main issue on appeal: whether the plaintiffs' claims accrued on the date they encountered a noncompliant barrier (which would be an application of the discovery rule) or on the date the City completed any noncompliant construction or alteration.[112] The Court sided with the City and adopted the latter approach, drawing a distinction between the discriminatory act and discovery of the discriminatory effect.[113] The Court noted that the United States Supreme Court only applied the discovery rule when medical malpractice and fraud – which are both latent in that often their injuries cannot be discovered until some time after the injurious act – are alleged.[114] As noncompliant sidewalks and curbs are distinguishable from fraud or medical malpractice in that they are not "hidden" or "concealed" from potential plaintiffs, the Court reasoned the discovery rule should not apply.[115] The Court also distinguished the plaintiffs' claims from employment discrimination cases under the ADA, to which the Court applies the discovery rule, because in employment discrimination cases the discovery and alleged discriminatory act occur at the same time.[116]

Lastly, the Court underscored the policy behind the statute of limitations to protect defendants from old claims. The Court endorsed the City's argument and concluded that: "the effect [of applying the discovery rule] would be an evisceration of the statute of limitations defense . . . and unlimited exposure to liability. We think the wiser, more reasonable, and . . .

108. *Id.*

109. *Id.*

110. *Id.* at 438 (citing Gaona v. Town & Country Credit, 324 F.3d 1050, 1054-56 (8th Cir. 2003); Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1136 n. 2 (9th Cir. 2002); Sexton v. Otis Coll. of Art & Design Bd. of Directors, 129 F.3d 127, 127 (9th Cir. 1997); Soignier v. Am. Bd. of Plastic Surgery, 92 F.3d 547 (7th Cir. 1996), cert. denied, 519 U.S. 1093 (1997); Walker v. Epps, 550 F.3d 407, 414 (5th Cir. 2008)).

111. *Id.*

112. *Id.*

113. *Id.* at 439.

114. *Id.* at 439-40. (citing TRW Inc. v. Andrews, 534 U.S. 19, 27 (2001)).

115. *Id.*

116. *Id.*

just approach, is a rule under which a public entity is liable for noncompliant construction or alteration, but only during a definite and single limitations period."[117]

However, the Court also determined that the City had the burden to establish the expiration of the limitations period.[118] The Court reached this result because of the fact that a party who asserts an affirmative defense bears the burden of proof, and, and as a practical matter, the City was in the best position to prove accrual. The plaintiffs could not have proved accrual without engaging in discovery with the City.[119]

### *B. Circuit Judge Prado's Concurrence in Part and Dissent in Part*

Judge Prado concurred with the majority in its determination that Title II authorized the plaintiffs' claims, but he "conclude[d] that the better rule – and the one that best comports with the text and purpose of the ADA – is that a cause of action accrues when a plaintiff suffers an injury under the Act based on that plaintiff's actual (as opposed to conjectural) inability to traverse the noncompliant sidewalk or other facility."[120] To Judge Prado, the core of the issue was that generally a plaintiff's claim accrued when she suffered an injury, and, according to Title II, the plaintiffs' injury occurred when they actually suffered exclusion from the sidewalks, curbs, and parking lots.[121] The statute in question[122] focused on the exclusion from or denial of the benefits of services, programs, or activities, and "a particular disabled person would not suffer an injury in fact until he or she encounters that discriminatory exclusion or denial. Simply put, there cannot be an injury under the ADA until the plaintiff actually suffers the exclusion or denial that the statute prohibits."[123]

Additionally, Judge Prado felt there was no reason to stray from the general rule for claim accrual (requiring injury in fact), especially considering the majority "wholly ignores both the policies underlying the ADA and the consequences of its decision."[124] Judge Prado elaborated on the policy behind the ADA, noting: "Congress enacted the ADA 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[,]' and 'the employment, transportation,

117. *Id.* at 440-41.

118. *Id.* at 441.

119. *Id.* (citing FED. R. CIV. P. 8) (2010).

120. *Id.* at 442 (Prado, J., concurring in part and dissenting in part).

