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DISABILITY DISCRIMINATION BY STATE AND LOCAL GOVERNMENT: THE RELATIONSHIP BETWEEN SECTION 504 OF THE REHABILITATION ACT AND TITLE II OF THE AMERICANS WITH DISABILITIES ACT

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Like the builders of ancient cities,¹ legislators frequently place layers of new work on top of previous structures. One example is the portion of the Americans with Disabilities Act barring discrimination by state and local governments. All states and most localities receive federal funding. For more than twenty years, section 504 of the Rehabilitation Act² has prohibited these funded entities from discriminating on the basis of disability. Nevertheless, when Congress specifically prohibited disability discrimination by state and local government in title II of the Americans with Disabilities Act (ADA) of 1990,³ it imposed obligations that are subtly different from those imposed by section 504. At the same time, Congress built upon section 504 when it imposed obligations on private employers and businesses in the other titles of the ADA but did not place exactly the same obligations on private companies that it placed on public entities with title II.

The content of states' and localities' obligations not to discriminate on the basis of disability carries great importance. Because of difficulties with access and the attitudes of others, persons

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1. "Piled one on top of the other, archaeologists found the ruins of nine ancient cities." This line from a children's encyclopedia article about Troy is my favorite example of a misplaced modifier. As this Article demonstrates, Congress, like the ancients, cares little for neatness, and those trying to decipher its commands must put their modifiers in order.

2. 29 U.S.C. § 794 (1988).

3. 42 U.S.C. § 12132 (Supp. V 1993).

with disabilities frequently lead lives that are not as full as those of other persons. Two-thirds of persons who consider themselves disabled and who are old enough to work are not working; of that group, two-thirds want work.⁴ Persons with disabilities leave home to eat, view movies, or participate in public events much less frequently than other members of the general population.⁵ The number of people whose lives are impoverished in this fashion may be as high as forty-three million.⁶

The private sector will not be able to provide enough opportunities to remedy this situation. Private-sector employment opportunities for all Americans—those with disabilities and those without—have grown at disappointingly slow rates over the past half-decade.⁷ Many persons with disabilities remain too poor to take full advantage of private recreation and commercial activity even when they achieve access to it.⁸ Employment and enrichment activities in the public sector therefore will be crucial in enabling persons with disabilities to participate in the fullness of daily life in this country.

Title II and section 504 are the key to that access; how they operate together, or separately, is thus profoundly important for the persons they were intended to benefit. Moreover, how they operate in their sphere may provide guidance for revisions to the obligations that apply to private enterprise, just as the experience of private enterprise with its obligations may provide the basis for modification of title II and section 504.

A number of authors⁹ have commented¹⁰ on the ADA, and

4. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 314 (describing research findings).

5. *Id.*

6. 42 U.S.C. § 12101(a)(1) (Supp. V 1993) (congressional findings).

7. State and local governments are the nation's second-largest source of employment after the federal government. Jean F. Galanos & Stephen H. Price, Comment, *Title I of the Americans with Disabilities Act of 1990: Concepts & Considerations for State & Local Government Employers*, 21 STETSON L. REV. 931, 935 (1992).

8. See H.R. REP. NO. 485, *supra* note 4, pt. 2, at 32-33, *reprinted in* 1990 U.S.C.C.A.N. at 314 (describing research findings indicating severe poverty of persons with disabilities).

9. E.g., Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMPLE L. REV. 393 (1991); Gregory S. Crespi, *Efficiency Rejected: Evalu-*

one has provided an analysis of title II.¹¹ Although these sourc-

ating "Undue Hardship" Claims Under the Americans with Disabilities Act, 26 TULSA L.J. 1 (1990); G. William Davenport, *The Americans with Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues*, 43 ALA. L. REV. 307 (1992); Russell H. Gardner & Carolyn J. Campanella, *The Undue Hardship Defense to the Reasonable Accommodation Requirement of the Americans with Disabilities Act of 1990*, 7 LAB. LAW. 37 (1991); Charles D. Goldman, *Americans with Disabilities Act: Dispelling the Myths*, 27 U. RICH. L. REV. 73 (1992); W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. REV. 295 (1992); Charles P. Gurd, *Whether a Genetic Defect Is a Disability Under the Americans with Disabilities Act: Preventing Genetic Discrimination by Employers*, 1 ANNALS HEALTH L. 107 (1992); Penn Lerblance, *Introducing the Americans with Disabilities Act: Promises and Challenges*, 27 U.S.F. L. REV. 149 (1992); Michael B. Laudor, *Disability and Community: Modes of Exclusion, Norms of Inclusion, and the Americans with Disabilities Act of 1990*, 43 SYRACUSE L. REV. 929 (1992); Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 TEMPLE L. REV. 499 (1991); Stephen L. Mikochik, *The Constitution and the Americans with Disabilities Act: Some First Impressions*, 64 TEMPLE L. REV. 619 (1991); John J. Sarno, *The Americans with Disabilities Act: Federal Mandate To Create an Integrated Society*, 17 SETON HALL LEGIS. J. 401 (1993); Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923; Floyd D. Weatherspoon, *The Americans with Disabilities Act of 1990: Title I and Its Impact on Employment Decisions*, 16 VT. L. REV. 263 (1991); C. Geoffrey Weirich, *Reasonable Accommodation Under the Americans with Disabilities Act*, 7 LAB. LAW. 27 (1991).

10. Student commentary also abounds. E.g., Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423 (1991); James C. Dugan, Note, *The Conflict Between "Disabling" and "Enabling" Paradigms in Law: Sterilization, the Developmentally Disabled, and the Americans with Disabilities Act of 1990*, 78 CORNELL L. REV. 507 (1993); James V. Garvey, Note, *Health Care Rationing and the Americans with Disabilities Act of 1990: What Protection Should the Disabled Be Afforded?*, 68 NOTRE DAME L. REV. 581 (1993); Loretta K. Haggard, Note, *Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act*, 43 WASH. U. J. URB. & CONTEMP. L. 343 (1993); Kathleen D. Henry, Note, *Civil Rights and the Disabled: A Comparison of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 in the Employment Setting*, 54 ALB. L. REV. 123 (1989); Lisa A. Lavelle, Note, *The Duty To Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only To Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135 (1991); Edward J. McGraw, Note, *Compliance Costs of the Americans with Disabilities Act*, 18 DEL. J. CORP. L. 521 (1993); Bryan P. Neal, Note, *The Proper Standard for Risk of Future Injury Under the Americans with Disabilities Act: Risk to Self or Risk to Others*, 46 SMU L. REV. 483 (1992).

11. Anne B. Thomas, *Beyond the Rehabilitation Act of 1973: Title II of the Americans with Disabilities Act*, 22 N.M. L. REV. 243 (1992). In addition, one article goes into employment issues under the Americans with Disabilities Act for state and local governmental employers, Galanos & Price, *supra* note 7, and another discusses title

es stress the consistencies between section 504 and title II obligations, there remains a need to explore the areas in which the laws are not fully consistent and to attempt to reconcile the inconsistencies. Moreover, although title II is also similar to the other titles of the ADA that cover private activity, there remains a need to clarify and evaluate the differences that exist between the section 504–title II combination—which controls state and local government—and the disability discrimination prohibitions that control private enterprise.¹² The most relevant prohibitions for this discussion are those of title I, which cover employment in general, and those of title III, which cover public accommodations other than government services.

This Article seeks to fill the gap in the scholarly commentary, making a comprehensive comparative evaluation. For example, from the perspectives of persons with disabilities, some benefits accrue from section 504's approach to the employment of persons who might be thought to pose a danger to others or whose cases will not benefit from administrative exhaustion. From the same perspective, there are some disadvantages to section 504's approach to reassignment of workers who cannot do their current jobs. Both benefits and disadvantages exist with section 504's requirement of program accessibility as a whole in comparison to the specific duty to make modest efforts to render every building accessible, called for in the title of the ADA applicable to

II of the Act in relation to the duty to provide integrated public services, Cook, *supra* note 9. Significant academic commentary also exists with respect to § 504 of the Rehabilitation Act of 1973. *E.g.*, Gary Lawson, *AIDS, Astrology, and Arline: Towards a Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237 (1989); Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435 (1986); Judith W. Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984); Mark E. Martin, Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881 (1980); Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863 (1988); Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997 (1984).

12. The provisions that forbid disability discrimination by the federal government are beyond the scope of this Article. In addition to § 504, they include 29 U.S.C. § 791(b), (g) (Supp. V 1993) and 42 U.S.C. § 12209 (Supp. V 1993).

private business. The remedial provisions of title III appear deficient when compared to those of section 504 and title II.

Prudence might dictate that these benefits and disadvantages of the statutes be observed in operation for several years before making specific proposals for law reform. Nevertheless, in the Conclusion to this Article, I suggest some areas for legislative revision.

This Article begins by sketching the comparative histories of section 504 of the Rehabilitation Act and title II of the ADA. It continues with a discussion of the similarities and differences between the two laws. It next makes a comparative evaluation of section 504 and title II. The Article continues with a description of the titles of the ADA that apply to private businesses, noting the similarities between the combined effect of section 504 and title II on the government and the effect of those provisions on private enterprise. It explains differences between the two sets of obligations and offers an evaluation of the approaches taken by the two sets of statutes. The Article concludes by pointing out areas that policy makers should consider for future legislative revision.

I. COMPARATIVE HISTORIES OF SECTION 504 AND TITLE II

Section 504 is the product of a long legislative process, protracted by disputes that had nothing to do with section 504 itself. Although the section provoked no conflict—and, indeed, little attention—in Congress, a major battle nevertheless ensued over the promulgation of regulations enforcing it. A shorter, more thoughtful, and less contentious process brought forth the statute and regulations for title II.

A. *Section 504*

In January of 1972, Senator Hubert Humphrey proposed amending title VI of the Civil Rights Act of 1964¹³ to prohibit discrimination based on disability in all programs receiving

13. Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252-53 (1964) (current version at 42 U.S.C. §§ 2000d to 2000d-4a (1988)).

federal financial assistance.¹⁴ Although the amendment to the Civil Rights Act never passed, Congress did amend a pending reauthorization of the law governing rehabilitation services for persons with disabilities to include the prohibition on discrimination in federally-supported programs.¹⁵ President Nixon pocket-vetoed the bill, arguing that the rehabilitation services it authorized cost too much.¹⁶ Congress passed a lower-cost bill, but failed to avert a second veto.¹⁷ After override failed, it passed a bill that authorized a still lower level of spending, and the President signed it on September 26, 1973.¹⁸ The debates, reports, veto messages, and other materials pertaining to the final legislation do not indicate any controversy over section 504.¹⁹

Drafting and promulgation of section 504's regulations took an exceedingly long time. From 1974 to 1976, the Department of Health, Education and Welfare (HEW) debated whether alcoholics, drugs users, and homosexuals were covered by the law and struggled with an inflationary impact statement.²⁰ In April of 1976, "President Ford ordered HEW 'to coordinate the implementation of section 504'" with respect to federal policies and procedures.²¹ HEW finally published the rules on July 16.²² The proposed rules garnered more than 700 written comments. The Department also held twenty-two public hearings on the rules.²³

Still, the proposed rules did not appear as final regulations.

14. See S. 3044, 92d Cong., 2d Sess. (1972); 118 CONG. REC. 525-26 (1972).

15. S. Rep. No. 318, 93d Cong., 1st Sess. 13 (1973), reprinted in 1973 U.S.C.C.A.N. 2076, 2087.

16. *Id.*

17. *Id.* at 14, reprinted in 1973 U.S.C.C.A.N. at 2088.

18. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-797b (1988 & Supp. V 1993)); see JOSEPH BALLARD ET AL., SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS 45 (1982).

19. Nevertheless, efforts to strengthen and expand § 504 by adding an amendment to the Civil Rights Act of 1964 for disability discrimination continued through the mid-seventies. See Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMPLE L. REV. 387, 389 (1991).

20. BALLARD, *supra* note 18, at 46.

21. ERWIN L. LEVINE & ELIZABETH M. WEXLER, PL 94-142: AN ACT OF CONGRESS 112 (1981).

22. 41 Fed. Reg. 29,548 (1976) (codified at 45 C.F.R. pt. 84 (1994)).

23. LEVINE & WEXLER, *supra* note 21, at 112.

After President Ford lost the 1976 election, the outgoing Secretary of HEW expressed the belief that the new administration should be given the opportunity to review the regulations before they appeared.²⁴ It took a lawsuit and ultimately a sit-in in the office of the new Secretary before he agreed to sign the regulations.²⁵ They went into effect June 3, 1977.²⁶

B. Title II

In comparison to the battles fought over the Rehabilitation Act of 1973 and the section 504 regulations, the process that led to title II of the ADA and its regulations was easy. Section 504 already covered most governmental units, and title II was perceived as merely extending that coverage a small degree. Indeed, little attention was given to any unique problems of state and local government employers and employees when the Act was drafted.²⁷ Documents from the legislative history of title II display strong support for the terms of section 504 and its regulations as well as support for court interpretations emphasizing the need to make accommodations and to provide services in the most integrated setting.²⁸

Quite possibly, these ideas about accommodation and integration were nowhere in the consciousness of the legislators when they passed section 504 seventeen years before. Before the development of the section 504 regulations, "reasonable accommodation" was not a term of art.²⁹ Congress placed the words in a 1972 amendment to title VII of the Civil Rights Act of 1964 with

24. *Id.*

25. *Id.* at 112-13; see Cook, *supra* note 9, at 394.

26. LEVINE & WEXLER, *supra* note 21, at 113.

27. Galanos & Price, *supra* note 7, at 935-36.

28. *E.g.* H.R. REP. NO. 485, *supra* note 4, pt. 1, at 26, reprinted in 1990 U.S.C.C.A.N. at 270.

29. Before 1978, the Supreme Court's use of "reasonable accommodation" included diverse cases applying it to the balance between, for example, inmate interests and institutional needs regarding prison discipline, *Baxter v. Palmigiano*, 425 U.S. 308, 324 (1976) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 572 (1974)), communication needs of incumbent office holders and campaign controls regarding congressional photographic services, *Buckley v. Valeo*, 424 U.S. 1, 84 n.112 (1976), and competing interests in railroad regulation, *Interstate Commerce Comm'n v. Oregon Pac. Indus.*, 420 U.S. 184, 193 n.2 (1975) (Powell, J., concurring).

respect to accommodation of religious differences,³⁰ but the Supreme Court gave that use of the term a very restrictive meaning.³¹ The authors of the section 504 regulations, like the later drafters of the ADA, intended something far more expansive.³²

The ADA as a whole had little difficulty once the White House and disability advocates came to terms. Some dispute arose in the conference committee concerning whether the law should apply to congressional employees and what provisions should be made for persons with contagious diseases who handle food.³³ Compromises had previously been reached on a few issues of coverage, such as whether drug users, persons with sex-related disorders, or homosexuals might be characterized as persons with disabilities.³⁴ The meaning of reasonable accommodation and undue hardship generated some controversy. Congress rejected an amendment to limit the accommodations considered reasonable in employment situations to those costing ten percent of the annual salary of the relevant employee.³⁵ Legislators reached compromises excluding religious entities and private clubs from some of the law's obligations.³⁶ One authority has speculated that the law would have passed even if proponents of the legislation had taken a more rigid approach and made fewer compromises.³⁷

The title II regulations also generated some controversy, but dramatically less than that generated by the ADA regulations covering public accommodations run by private enterprise. The Department of Justice received just over one hundred comments addressed solely to title II, in contrast to 2900 regarding the public accommodations rules.³⁸ Issues raised over the title II

30. 42 U.S.C. § 2000e(j) (1988).

31. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (finding that an employer need not give an employee Saturdays off for religious reasons, and that duty of accommodation is de minimis).

32. 28 C.F.R. § 42.511 (1993); H.R. REP. NO. 485, *supra* note 4, pt. 2, at 57, *reprinted in* 1990 U.S.C.C.A.N. at 339.

33. Burgdorf, *supra* note 9, at 433 n.112.

34. *Id.* at 452.

35. *Id.* at 517.

36. *Id.* at 518.

37. *Id.* at 521.

38. Nondiscrimination on the Basis of Disability in State and Local Government

regulations included whether particular ailments (traumatic brain injury, multiple chemical sensitivity) needed to be included as disabling conditions. The Department resisted a separate listing for traumatic brain injury and rejected a categorical inclusion of chemical sensitivity.³⁹ Many commenters wanted to strengthen obligations to integrate persons with disabilities into mainstream public programs, but the Department demurred, expressing concern over the inflexibility of such requirements and noting the permissibility of some separate programming under section 504.⁴⁰ In response to commenters' requests, the Department added a general requirement of curb ramps at intersections of altered or newly constructed streets.⁴¹ New accessibility standards for jails and prisons, public rights of way, courthouses, and other specifically governmental facilities were proposed at the end of 1992 and should appear in final form shortly.⁴²

II. SIMILARITIES BETWEEN SECTION 504 AND TITLE II

As noted, Congress intended section 504 and title II to have many more similarities than differences. The similarities between section 504 and title II comprise duties, excuses for failure to act, and remedies.

A. Duties

Duties imposed by the two statutes may be analyzed by looking at each law in turn, noting first general terms and employment duties, then duties relevant to program accessibility.

Services, Notice of Final Rulemaking, 56 Fed. Reg. 35,694, 35,694-95 (1991) [hereinafter Nondiscrimination Notice].

39. *Id.* at 35,698-99.

40. *Id.* at 35,703.

41. *Id.* at 35,711; see *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993) (requiring curb cuts under title II), *cert. denied*, 114 S. Ct. 1545 (1994).