121. *Id.* (continuing: "A plaintiff does not have a complete and present cause of action and cannot file suit and obtain relief until, inter alia, he or she has standing, which in turn requires the plaintiff to suffer an 'injury in fact. . .' Thus, an essential question (and one I think the majority overlooks) is when these particular plaintiffs suffered an injury in fact." (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). *Frame*, 575 F.3d at 443 (Prado, J. concurring in part and dissenting in part)).

122. *Id.* ("The provision at issue, 42 U.S.C. § 12132, 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.'").

123. *Id.* at 443.

124. *Id.* at 447.

and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets."[125] The majority's holding cuts against this "sweeping remedial purpose," Judge Prado reasoned because, "[i]n essence, the City can avoid all liability and maintain noncompliant sidewalks if it successfully avoids a lawsuit for two years after completing the construction or alteration[, while a] newly disabled person, or a disabled person who just moves to the City, would have no recourse but to suffer through the ADA violation."[126]

Judge Prado acknowledged the policy considerations that underlie the statute of limitations, but he offered two facts that favor the plaintiffs in the case at hand.[127] First, in line with his lengthy discussion about injury in fact being a prerequisite to the ability to file suit, Judge Prado reasoned "[a] statute of limitations should not . . . cut off a plaintiff's ability to redress a new injury to that plaintiff."[128] Second, the City would not be liable forever and could have avoided this litigation and all future liability by fixing the noncompliant construction or alteration.[129]

Thus, Judge Prado concluded that the analysis of when a plaintiff actually suffers an injury and the text and purposes behind the ADA meant the correct decision would have been to allow the plaintiff to bring suit within two years of their injury. That is, the plaintiffs should have been allowed to bring suit within two years of being unable to access or deterred from accessing a noncompliant sidewalk, curb, or parking lot.[130]

## V. ANALYSIS

The majority's decision in *Frame* to apply the reasoning of *Ricks* and *Chardon* is ill-conceived for many reasons, and it sets bad precedent at a time when similar claims are beginning to rise with more frequency as our infrastructure ages.[131] The holding in *Frame* regarding the accrual date for the statute of limitations is as blatantly contrary to congressional intent as the holding in *Lorance*, and, hopefully, as it did after *Lorance*, Congress will amend the ADA to preclude the result reached in *Frame*.[132]

125. *Id.* (quoting H.R. Rep. No. 101-485, at 84 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 367).

126. *Id.*

127. *Id.* at 448.

128. *Id.*

129. *Id.*

130. *Id.* at 449.

131. *See, e.g.*, Chris Joyner, *Suit Calls for Jackson Compliance: Public Areas Called Impassable for People with Wheelchairs*, Clarion Ledger, Oct. 27, 2009, at A1 (discussing a suit recently filed in Jackson, Miss. to bring curb cuts into compliance with the ADA and noting similar suits in Cal., Mo., Tenn., and Tex.).

132. *See supra* Part III, B, 1. At the time of this note's publication, a petition for rehearing en banc has not yet been granted or denied. Hopefully, the court will rehear the case and reverse its prior holding. The outcome of that petition and possible rehearing, however, does not affect the need for consistency this note highlights or its hopeful prediction that Congress, absent action by the Supreme Court, will amend the ADA to prevent results like *Frame* in the future.

Subsection A of this analysis will highlight why an application of the continuing violation theory would facilitate the clear intent of Congress and allow plaintiffs such as *Frame* to defeat asserted defenses that their claims fall outside of the applicable statute of limitations. Subsection B will underscore the fact that, even if the continuing violation theory would not apply in a situation such as *Frame*, *Ricks* and *Chardon* are distinguishable on key facts. The correct approach, therefore, requires plaintiffs to be actually injured before the statute of limitations begins to run. Lastly, Subsection C will prove congressional disfavor of results such as the one reached in *Frame* and why recent legislation hopefully foreshadows a legislative reversal of such cases as *Frame*.