42. See Notice of Proposed Rule Making, 57 Fed. Reg. 60,612 (1992). An interim final rule, effective December 20, 1994, appeared on June 20, 1994. 59 Fed. Reg. 31,676 (1994) (to be codified at 36 C.F.R. § 1191).

1. Section 504

The substantive command of section 504 consists of a single sentence: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"⁴³ The section 504 regulations amplify this directive by generally requiring opportunities to participate and equal opportunities to achieve the same benefits, and by prohibiting the provision of different or separate assistance or retaliation against persons who assert section 504 rights.⁴⁴

In the specific area of employment, the law's regulations bar discrimination in recruitment, advertising, hiring, promotion, pay and benefits, job assignments, training, employer-sponsored social programs, and other work conditions.⁴⁵ Covered employers must make reasonable accommodations for the known physical and mental limitations of an otherwise qualified applicant or employee unless the employer can demonstrate from an individualized assessment of the individual that the accommodation would impose an undue hardship on the operation of the program.⁴⁶ The employment regulations also bar discriminatory employment criteria and preemployment inquiries.⁴⁷

43. 29 U.S.C. § 794(a) (Supp. V 1993). The first ellipsis in the quoted material is a reference to the definition of a person with a disability elsewhere in the Rehabilitation Act; the second is the extension of the statute to programs and activities conducted by federal executive agencies and by the United States Postal Service. *See id.*

44. 28 C.F.R. § 42.503(b) (1993). Each federal agency has promulgated regulations for recipients of federal funding under its purview. *See* BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES*, at app. B (1991) (listing regulations promulgated under § 504). Although there are minor differences, the regulations are largely identical. This Article generally will make reference to those promulgated by the Department of Justice for activities that it funds.

45. 28 C.F.R. § 42.510(b) (1993).

46. *Id.* § 42.511(a). Reasonable accommodation may include making facilities accessible to persons with disabilities, restructuring jobs, modifying work schedules, acquiring equipment or devices, and providing readers and interpreters. *Id.* § 42.511(b). Factors considered in determining undue hardship include the overall size of the program—the number of employees and facilities and the size of the budget. *Id.* § 42.511(c)(1).

47. *Id.* §§ 42.512-.513.

As to program accessibility, the other area with more than procedural or definitional terms, the section 504 regulations bar discrimination in the administration of programs conducted by state and local government⁴⁸ and require that the program or activity operated by a federally funded entity, when viewed in its entirety, be readily accessible to persons with disabilities.⁴⁹ The regulation, however, does not require recipients to make each of their existing facilities or every part of a facility accessible to and usable by persons with disabilities.⁵⁰ Covered entities have to give priority to methods of accessibility that provide persons with disabilities the most integrated setting appropriate to obtain full benefits from the program.⁵¹

The regulations treat new facilities more strictly than old ones, recognizing the cost-effectiveness of accessible design. The recipient must design and construct facilities begun after the 1977 effective date of the section 504 regulations so that they are readily accessible to persons with disabilities.⁵² Alterations must be made in an accessible manner to the maximum extent feasible.⁵³ Compliance with the Uniform Federal Accessibility Standards (UFAS) meets the accessibility requirements.⁵⁴

2. Title II

Title II's statutory language restates section 504 in its general terms: "[N]o 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."⁵⁵ The ADA prohibits retaliation and coercion just as the

48. *Id.* § 42.520.

49. *Id.* § 42.521(a).

50. *Id.* The identical provision governing education is found at 34 C.F.R. § 104.22(a) (1993).

51. 28 C.F.R. § 42.521(b). Providers of services with fewer than fifteen employees may refer persons elsewhere if they cannot serve them. *Id.* § 42.521(c).

52. *Id.* § 42.522(a).

53. *Id.*

54. *Id.* § 42.522(b) (citing the UFAS regulations in 41 C.F.R. § 101-19.6 app. A (1993)).

55. 42 U.S.C. § 12132 (Supp. V 1993).

section 504 regulations do.⁵⁶

Rather than provide greater specificity on employment, program accessibility, or other matters, title II requires that the Attorney General promulgate regulations consistent with the section 504 regulations. For employment, accessibility of new facilities, and other topics, the regulations must be consistent with those developed by the Department of Justice in its role coordinating the implementation of section 504 for other federal agencies.⁵⁷ For accessibility of existing facilities and communications, the regulations must be consistent with Justice's section 504 rules for its own activities.⁵⁸

The employment regulations actually incorporate the section 504 regulations only for entities that are not also subject to the jurisdiction of title I⁵⁹—essentially, public agencies with fewer than fifteen employees. For those public entities covered by title I, the regulations incorporate the title I employment regulations. The basics of the employment regime are the same for both sets of regulations and are accordingly the same as the rules the regulations impose on recipients under section 504.

A reasonable accommodation test applies in employment covered by title II, and this test is intended to be the same as that applied in the regulations for sections 501, 503, and 504 of the Rehabilitation Act.⁶⁰ Indeed, the title II legislative history regarding reasonable accommodation in employment specifically mentions the obligation of a large state agency to employ readers for blind caseworkers,⁶¹ an accommodation that was required in a case decided under section 504.⁶² Like the section 504 regulations, the title I employment regulations (made applicable to most title II entities) bar practices that have a disparate

56. *Id.* § 12203; see 28 C.F.R. § 35.134 (1993) (title II); 28 C.F.R. § 42.503(b)(1)(vii) (1993) (§ 504).

57. 42 U.S.C. § 12134 (Supp. V 1993).

58. *Id.*

59. 28 C.F.R. § 35.140(b)(2) (1993).

60. *Id.* § 35.140; see H.R. REP. NO. 485, *supra* note 4, pt. 3, at 50, *reprinted in* 1990 U.S.C.C.A.N. at 473.

61. H.R. REP. NO. 485, *supra* note 4, pt. 3, at 51, *reprinted in* 1990 U.S.C.C.A.N. at 474.

62. *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 118 (1985).

negative impact on employment of persons with disabilities unless the employer establishes business necessity.⁶³ As with section 504, discriminatory preemployment inquiries and medical screening practices are barred.⁶⁴

An even closer harmony exists for program accessibility. The title II regulation on accessibility is not only consistent with the parallel section 504 regulation, the first part of it is virtually identical.⁶⁵ Not only must each program be accessible as a whole, but covered entities also must give priority to methods of accessibility that provide persons with disabilities the most integrated setting appropriate to obtain full benefits from the program.⁶⁶ This standard was drawn from section 504 interpretations that rejected the idea that separate but equal services were permissible, reasoning that they perpetuate the seeming invisibility of persons with disabilities.⁶⁷ Surcharges are generally prohibited under title II, as they are under section 504.⁶⁸ The regulation permits small public entities that cannot serve persons with disabilities without making significant program alterations to make referrals to other entities under circum-

63. 29 C.F.R. § 1630.7 (1993).

64. *Id.* § 1630.13.

65. The title II regulation reads:

A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

28 C.F.R. § 35.150(a) (1993). The third paragraph codifies case law interpretations of § 504. See *infra* text accompanying notes 78-79.

66. 28 C.F.R. § 42.521(b) (1993). Providers of services with fewer than fifteen employees may refer persons elsewhere if they cannot serve them. *Id.* § 42.521(c).

67. H.R. REP. NO. 485, *supra* note 4, pt. 3, at 50, reprinted in 1990 U.S.C.C.A.N. at 473.

68. 28 C.F.R. § 35.130(f) (1993) (title II); 34 C.F.R. § 104.39(b) (1993) (§ 504 provision applicable to private education programs).

stances similar to those applicable to section 504.⁶⁹

The title II provisions on structural change apply the same distinction between new and old construction that the section 504 regulations employ. They impose the same obligations: conform with UFAS for new structures and significantly modified portions of existing structures.⁷⁰ The Department of Justice rejected suggestions that it impose Americans with Disabilities Act Accessibility Guidelines (ADAAG) on the ground that Congress wanted the standards of section 504 and title II to be identical, and section 504 permitted use of UFAS.⁷¹

The remainder of title II—and the vast majority of its statutory language—covers public ground transportation provided by state and local government. Pre-ADA interpretations of section 504 on public transportation sometimes conflicted.⁷² To end this conflict and prevent future conflict between section 504 and title II, Congress provided that the public transportation terms of title II would simultaneously work identical amendments to section 504.⁷³ In this manner, Congress prevented the array of detail that it enacted into law from clashing with an equally sized array of detail created by courts interpreting section 504. Congress also reversed section 504 interpretations that it felt were unduly restrictive in the field of public transportation.⁷⁴

B. *Excuses*

In the area of employment, section 504 and title II apply the same limit to the obligation to provide reasonable accommodation—the employer need not provide an accommodation that would cause undue hardship.⁷⁵ Hardship depends on the size of

69. 28 C.F.R. § 35.150(a)(1), (3) (1993) (title II); *id.* § 42.521(c) (§ 504).

70. 28 C.F.R. § 35.150 (existing facilities); *id.* § 35.151 (new construction and alterations) (1993).

71. Nondiscrimination Notice, *supra* note 38, at 35,710-11.

72. *See, e.g.,* Skinner v. Eastern Paralyzed Veterans Ass'n, 881 F.2d 1184, 1191-93 (3d Cir. 1988) (reciting the muddled history of court and regulatory interpretations of § 504, especially regarding public transportation). c

73. 42 U.S.C. §§ 12142-12162 (Supp. V 1993).

74. *See* H.R. REP. NO. 485, *supra* note 4, pt. 2, at 89, *reprinted in* 1990 U.S.C.C.A.N. at 371 (suggesting that misinterpretations of § 504 had limited its reach regarding some persons with impairments that did not necessitate the use of wheelchairs).

75. 28 C.F.R. § 42.511(a) (1993) (§ 504); 29 C.F.R. § 1630.15(d) (1993) (title I

the employer and the availability of resources, including outside grants and, if offered, the sharing of accommodation costs by the employee.⁷⁶ Congress specifically intended the undue burden test used in employment matters under title II to be identical to that applied in the regulations for sections 501, 503, and 504 of the Rehabilitation Act of 1973.⁷⁷

For program accessibility and access to existing facilities, both section 504 and title II apply an undue burden standard, embracing the idea that covered entities are not obliged to make fundamental alterations in their programs. The title II regulations are somewhat more explicit than those of section 504, however. They expressly state that the law does not require public entities to take action that would (1) threaten or destroy the historic significance of property, (2) result in a fundamental alteration in the nature of a service, program, or activity, or (3) impose undue financial and administrative burdens.⁷⁸ Nevertheless, case law under section 504 has established that covered entities need not engage in actions that would cause either a fundamental alteration in their programs or an undue burden.⁷⁹

regulation applicable to title II).

76. 28 C.F.R. § 42.512(c) (1993) (§ 504); 29 C.F.R. § 1630.2 (1993) (title I regulation applicable to title II).

77. H.R. REP. NO. 485, *supra* note 4, pt. 3, at 50, *reprinted in* 1990 U.S.C.C.A.N. at 473. Interestingly, the sections referred to other than § 504 confer duties of affirmative action for employees with disabilities on federal agencies and federal contractors. Incorporation of a standard applicable to entities under such a duty raises the possibility that Congress imposed a more difficult standard for employers to meet than that applied in § 504 cases. *See infra* notes 161-63 and accompanying text (discussing possible effective congressional revision of § 504 by passage of title IV).

78. 28 C.F.R. § 35.150(a)(2)-(3) (1993). This excuse is hedged significantly by the requirement that the public entity demonstrate the fundamental alteration or undue burden. The head of the entity or that person's designee has to make such a decision after considering all resources available and must make a written statement of reasons. Other actions to ensure that persons with disabilities receive benefits are still required. *Id.* § 35.150(a)(3). Audio-visual presentations and other steps may furnish means of access to historic properties that cannot be rendered physically accessible. *Id.* § 35.510(b)(2).

79. *See, e.g.,* Alexander v. Choate, 469 U.S. 287 (1985) (holding federal grantees do not have to make distributive decisions in a way most favorable to persons with disabilities); Southeastern Community College v. Davis, 442 U.S. 397 (1979) (holding that a college's reasonable physical fitness requirements for its nursing program

Undue burden operates only as a limit on covered entities' obligations with respect to program accessibility as a whole and the operation of facilities already in existence. Under title II, undue burden does not excuse a failure to make altered or new facilities accessible.⁸⁰ Section 504 applies an identical rule.⁸¹

C. Remedies

Title II incorporates by reference the remedies of section 504.⁸² These remedies are cumulative: neither section 504 nor title II⁸³ preempts constitutional, federal statutory, or state law claims. Thus, additional relief may be obtained from assertion of claims based on those provisions.⁸⁴ The topic of remedies under section 504 and title II includes both the procedural mechanisms the claimant may pursue and the relief a victorious claimant can obtain.

With regard to procedural mechanisms, section 504 carries with it a private right of action for damages and injunctive relief,⁸⁵ and title II incorporates that remedy. Significantly, section 504 does not require exhaustion of administrative remedies as a prerequisite to a suit,⁸⁶ although many other statutes, including title I of the ADA, require some form of exhaustion for

were not barred by § 504).

80. *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1545 (1994); see H.R. REP. NO. 485, *supra* note 4, pt. 3, at 50, *reprinted in* 1990 U.S.C.C.A.N. at 473 ("The specific sections on employment and program access in existing facilities are subject to the 'undue hardship' and 'undue burden' provisions of the regulations which are incorporated in § 504. No other limitation should be implied in other areas.").

81. 28 C.F.R. § 42.522(a) (1993).

82. See 42 U.S.C. § 12133 (Supp. V 1993) ("The remedies, procedures, and rights set forth in § 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of § 12132 of this title.").

83. *Id.* § 12201(b).

84. See H.R. REP. NO. 485, *supra* note 4, pt. 3, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 475 (discussing rule that remedies are not preempted).

85. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 631 (1984) (allowing employment discrimination action under § 504 for monetary relief).

86. *Tuck v. HCA Health Servs.*, 7 F.3d 465 (6th Cir. 1993); see also *Smith v. Robinson*, 468 U.S. 992 (1984) (recognizing general absence of exhaustion requirement for § 504 claims); *Cannon v. University of Chi.*, 441 U.S. 677 (1979) (not requiring exhaustion for claim under closely analogous statute).

employment discrimination matters.⁸⁷ Title II's legislative history makes clear that its drafters meant to exclude private actions brought under it from a requirement of administrative exhaustion, in harmony with section 504.⁸⁸ The Department of Justice has recognized this fact in various regulatory materials it has developed.⁸⁹

The early case law supports this understanding, but not uniformly. In *Petersen v. University of Wisconsin Board of Regents*,⁹⁰ the court did not require exhaustion in a title II employment discrimination case. According to his complaint, Peterson lost his job with the University of Wisconsin's Small Business Development Center when he requested a reappointment at eighty percent time because of limits imposed on him by a disabling condition.⁹¹ Though he could have continued to work with the reduction in the hours of his job, the university would not agree to the accommodation.⁹² The university moved to dismiss the case on the ground that Petersen filed directly in court without first filing with the Equal Employment Opportunity Commission, the step that would be required for a title I complaint.⁹³ The court denied the motion, reasoning that title II adopted the remedies of section 504, that section 504 did not require exhaustion, and that the legislative history of title II and the official explanation of the regulations promulgated under it established that, as with section 504, no exhaustion was required.⁹⁴ The court noted that the title II regulations adopt the requirements of the title I regulations for entities covered by

87. See 42 U.S.C. § 12117(a) (Supp. V 1993) (incorporating remedial provisions of title VII of the Civil Rights Act of 1964).

88. H.R. REP. NO. 485, *supra* note 4, pt. 2, at 98, *reprinted in* 1990 U.S.C.A.A.N. at 381 ("As with § 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."). Commentators are in accord with the position taken in the text. See, e.g., Burgdorf, *supra* note 9, at 468.

89. 28 C.F.R. §§ 35.170.178, app. A (1993); U.S. DEPT OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL 48 (1992).

90. 818 F. Supp. 1276 (W.D. Wis. 1993).

91. *Id.*

92. *Id.* at 1277.

93. *Id.*

94. *Id.* at 1279-80.

title I, but ruled that the title II provisions adopted only the substantive standards of title I, not the procedural requirements, which are found in a separate section of the Equal Employment Opportunity Commission rules.⁹⁵

In contrast to *Petersen*, the court in *Kent v. Director, Missouri Department of Elementary and Secondary Education*⁹⁶ dismissed an employment discrimination claim for failure of the plaintiff to obtain a right-to-sue letter certifying exhaustion of the administrative process.⁹⁷ The plaintiff, however, although suing the state government, relied only on title I of the Act, and the court never considered the possibility that exhaustion might be excused if the claim were brought under title II.⁹⁸ Although requiring exhaustion of administrative remedies has whatever benefit may inhere in attaining consistency with title I's exhaustion rule, such a requirement would be quite inconsistent with both Congress's general intention that title II conform to section 504 and the specific congressional statements that exhaustion not be required in title II cases. While drafting the legislation, the congressional committees must have been aware that a large fraction of title II cases would be employment related,⁹⁹ but the statements in their reports make no exception for employment cases.¹⁰⁰ The better reasoned precedent supports

95. *Id.* at 1280.

96. 792 F. Supp. 59 (E.D. Mo. 1992), *remanded for reinstatement of action*, 989 F.2d 505 (8th Cir. 1993). The opinion is the district court's adoption of a magistrate's recommended disposition; the plaintiff appeared pro se. As the court noted, the case actually challenged the department's failure to provide rehabilitation services to improve the plaintiff's employability, rather than denial of a job or promotion from the department, and plaintiff's argument was that the department committed religious discrimination, rather than disability discrimination, by refusing to serve him unless he agreed to a psychological examination. *See id.* at 60-61.