### *A.* Havens *and why the continuing violations doctrine should have been adopted in Frame to better comport with congressional intent*

In *Frame*, the majority's discussion of the continuing violation theory is brief and conclusory. Its reasoning for not applying the doctrine was that:

> [t]he continuing violations doctrine, which typically arises in the context of employment discrimination, relieves a plaintiff of a limitations bar if he can show a series of related acts to him . . . . We hesitate to extend that doctrine here, where the alleged violations are not related. A noncompliant curb, for instance, bears no relation to a noncompliant parking lot on the other side of the City.[133]

The majority could not be more wrong, however. Noncompliant curbs on either side of the City are most certainly related – they make the whole class of disabled persons who rely upon them unable to access that much more of the City, which makes the case for systemic discrimination that much stronger. The only other discussion of the continuing violations theory implies that the majority realized the untenable nature of its decision regarding the possibility of a continuing violation, yet it did not care, holding that "the concept of a continuing violation plainly is inconsistent with our ultimate holding in this case."[134] *Havens* helps illuminate where the majority went wrong in its terse decision and why it should have found a continuing violation.

In *Havens*, the Supreme Court gave deference to congressional intent regarding the Fair Housing Act and took the opportunity to redefine what constitutes a continuing violation when complaints of systemic discrimination are made:

> a 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination

133. *Frame*, 575 F.3d at 438.
134. *Id.*

> [i.e., what *Ricks* proscribes] . . . . Where the challenged violation is a continuing one, the staleness concern [of statutes of limitations] disappears. Petitioners' wooden application . . . ignores the continuing nature of the violation, only undermin[ing] the broad remedial intent of Congress embodied in the Act.[135]

Accordingly, the Court concluded that the violation in systemic discrimination cases was the policy of discrimination itself, and the continuing existence of that policy amounted to a continuing violation.[136]

The same result should be reached in cases involving Title II of the ADA such as *Frame* because the Fair Housing Act, Title VII of the Civil Rights Act, and Title II of the ADA all have identical goals: to eliminate discriminatory acts, policies, and practices directed at those who have traditionally been victims of discrimination.[137] All three Acts were specifically intended to address the social, economic, and psychological effects of discrimination on members of groups that have been traditionally discriminated against.[138] Additionally, discrimination in general – regardless of its basis or form – stands in sharp contrast to fundamental constitutional principles upon which our society is based.[139] When he signed the ADA into law, President Bush aptly alluded to the inharmonious relationship between discrimination and constitutional principles our society values: "[i]t is altogether fitting that the American people have once again given clear expression to our most basic ideals of freedom and equality. The [ADA] represents the full flowering of our democratic principles[.]"[140]

Since the Civil Rights Act, the FHA, and the ADA were all designed to eliminate discrimination that has traditionally hampered whole classes of the population, logic – as well as judicial consistency – requires discriminatory violation of all three Acts to necessarily be defined as systemic (that is, continuing).[141] It is an unwise notion that the failure to adequately maintain more than one hundred curb cuts and sidewalks throughout a metropolitan area that an entire class of disabled people relies upon for mobility is not systemic discrimination, especially considering that the Supreme Court found nearly thirty years ago in *Havens* that, due to congressional

---

135. *Havens*, 455 U.S. at 380.

136. Thelma A. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171, 1181 (1988).

137. *See generally* Crivens, *supra* note 136, for a discussion of the congressional goals in enacting the Fair Housing Act and Civil Rights Act; *see supra* note 20 regarding the remedial goals of the ADA.

138. *Id.*

139. Crivens, *supra* note 136, at 1171-72.

140. "Statement by President George Bush upon Signing S. 933," *supra* note 17.

141. As noted in *supra* note 137, the Civil Rights Act shares the same remedial goals as the FHA and ADA. While *Morgan* limited the applicability of the continuing violation theory in Title VII cases (*see supra* note 29), it excluded the doctrine only where discrete, easily identifiable harm is concerned, and it did not preclude its applicability to Title VII cases that allege systemic discrimination. *Morgan*, 536 U.S. at 109-10; *see also* Graham, *supra* note 28, at 304; *see also* Eve L. Hill & Peter Blanck, *Future of Disability Rights: Part Three, Statutes of Limitations in Americans with Disabilities Act "Design and Construction Cases,"* 60 SYRACUSE L. REV. 125 (2009) (discussing the various ways courts have applied the statute of limitations in cases such as *Frame*).

intent, violations of the FHA can necessarily be defined as continuing.[142] If violations of the FHA are necessarily continuing, so should violations of the ADA, as they both seek to redress systemic discrimination.