97. *Id.* at 60. The dismissal was without prejudice. *Id.*

98. The court did mention the possibility that a claim might exist under title II. *Id.* at 61.

99. A large percentage of § 504 cases, including some of the best-known ones, such as *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), and *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981), were employment cases.

100. A separate matter is whether exhaustion requirements are beneficial in cases alleging disability discrimination in employment. As noted below, the no-exhaustion rule has some virtue, even if its benefits were not apparent to the drafters of title I. *See generally infra* text accompanying notes 227-35.

the conclusion that no exhaustion rule should apply to title II employment matters.¹⁰¹

Beyond remedial procedure lies relief. The relief that an individual may receive in administrative proceedings under section 504 and title II is an order or agreement that the funded or public entity must obey the antidiscrimination requirements or suffer termination of federal funding or other federal administrative action.¹⁰² Relief available in a private judicial action under section 504, which is the relief made applicable to title II private actions,¹⁰³ includes injunctive relief, and, in appropriate cases, compensatory and punitive damages.¹⁰⁴ In general, however, units of state and local government are immune from punitive damages in civil rights actions such as those brought under section 504.¹⁰⁵ Attorneys' fees and expenses are

101. Cases in accord with *Petersen* include: *Doe v. County of Milwaukee*, 871 F. Supp. 1072 (E.D. Wis. Jan. 10, 1995); *Binetti v. Illinois Dep't of Transp.*, No. 94 C 2694 1994 WL 724866 (N.D. Ill. Dec. 22, 1994); *Ethridge v. Alabama*, 847 F. Supp. 903 (M.D. Ala. 1994). Other title II cases that do not require exhaustion include *Noland v. Wheatley*, 835 F. Supp. 476 (N.D. Ind. 1993), and *Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993). Neither case concerns employment, however. See generally *Finley v. Giacobbe*, 827 F. Supp. 215 (S.D.N.Y. 1993) (denying dismissal of § 504, ADA, and constitutional claims, though state notice of claim statute was not followed; noting absence of exhaustion requirement for § 504 and title II; and citing *Petersen* with approval).

102. 28 C.F.R. § 42.530 (1993) (incorporating by reference 28 C.F.R. §§ 42.106-110 (1993)) (§ 504); 28 C.F.R. §§ 35.172-174 (1993) (title II).

103. 42 U.S.C. § 12133 (Supp. V 1993).

104. The remedial provision for § 504 states that in actions against entities other than the federal government, the remedies are those of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, for certain other kinds of discrimination in federally funded activity. These remedies have been construed to include injunctions, e.g., *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982), compensatory damages, e.g., *Gelman v. Department of Educ.*, 544 F. Supp. 651 (D. Colo. 1982), and punitive damages, see, e.g., *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984). See generally *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028 (1992) (finding damages available in action under Title IX of the Education Amendments of 1972). In employment matters, the remedies are subject to the provisions of the Civil Rights Act of 1991. See *infra* notes 107-08, 225 and accompanying text.

105. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (holding municipality immune from claim of punitive damages in civil rights action brought under 42 U.S.C. § 1983); see DAN B. DOBBS, LAW OF REMEDIES § 3.11(1), at 318 (2d ed. 1993) ("Public entities . . . are usually protected from punitive liabilities in the absence of a special statute . . .").

available to the successful claimant in both administrative and judicial proceedings.¹⁰⁶

In employment matters, applicable provisions of the Civil Rights Act of 1991 entitle the winning claimant to injunctive and monetary relief, subject to limits based on the size of the employer.¹⁰⁷ Governmental entities, however, explicitly are granted immunity from punitive damages in employment actions brought under title II.¹⁰⁸

One court has expressed uncertainty whether title II fully incorporates the monetary remedies of section 504. In *Coleman v. Zatechka*,¹⁰⁹ the district court noted that title II incorporates the relief provision for the antidiscrimination portions of the Rehabilitation Act, but that this Rehabilitation Act provision does not explicitly call for compensatory and punitive relief.¹¹⁰ Instead, courts have implied those remedies. Nevertheless, the legislative history of title II dispels any ambiguity on this subject. The House Committee Report states that Congress intended to incorporate the "full panoply of remedies available" in Rehabilitation Act cases,¹¹¹ and even cites a case that awarded damages against a governmental unit for a section 504 violation.¹¹²

106. 29 U.S.C. § 794a(b) (1988) (concerning § 504); 42 U.S.C. § 12205 (Supp. V 1993) (concerning the ADA). The ADA is clearer in establishing that fees are available for administrative proceedings.

107. If the employer has more than 14 employees but fewer than 101 during each of 20 or more calendar weeks, the compensatory and punitive damages cannot total more than \$50,000. 42 U.S.C. § 1981a(b)(3)(A) (Supp. V 1993). If the number of employees is between 101 and 200 for the same time period, the sum of compensatory and punitive damages may not exceed \$100,000. *Id.* § 1981a(b)(3)(B). If the employer has 201 to 500 employees for the 20 weeks, the maximum is \$200,000. *Id.* § 1981a(b)(3)(C). If the employees exceed 500 for 20 weeks, the maximum compensatory and punitive damages is \$300,000. *Id.* § 1981a(b)(3)(D).

108. 42 U.S.C. § 1981a(b)(1) (Supp. 1993). *Contra* Galanos & Price, *supra* note 7, at 973. Galanos and Price do not consider § 1981a in their discussion of punitive remedies.

109. 824 F. Supp. 1360, 1374 n.30 (D. Neb. 1993).

110. *See* 29 U.S.C. § 794a (1988). Cases other than *Coleman* hold that title II does not permit monetary relief for unintentional conduct other than employment discrimination, but they rely explicitly on § 504 case law to reach that position. *E.g.*, *Tafoya v. Bobroff*, 865 F. Supp. 742 (D.N.M. 1994); *Tyler v. City of Manhattan*, 849 F. Supp. 1442 (D. Kan. 1994).

111. H.R. REP. NO. 485, *supra* note 4, pt. 3, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 475.

112. *Id.* at 52 n.62, *reprinted in* 1990 U.S.C.C.A.N. at 475 n.62 (citing *Miener v.*

Moreover, relief was a much debated topic in the framing of the ADA.¹¹³ Where Congress intended to exclude private monetary remedies, as with the title III provisions governing public accommodations operated by private businesses, it did so explicitly¹¹⁴ or by incorporating by reference provisions that had been held not to permit monetary relief.¹¹⁵ Commentators universally support the position that title II fully incorporates the monetary relief available under section 504.¹¹⁶ The issue may never receive full judicial development because any court that doubts the availability of monetary relief under title II will simply award it under section 504 against those defendants—the vast majority of public entities—covered by both statutes.¹¹⁷

III. DIFFERENCES BETWEEN SECTION 504 AND TITLE II

The differences between section 504 and its regulations and title II and its regulations include distinctions that are apparent on the face of the statutes: matters of coverage, and, to some degree, enforcement. More subtle differences exist as well because of current interpretations of section 504 that were implicitly rejected in the legislative history of title II.

A. *Facial Differences*

The most obvious difference between these two provisions is that section 504 covers all entities that receive federal financial assistance while title II covers all state and local governmental entities. *Grove City College v. Bell*¹¹⁸ initially established a highly restrictive concept of what federally assisted programs

Missouri, 673 F.2d 969 (8th Cir. 1982)).

113. See, e.g., *id.* at 88, reprinted in 1990 U.S.C.C.A.N. at 506 (discussing negotiations over remedies).

114. 42 U.S.C. § 12188(b)(4) (Supp. V 1993) (excluding punitive damages in civil suits brought by U.S. Attorney General to enforce title III).

115. *Id.* § 12188(a)(1) (incorporating provisions of Civil Rights Act not allowing monetary relief for private enforcement actions under title III).

116. TUCKER & GOLDSTEIN, *supra* note 44, at 23:10; Galanos & Price, *supra* note 7, at 973; Thomas, *supra* note 11, at 257.

117. The court did exactly that in *Coleman v. Zatechka*, 824 F. Supp. 1360, 1373 (D. Neb. 1993).

118. 465 U.S. 555 (1984).

were, holding that an entire college was not covered by the analogous title VI of the Civil Rights Act of 1964 when only the college's financial aid program was federally supported.¹¹⁹ The Civil Rights Restoration Act of 1987¹²⁰ corrected the Supreme Court's interpretation of covered entities, providing that for institutions such as universities, if one part of the entity receives the funding, the whole institution must conform to the law.¹²¹ Nevertheless, the broadening language was much clearer for institutions such as universities than for governmental units.¹²²

The current version of the Rehabilitation Act clarifies the coverage of states and municipalities without extending that coverage as far as some advocates might have hoped. A program or activity is defined as a department, agency, special purpose district, or other instrumentality of the government—or all the operations of the state or local government entity that distributes the federal financial assistance and each department, agency, or other governmental entity to which the assistance is extended.¹²³ Thus an entire city department receiving funding is covered, but nonfunded departments would not appear to be.