Additionally, the argument that finding a continuing violation in *Frame* would subject the City to unlimited liability fails because after the first suit the City would be required to fix the problem, thus eliminating the possibility of future suits. The argument that cities do not have the funds to make the updates that liability may mandate is also unfounded. In Jackson, Mississippi, for instance, – a city well known for its budgetary issues – estimation to bring its curbs into ADA compliance is under one-tenth of the bond issue that would provide funding.[143] Also, finding a continuing violation in suits such as *Frame* would facilitate the goals of Title II by requiring the catalyst to actually bring curbs into compliance. Indeed, a suit similar to *Frame* served as the catalyst for Memphis, Tennessee, to bring all of its curbs into compliance with the ADA.[144] Cities might actually even bring curbs into compliance voluntarily to avoid the costs of potential litigation.

Accordingly, a more reasoned and consistent approach in *Frame* would have been to adopt the reasoning in *Havens* and hold that the City's chronic failure to make scores of curb cuts and sidewalks accessible to a whole class of people dependent upon them is a combination of related events that amount to systemic discrimination, and therefore necessarily a continuing violation. As the plaintiffs had encountered at least one of the noncompliant curbs or sidewalks within the applicable two-year statute of limitations, the statute of limitations defense should not have succeeded.[145] By not finding a continuing violation, the majority chose to grant what amounts to limited liability to the City rather than reach a result that would actually comport with clear congressional intent.

### *B.* Ricks, Chardon, *and their inapplicability to the facts of* Frame

*Ricks* not only conflicts with prior congressional endorsement of case law that granted "maximum coverage under the law" to plaintiffs in discrimination suits,[146] but it is also distinguishable from the Supreme Court's later pronouncement in *Havens* discussed above, which involved systemic discrimination and is thus more factually analogous to *Frame*. *Ricks* involved a single act of discrimination directed at a single individual, and the plaintiff had actual notice of his injury as well.[147] In fact, the only alleged act of discrimination in *Ricks* was the actual notice of the plaintiff's denial

142. *Havens*, 455 U.S. at 380.

143. Joyner, *supra* note 131.

144. *Id.*

145. Br. of Pl. in Resp. to Def.'s Third Renewed Mot. To Dismiss at 9, *Frame v. City of Arlington*, No. 4-05CV-470-Y (N.D. Tex. 2008).

146. Crivens, *supra* note 136 at 1187 (citing B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 236 (2d ed. 1983 & Supp. 1983-1984)).

147. *Id.* at 1191.

of tenure. In such a situation, the rationale for applying the statute of limitations is obvious, for a delay in filing suit could potentially harm the defendant, and the plaintiff had concrete notice of his alleged injury.

*Frame* is not such a case, however. If the alleged violation in *Frame* is not deemed continuing, it is at least clearly distinguishable from the alleged violation in *Ricks*; in *Frame*, multiple plaintiffs were asserting that over one hundred curb cuts and sidewalks throughout the City were non-compliant.[148] As Judge Prado correctly noted in his dissent, "a denial of access is not a later consequence of an injury but rather is the injury itself."[149] In such a situation, statute of limitations concerns are nonexistent because the alleged violation is not stale; it is undeniable that the noncompliant curb cuts were not only inaccessible to disabled people during the two years before the plaintiffs filed suit, but also are presently inaccessible.[150]

As previously noted, *Frame* is also distinguishable from *Ricks* and *Chardon* with respect to notice. In *Frame*, the plaintiffs could not have notice of the violations until they encountered each one, which is problematic, given the fact that they were dependent upon other noncompliant curb cuts and sidewalks for mobility. The lack of notice in *Frame* is arguably the strongest reason not to apply the rationale of *Ricks*. In a case such as *Frame*, potential plaintiffs are not always – in fact, they are hardly ever – aware of specific failures of compliance with regards to curb cuts. The most frequent failures in compliance are not known until the disabled person actually tries to access the specific curb cut. It makes absolutely no sense to require a suit to be brought within two years of construction of a non-compliant curb if potential plaintiffs do not have notice of the curbs' construction or alteration.

This is especially true since notice is intertwined with Article III standing. For instance, in 2007, the Supreme Court reaffirmed the general rule that a plaintiff's claim does not accrue until the plaintiff is injured,[151] and the dissent in *Frame* cited a Fifth Circuit case from 2008 that stated: "the limitations period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'"[152] Since under the ADA a plaintiff in the context of *Frame* is not injured until he or she is actually excluded from use of curb cuts and sidewalks,[153] the statute of limitations cannot begin to run until the plaintiffs actually encountered the non-compliant curb cuts.

Using the majority's logic, many claims under the ADA– including *Frame* – would have to be filed anticipatorily, as the plaintiffs may not have even been injured within two years of non-compliant completion of a curb cut. The fear of that result can be traced back to the dissents in *Chardon*

148. *Frame*, 575 F.3d at 433-34.

149. *Id.* at 445 (Prado, J., dissenting).

150. *Supra* note 145.

151. Wallace v. Kato, 549 U.S. 384, 388 (2007).

152. *Frame*, 575 F.3d at 442 (Prado, J., dissenting) (citing Walker v. Epps, 550 F.3d 407, 414 (5th Cir. 2008) (quoting Piotrowski v. City of Houston, 237 F.3d 567, 576 (5th Cir. 2001)).

153. 42 U.S.C. § 12132 (2010).

and *Lorance*, and the Supreme Court adopted those dissenters' views in *Bay Area Laundry*.[154] Additionally, the majority's logic effectively places a burden on disabled people to search for newly constructed curb cuts in order to timely file suit, which flies in the face of congressional intent. The ADA was intended to relieve them from discrimination, not require them to actively engage in the precise activity they are discriminatorily barred from to timely file suit.

Section III highlighted how *Ricks* and *Chardon* have led to absurd and conflicting results in various courts. There is evidence that courts see the folly in *Frame* and will fail to follow it. In *Eames, Jr. v. S. Univ. & Agric. & Mech. Coll.*,[155] a factually similar case decided just three months after *Frame* and within appellate jurisdiction of the Fifth Circuit, the court held that *Frame* did not apply and instead deferred to congressional intent, stating "[t]o find otherwise would destroy the requirement that governments provide persons with disabilities 'meaningful access' to programs.'"[156] Two other district courts have also already found ways to distinguish *Frame*.[157]

Given the inconsistencies in courts' approaches in cases such as *Frame*, however, action by the Supreme Court or Congress is necessary in order to promote judicial consistency. The Supreme Court or Congress should soon resolve the conflict and find that systemic discrimination such as that present in *Frame,* if not a continuing violation, is analytically distinct from such cases as *Ricks* and thus declare that the statute of limitations does not begin to run until the plaintiffs are actually injured. An analysis of the wake of *Lorance* and recent congressional action hopefully foreshadows just such action by Congress.

### C. *Congressional response to* Lorance *and recent legislation as hopeful predictions of swift Congressional action*

As previously noted, the dissenter in *Lorance* correctly predicted congressional backlash to the majority's decision to effectively grant seniority systems the same immunity *Frame* recently gave the City through an adoption of the reasoning in *Ricks*.[158] He was not alone. As one commentator noted, "[b]y reducing systemic discrimination to an individual practice occurring at a precise moment, *Lorance* threatens to narrow the protection of Title VII, and perhaps also of other federal civil rights laws."[159] Unfortunately, this commentator was right, and the Fifth Circuit expanded the

154. *See supra* Section III.

155. 2009 WL 3379070 (M.D. La. Oct. 16, 2009).

156. *Id.* at *3.

157. *See* Mosier v. Kentucky, 2009 U.S. Dist. LEXIS 114699 (E.D. Ky. Dec. 9, 2009); *see also* Californians for Disability Rights, Inc. v. Cal. DOT, 2009 U.S. Dist. LEXIS 91490 (N.D. Cal. Sept. 14, 2009).

158. *Supra* note 50.