Title II sidesteps this coverage deficiency and extends to all units of state and local government, whether they receive federal funding or not. Of course, section 504 still covers a variety of entities that neither title II nor title III of the ADA cover, specifically private (not covered by title II) or religious-controlled (not covered by title III) institutions, including religious-controlled, private universities.

Another apparent, facial difference of section 504 and title II is the language limiting the prohibited discrimination to that "solely by reason of" disability, found only in section 504. The drafters of title II did not consider this difference significant, and omitted the term from title II. They reasoned that the "sole-

119. *Id.*

120. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended with regard to § 504 at 29 U.S.C. § 794(b) (1988)).

121. See 29 U.S.C. § 794(b)(2)(A) (1988).

122. See 42 U.S.C. § 2000d-4a (1988) (provision applicable to title VI of the Civil Rights Act of 1964).

123. 29 U.S.C. § 794(b)(1).

ly" term should be read out of section 504, as it would lead to absurd results: a person fired on the ground that she was both black and disabled would not have any claim for disability discrimination if the term were taken literally.¹²⁴ The title II legislative history noted that the term "solely" is not found in the regulations implementing section 504.¹²⁵ However, Congress may be more strongly persuaded of the insignificance of the language than the courts are. As recently as 1992, a federal district court found no cause of action under section 504 when the plaintiff alleged denial of self-medication privileges in a public health program on the two grounds that he had a disability and was unemployed.¹²⁶ The court emphasized the "solely by reason of" language of the statute.¹²⁷ This result is impossible to square with common sense or the congressional understanding of section 504 expressed in the ADA legislative history.¹²⁸ A superior approach would be to treat such mixed motivation cases in the same fashion as they are treated under title VII¹²⁹ and to follow the lead of the regulators and title II drafters by reading the word "solely" as nothing more than an ordinary

124. See H.R. REP. NO. 485, *supra* note 4, pt. 2, at 85-86, reprinted in 1990 U.S.C.C.A.N. at 368.

125. *Id.*

126. *Cushing v. Moore*, 783 F. Supp. 727 (N.D.N.Y. 1992), *vacated and remanded for filing of amended complaint*, 970 F.2d 1103 (2d Cir. 1992); see also *Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985) (finding that a disability was not the reason a librarian failed to receive a job offer). In dicta, the court in *Norcross* distinguished the proof requirements of a § 504 case from those of a title VII claim, in which the plaintiff need only show that an impermissible consideration was a factor influencing the decision. *Id.* at 116-17 n.5. See generally *Doe v. Attorney General*, 44 F.3d 715 (9th Cir. 1995) (raising issue, but declining to decide it); *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992) (declining to decide issue, but collecting Eleventh Circuit authority).

127. *Cushing*, 783 F. Supp. at 734-35.

128. See H.R. REP. NO. 485, *supra* note 4, pt. 2, at 85, reprinted in 1990 U.S.C.C.A.N. at 368.

129. See 42 U.S.C. § 2000e-2(m) (Supp. V 1993) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (interpreting previous provisions of title VII in mixed motivation case); Mark C. Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495 (1990) (criticizing the Court's interpretation).

requirement of cause in fact.¹³⁰

Finally, section 504 and title II, though embodying similar mechanisms for handling administrative complaints, have an obvious difference in administrative remedies. Funding termination works as a sanction only for those entities that receive federal funding; that is, those governed by section 504 solely or in addition to title II.¹³¹ Nonfunded entities subject to title II are vulnerable to suits brought by the Department of Justice, however, just as they are vulnerable to private actions.¹³²

B. Differences of Interpretation

It is far too early to contrast judicial interpretations of section 504 and title II. Title II cases are beginning to appear, but the reports are hardly plentiful.¹³³ Nevertheless, existing case law may support some predictions about likely differences of interpretation, even though Congress and the regulators intended the statutes to be interpreted in a consistent manner. The most persuasive evidence is the change over time in judicial interpreta-

130. Even the narrow approach to causation in disability discrimination cases proposed by Professor Lawson does not purport to do more than apply ordinary rules of cause in fact. See Lawson, *supra* note 11, at 242, 249. Nevertheless, the approach taken by Professor Lawson is subject to grave doubt. He would restrict the reach of § 504 to only those instances in which the disability medically causes a limit on physical activity. If an individual can physically do the conduct in question, the individual's physical condition is not a disability, and that individual does not qualify for protection under § 504. This interpretation is, as Lawson notes, contrary to the regulations enforcing § 504, *see id.* at 246-86, and would yield bizarre results. If, as he argues, a person with AIDS is not impaired in sexual functions, and can still have sex, *see id.* at 285-86, however unsafe it may be, so too can a blind person drive a car, however unsafe it may be.

131. See H.R. REP. NO. 485, *supra* note 4, pt. 2, at 98, *reprinted in* 1990 U.S.C.C.A.N. at 381 (describing the funding termination process).

132. *See id.*

133. Anecdotal evidence suggests that employment discrimination litigation tends to rise as the economy falls. The first wave of title VII litigation did not occur immediately after the statute was passed but rather during the economic downturn of the early 1970s. *See, e.g.,* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). This phenomenon makes sense. Employees who lose jobs are far more likely to sue than applicants who are denied them. The stakes are higher, and frequently the causal link to discriminatory motivation is clearer. The general economic growth of the recent era may be keeping litigation somewhat lower than would be the case if the economy were in a downturn.

tions of section 504 itself.

The Supreme Court's first interpretation of section 504, *Southeastern Community College v. Davis*,¹³⁴ limited the operation of the law by stressing that a person with a disability who was "otherwise qualified" was one able to do what was demanded on the job in spite of her disability.¹³⁵ It noted that some accommodation was required but emphasized that the law did not require affirmative action.¹³⁶ Applying these principles, the Court upheld a decision of a community college to deny a student who was deaf admission into its nurses' training program rather than modify the program to accommodate her.¹³⁷ Commentators have noted the narrowing effect that the interpretation had on section 504.¹³⁸ The school was not asked to demonstrate the real costs of modifying its program or allowing the student to substitute other forms of training experience.¹³⁹ The casual use of the loaded term "affirmative action" for some modifications of program requirements suggested that courts would require few modifications of any kind.¹⁴⁰

Lower court decisions after *Davis* did not fulfill the more dire predictions of the case's impact, however. Although quite a number of cases rejected requests for accommodations and program modifications,¹⁴¹ others imposed changes in job duties, academ-

134. 442 U.S. 397 (1979).

135. *Id.* at 406.

136. *See id.* at 411-12.

137. *Id.* at 414.

138. *See, e.g.*, Bonnie P. Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley: *Utter Chaos*, 12 J.L. & EDUC. 235, 245 n.21 (1983).

139. *See* Davenport, *supra* note 9, at 318. As Mr. Davenport notes, the Court did not ask whether the student could perform the essential functions of a nurse trainee, the question posed by the employment provisions of the ADA.

140. *See Davis*, 442 U.S. at 410-12.

141. *See, e.g.*, Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 718 F.2d 490 (1st Cir. 1983) (reversing order that defendant purchase buses with wheelchair lifts); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983) (refusing to require employment of person with heart condition as seasonal park technician); American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (overturning regulations requiring that federally-funded transit systems take affirmative action to accommodate persons with disabilities); Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency, 649 F.2d 71 (1st Cir. 1981) (not requiring special nuclear accident evacuation plan for persons with disabilities); Pinkerton v. Moyer, 509 F. Supp. 107 (W.D. Va. 1981) (interpreting § 504 to not require institu-

ic practices, and government services.¹⁴² Ramps became a common, if still not universal, characteristic of public buildings; accessible public transportation appeared, if somewhat late and with insufficient frequency.

In 1985, *Alexander v. Choate*¹⁴³ presented the Court an opportunity to read section 504 as a broad mandate that governmental decisions must permit full access for persons with disabilities to services that are as equally effective as services given the rest of the population. As might have been predicted from the attitudes displayed in *Davis*, the Court declined the invitation. It upheld a Medicaid plan that imposed an annual limit on days of Medicaid-covered hospitalization, even though that plan had a greater negative impact on persons with disabilities than other possible Medicaid plans would have had, and it lacked a justification to make it superior to other forms of budget control with a lesser impact.¹⁴⁴ However, the Court distinguished the adverse impact of the plan in *Choate* from claims of adverse impact in areas such as architectural barriers, transportation, job qualification, and education. It recognized that section 504 reached adverse impacts in these areas.¹⁴⁵ Moreover, it clarified *Davis*' distinction between reasonable accommodation and affirmative action, saying that *Davis* meant to exclude from the requirements of section 504 only fundamental alterations in programs.¹⁴⁶ After *Choate*, the lower courts' interpretations of sec-

tion of an educational program for children with disabilities in a school district).