159. Michael S. Vogel, *The Remains of Title VII After* Lorance v. AT&T Technologies, 22 COLUM. HUM. RTS. L. REV. 73, 76 (Fall 1990).

scope of *Lorance,* holding that it applies to not only seniority cases but also other types of cases.[160] The commentator went on:

> The inefficiency and injustice of *Lorance* can be addressed to some extent by attempting to distinguish *Lorance* on its facts, or by resorting to state law or other federal remedies. These solutions, however, promise to address only a minority of labor discrimination cases affected by *Lorance.* Congress must amend Title VII in a manner which restores the act to its original effect.[161]

Fortunately, as previously mentioned, Congress amended the Civil Rights Act to overrule the holding in *Lorance* regarding seniority systems.[162]

The same concerns are present after *Frame*, and their only remedy is the same prescription. Just as in *Lorance*, the majority in *Frame* fails to comport with clear congressional intent, much less traditional notions of justice. Attempts, as some courts have, at distinguishing *Ricks* on its facts will also only remedy a minority of Title II ADA cases and only further the inconsistency with which the cases are handled. Fortunately, recent congressional action suggests Congress may step in and legislatively reverse decisions such as *Frame.*

On September 25, 2008 the 110th Congress enacted Public Law 110-325, which amended the ADA "[t]o restore the intent and protections of the American with Disabilities Act[.]"[163] The amendment immediately evidences congressional displeasure with results such as *Frame*, stating in its first finding that "Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and to provide broad coverage."[164] The amendment further specifically cites two Supreme Court cases that "have narrowed the broad scope of protection intended to be afforded by the ADA."[165]

Additionally, on January 29, 2009, the Lilly Ledbetter Fair Pay Act of 2009 was signed into law, which overturned *Ledbetter v. Goodyear Tire & Rubber Co.*[166] In *Ledbetter*, a recent Supreme Court decision, the Court held that in equal-pay lawsuits the statute of limitations began to run on the date the pay was agreed upon rather than the date of the most recent

160. Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473, 477 (5th Cir. 1991) (holding that the reasoning from *Lorance* applied with equal force to a claim under the ADEA).

161. *Supra* note 159 at 95.

162. *Supra* note 52; *see also* Casteel v. Executive Bd. of Local 703 of Int'l. Broth. of Teamsters, 272 F.3d 463, 467 ("*Lorance* was abrogated when Congress passed the Civil Rights Act of 1991[ ]").

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

164. *Id.* at § 2(a)(1).

165. *Id.* at § 2(a)(4).

166. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 5 (2009).

check.[167] The Lilly Ledbetter Fair Pay Act reversed *Ledbetter* and established that the statute of limitations resets with each new discriminatory paycheck; specifically, the Act states that *Ledbetter*:

> significantly impairs statutory protections against discrimination . . . that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions *or other practices*, contrary to the intent of Congress.[168]

These recent, explicit actions by Congress clearly convey how it may view *Frame*, which significantly narrowed the scope of Title II of the ADA through a misapplication of the statute of limitations. Additionally, the ADA Amendments Act of 2008 and the Lilly Ledbetter Act are hopefully predictions that in the absence of judicial action Congress, as it did in the aftermath of *Lorance*, will act to prevent the result reached by *Frame* from recurring in the future.

## VI. CONCLUSION

It is strange that the majority in *Frame* relied upon the reasoning in *Ricks* to hold that the statute of limitations in ADA cases can run before potential plaintiffs are injured, given that *Ricks* itself "recognize[d], of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."[169] Additionally, it is clear that Congress did not enact the ADA with the intention of allowing procedural labyrinths to effectively destroy the very protections it sought to so extensively provide disabled Americans.[170] While a contrary holding was well-warranted in *Frame*, only through the Supreme Court's decision that *Ricks* is distinguishable from cases like *Frame* or an amendment to the ADA itself will courts consistently reach results contrary to *Frame*. Hopefully just such action is soon to come to fruition.

167. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642-43 (2007).
168. *Supra* note 166 at § 2(1).
169. *Ricks*, 449 U.S. at 262.
170. *See, e.g.*, Bethel v. Jefferson, 589 F.2d 631, 643 (D.C. Cir. 1978).