142. See, e.g., *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983) (granting a preliminary injunction requiring school district to provide catheterization to child); *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982) (stating that complaint on accessibility of public transportation stated cause of action); *Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981) (requiring consideration of reasonable accommodation for postal clerk to avoid "surmountable barrier" discrimination); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976) (requiring school officials to allow children with minimal disabilities to attend school in regular public classrooms).

143. 469 U.S. 287 (1985).

144. See *id.* at 308-09. The Court noted that to require state Medicaid administrators to always implement the Medicaid plan that is the least disadvantageous to persons with disabilities would be unworkable. *Id.* at 308.

145. See *id.* at 295-99. The Court held that § 504 must be kept within manageable bounds. *Id.* at 299.

146. *Id.* at 300-01 & n.20. The Court further developed this reasoning in *School Bd. v. Arline*, 480 U.S. 273, 289 n.19 (1987), which distinguished the affirmative obligation to make reasonable accommodations from affirmative action as used in

tion 504 became noticeably more sympathetic to persons with disabilities, though *Davis* still received frequent citation.¹⁴⁷ The Court confirmed its view that the statute imposed stringent disability discrimination obligations in *School Board v. Arline*,¹⁴⁸ a 1987 case regarding a school teacher with tuberculosis. The Court defined a qualified person with a disability as one who can perform the essential functions of a job with reasonable accommodation,¹⁴⁹ rather than one who can do all the functions despite the disability.

In the legislative history of title II, the congressional committees held out *Choate* as the definitive interpretation of section 504 that it intended title II to copy.¹⁵⁰ *Davis* does not receive mention. Similarly, a few other cases, all sympathetic to the claims of persons with disabilities, appear as examples of what Congress wanted title II to accomplish.¹⁵¹ This "selective incorporation"¹⁵² of section 504 case law gives a different cast to title II than that of section 504.¹⁵³ Section 504 must live

other contexts. See Cooper, *supra* note 10, at 1431-35 (explaining distinction).

147. *E.g.*, *Nathanson v. Medical College*, 926 F.2d 1368, 1380 (3d Cir. 1991) (holding that the obligation to make workplace accommodations goes beyond rendering facilities accessible); *Arneson v. Heckler*, 879 F.2d 393, 398 (8th Cir. 1989) (remanding for consideration of alternatives for accommodating employee); *Greater Los Angeles Council on Deafness v. Baldrige*, 827 F.2d 1353, 1357 (9th Cir. 1987) (remanding for consideration of whether captioning of broadcasts was a required accommodation in light of *Choate*).

148. 480 U.S. 273 (1987).

149. *Id.* at 287 n.17.

150. "It is . . . the Committee's intent that section 202 also be interpreted consistent with *Alexander v. Choate*." H.R. REP. NO. 485, *supra* note 4, pt. 2, at 84, *reprinted in* 1990 U.S.C.C.A.N. at 367.

151. For example, the legislative history cited with approval the concurrence by Judge Mansmann in *ADAPT v. Skinner*, 881 F.2d 1184, 1203 (3d Cir. 1989) (Mansmann, J., concurring in a case that approved a separate-but-equal transportation service for persons with disabilities). Unlike the majority, Judge Mansmann would have required the transit authority to equip all newly purchased buses with wheelchair lifts. *Id.* at 1204. The House Committee cited Mansmann's views with approval. H.R. REP. NO. 485, *supra* note 4, pt. 3, at 50, *reprinted in* 1990 U.S.C.C.A.N. at 473.

152. The allusion here, of course, is to the idea of selective incorporation of protections of the Bill of Rights in the Fourteenth Amendment. See, *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that the Sixth Amendment right to a jury trial applies to states under the Fourteenth Amendment).

153. See Cook, *supra* note 11, at 415-25 (describing the integration obligations imposed by the ADA).

with all the baggage of its past. The congressional committees intended to give title II only some of that baggage, generally that most favorable to persons with disabilities.

Of course, limits on governmental accommodation still apply. *Choate* rejected a disparate impact challenge to the design of a Medicaid program, so long as some meaningful access to services remained for persons with disabilities. The Court rejected the idea that government always has to minimize the negative effects of its decisions on persons with disabling conditions.¹⁵⁴ In their work on title II, Congress and the regulators adopted the idea that the law would not require fundamental alterations in programs to accommodate persons with disabilities.¹⁵⁵

However, the congressional committees endorsed results at odds with *Davis* and its more restrictive progeny, such as decisions that required readers for blind workers,¹⁵⁶ accessible key public transit stations for persons with mobility impairments,¹⁵⁷ and the elimination of written tests for a heavy equipment operator.¹⁵⁸ If courts interpret title II faithfully in accordance with the intent of its drafters, the statute's interpretation will move away from the *Davis*-influenced interpretation.¹⁵⁹

IV. EVALUATING THE DIFFERENCES BETWEEN SECTION 504 AND TITLE II

Davis, if taken literally, casts doubt on the section 504 regulations that guarantee full program accessibility and impose clear duties of accommodation and integration on operators of funded programs. Congress was wise to shun the case when explaining

154. See *Choate*, 469 U.S. at 308-09.

155. See H.R. REP. NO. 485, *supra* note 4, pt. 2, at 84, reprinted in 1990 U.S.C.C.A.N. at 367 (citing *Choate*); see also 28 C.F.R. § 35.150(a) (1993).

156. H.R. REP. NO. 485, *supra* note 4, pt. 3, at 51, reprinted in 1990 U.S.C.C.A.N. at 474 (citing *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984)).

157. *Id.*, pt. 2, at 96-97, reprinted in 1990 U.S.C.C.A.N. at 379 (citing Department of Transportation regulations).

158. *Id.* at 71-72, reprinted in 1990 U.S.C.C.A.N. at 354 (citing *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983)).

159. See *Lavelle*, *supra* note 10, at 1138 n.22 (stating that lower federal court decisions conflict when interpreting § 504).

the import of title II. If the result is a difference of interpretation between the two laws, the difference is beneficial from the standpoint of functional equality for persons with disabilities.¹⁶⁰

Even so, the differences between the two statutes likely will be theoretical or historical rather than effective. Four factors will contribute to a similarity in interpretation of the laws, a similarity that is likely to diminish the precedential force of *Davis* and its progeny. First, most cases involving either section 504 or title II will involve both statutes, inducing the courts to interpret them to achieve a uniform result. Second, courts have widely recognized that *Choate* expanded the reach of the law, contrary to the suggestions given in *Davis*.¹⁶¹ Third, title II's legislative history is, in reality, a form of subsequent legislative history for section 504.¹⁶² Although Congress did not modify section 504's operative language, it did take the opportunity to state which interpretations of the law met its approval. Those statements should enhance the precedential value of those cases and reinforce the approach to disparate impact discrimination and reasonable accommodation that they display. Fourth, Congress subsequently modified section 504 to say that in employment cases the standards for discrimination should be the same as those in title I of the ADA, which the title II regulations also adopt for employment matters with regard to most title II-covered entities.¹⁶³ These four considerations should propel section 504 out from under its earlier, more restrictive interpretations.

160. See Mark C. Weber, *ADA Recognizes Formal Equality Is Not Equal Enough*, HUMAN RIGHTS, Spring 1992, at 2 (distinguishing formal from effective equality for persons with disabilities).

161. See cases cited *supra* note 147.

162. See *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666-71 (1980) (discussing use of subsequent legislative history). In *Choate*, the Court used legislative history from 1974 and 1978 amendments to interpret § 504, *Alexander v. Choate*, 469 U.S. 287, 306-07 n.27 (1985), as it did in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632-33 (1984).

163. 29 U.S.C. § 794(d) (Supp. V 1993).

V. SECTION 504, TITLE II, AND OTHER AMERICANS WITH DISABILITIES ACT TITLES

The portions of the ADA other than title II cover employment (title I), public accommodations operated by private entities (title III), telecommunications (title IV), and general provisions (title V). Because the most important duties imposed by section 504 and title II relate to employment and access to services, titles I and III are the most relevant for comparison.¹⁶⁴

A. *Obligations Imposed by Titles I and III of the Act*

Title I of the ADA prohibits employment discrimination against qualified persons with disabilities by all but the smallest employers. All terms and conditions of employment are covered.¹⁶⁵ Prohibitions extend to intentional discrimination¹⁶⁶ as well as practices that have an unintended negative impact on persons with disabilities.¹⁶⁷ To maintain such a practice, the employer must show that business necessity requires it, and that needed performance cannot be accomplished by reasonable accommodation.¹⁶⁸ Segregation of workers with disabilities also violates title I.¹⁶⁹ Employers must provide reasonable accommodations such as changes in schedules, modifications of work settings, and the provision of needed services to persons with disabilities.¹⁷⁰ A person is qualified to do the job if reasonable accommodation will permit the person to do the job's essential functions.¹⁷¹ However, employers need not make accommodations if an undue hardship would result.¹⁷² Undue hardship depends on the total resources of the employer, including those available from government, or, in some instances, those shared

164. Focusing on these aspects leaves aside the public transportation provisions of title II, discussed *supra* notes 73-74 and accompanying text.

165. 42 U.S.C. § 12112(a) (Supp. V 1993).

166. *Id.*

167. *Id.* § 12112(b)(1), (3), (6)-(7).

168. *Id.* § 12113(a).

169. *Id.* § 12112(b)(1).

170. *Id.* §§ 12111(9), 12112(b)(5).

171. *Id.* § 12111(8).

172. *Id.* § 12112(b)(5)(A).

by the worker.¹⁷³ A variety of application and screening procedures that may have a negative impact on persons with disabilities are prohibited.¹⁷⁴

Title III of the Act bars discrimination against persons with disabilities in a wide range of public accommodations operated by private entities. Covered accommodations comprise twelve categories of enterprises, including hotels, restaurants, theaters, arenas, stores, service providers, health care providers, schools, and recreational facilities.¹⁷⁵ Some exclusions apply, such as airlines,¹⁷⁶ residential facilities,¹⁷⁷ and entities controlled by religious organizations.¹⁷⁸ Title III outlaws discrimination on the basis of disability in the full and equal enjoyment of the goods, services, or other benefits of the covered entity.¹⁷⁹ Separation and segregation, affording unequal opportunities, and discrimination against the associates of persons with disabilities are specifically prohibited, as are practices that tend to screen out individuals with disabilities from full and equal enjoyment of the benefits of the covered business.¹⁸⁰ Title III requires reasonable modifications in policies and procedures unless doing so would fundamentally alter the nature of the goods, services, or other benefits.¹⁸¹ It also requires removal of architectural and communication barriers in existing facilities when removal is readily achievable.¹⁸² New construction and altered facilities must meet access standards.¹⁸³

173. *Id.* § 12111(10)(B).

174. *Id.* § 12112(d).

175. *Id.* § 12181(7).

176. *Id.* § 12181(10).

177. *Id.* § 12181(2)(A).

178. *Id.* § 12187.

179. *Id.* § 12182(a).

180. *Id.* § 12182(b)(1)-(2).

181. *Id.* § 12182(b)(2)(A)(ii).

182. *Id.* § 12182(b)(2)(A)(iv).

183. *Id.* § 12183. Special rules apply to service in public transportation provided by private entities. *Id.* § 12184.

B. Similarities Between the Title II-Section 504 Combination and Titles I and III

Section 504, its regulations, and its subsequent judicial interpretations were the model for all of the ADA, just as they were for title II.¹⁸⁴ Not surprisingly, the general prohibition of intentional and adverse impact discrimination leapt from section 504 to the other provisions, as did the concepts of reasonable accommodation, undue hardship, and fundamental alteration. Separation and segregation, a key target of section 504, remains a target for titles I and III. The legislative history of title II reinforces the similarities that originated with section 504 by stating that title II should be read to incorporate the prohibitions of titles I and III not inconsistent with section 504, although not to lessen any duties section 504 put into place.¹⁸⁵ More specific points of similarity may be analyzed by looking first at employment and then at accessibility.

1. Employment

Because title I governs both public and private entities with fifteen or more employees,¹⁸⁶ employment obligations imposed on government and commercial sectors are in most cases identical.¹⁸⁷ The title II employment regulations incorporate those of title I for entities large enough to be covered by title I.¹⁸⁸ The section 504 employment regulations cover the remainder of the

184. See, e.g., H.R. REP. NO. 485, *supra* note 4, pt. 2, at 23, 50, *reprinted in* 1990 U.S.C.C.A.N. at 304, 332.

185. *Id.* pt. 3, at 51, *reprinted in* 1990 U.S.C.C.A.N. at 474; *see id.* at 84, *reprinted in* 1990 U.S.C.C.A.N. at 367 ("The Committee intends . . . that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation."); *see also infra* note 214 (discussing applicable language).

186. 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

187. One difference, however, is that state and local government employers with fewer than 15 employees are prohibited from engaging in employment discrimination under title II, though they are too small to be covered under title I. The employment obligations they must meet are those of § 504, which in turn was the model for title I. H.R. REP. NO. 485, *supra* note 4, pt. 2, at 54-83, *reprinted in* 1990 U.S.C.C.A.N. at 336-66.

188. 28 C.F.R. § 35.140(b)(1) (1993).

public entities.¹⁸⁹ That contrast hides a larger similarity, for the central requirements of the title I and section 504 employment rules are the same. Both sets of rules prohibit intentional discrimination, practices with an adverse impact that are not demonstrated to be supported by business necessity, and segregation of workers with disabilities. They both require the employer to provide reasonable accommodations for the known disabilities of workers and job applicants. An employer may claim undue hardship but must demonstrate the inability to provide the accommodation in light of all the resources available. Both laws prohibit the same discriminatory application and screening procedures.

2. Access

The legislative history of title III of the ADA states explicitly that its purpose is to extend the general prohibitions against discrimination found in section 504 to privately operated businesses.¹⁹⁰ Title III prohibits private businesses from discriminating against persons with disabilities, either purposefully or unintentionally, just as section 504 does for funded entities and title II does for state and local government.¹⁹¹ Title III retains section 504's distinction between existing facilities and new or significantly altered construction, inducing those building new facilities to obtain the economies of accessible design rather than requiring all facilities to be retrofitted.¹⁹²

C. Differences Between Title II and Titles I and III

The differences between title II and titles I and III are best analyzed by discussing first the duties on employers and places of public accommodation and then the remedies available against either of those types of entities.

189. *Id.* § 35.140(b)(2).

190. H.R. REP. NO. 485, *supra* note 4, pt. 2, at 99, reprinted in 1990 U.S.C.C.A.N. at 382.

191. *Id.* at 84, reprinted in 1990 U.S.C.C.A.N. at 366.

192. *Id.* at 116, reprinted in 1990 U.S.C.C.A.N. at 399.

1. *Employment and Title I*

With regard to employment, title I of the ADA has some provisions that are different from those of section 504 and its regulations, though the differences are few. Both section 504 and the ADA exclude current users of illegal drugs, but the ADA also contains a title I provision that allows employers to hold alcoholics and current users of illegal drugs to the same behavior standards as other employees.¹⁹³ That statutory language would give another defense to entities covered by title I, but not section 504 or title II, in employment matters regarding alcoholics. Even so, the ADA amended the Rehabilitation Act to exclude, for purposes of employment, any alcoholic whose current use of alcohol prevents the person from performing the duties of the job or constitutes a direct threat to the property or safety of others.¹⁹⁴ Hence, employers are not required to excuse current abusers of alcohol who cannot perform job duties or fail the direct threat test from any uniform behavior standards.

Other safety-related employment provisions are somewhat stricter than those in title I for employers covered under title II and section 504. Title I states that qualification standards may include a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace, and that the standards may be permitted if job related, consistent with business necessity, and not rendered unnecessary by a reasonable accommodation.¹⁹⁵ Section 504's employment regulations do not have a parallel provision, though the statute excludes from its definition of an individual with a disability any person who currently has a contagious disease or infection and whose disease or infection constitutes a direct threat to the health or safety of others.¹⁹⁶ Title I's food handling provisions, which have no analogue in section 504, permit covered employers to refuse to assign persons with an infectious or communicable disease, listed by the Secretary of Health and Human Services as transmitted through handling the food supply, to

193. 42 U.S.C. § 12114(c)(4) (Supp. V 1993).

194. 29 U.S.C. § 706(8)(C)(v) (Supp. V 1993).

195. 42 U.S.C. § 12113(b).

196. 29 U.S.C. § 706(8)(D).

food-handling jobs if reasonable accommodation will not solve the problem.¹⁹⁷

Two enactments cast doubt on whether these somewhat more liberal provisions of section 504 may be given effect, especially for entities covered by both title II and section 504. First, the title II employment regulations provide that the title I regulations apply to employment in any activity conducted by a public entity that is subject to title I,¹⁹⁸ but that the section 504 regulations apply to employment in any activity that is "not also subject to the jurisdiction of title I."¹⁹⁹ This provision saves the employment rules of section 504 only for those entities that are not subject to title I—that is, for those with fewer than fifteen employees. Nevertheless, because the ADA generally preserves the rights given under other laws,²⁰⁰ employees of entities that receive federal assistance could sue under section 504 to take advantage of the section 504 rules. Employees of entities with fifteen or more employees that do not receive federal assistance, however, would be left without whatever extra advantage section 504 might confer.

Second, for all public entities, even those covered solely by section 504, the applicability of the existing language of section 504 and its regulations on employment matters is subject to doubt because of a 1992 amendment to the Rehabilitation Act. The amendment, added to section 504, states that the standards used to determine whether an activity violates section 504 in a complaint alleging employment discrimination will be those applied under title I of the ADA, including certain general provisions of that act as they relate to employment.²⁰¹ It is far from clear, however, whether Congress intended this vague language to supply extra defenses for employers against would-be food handlers or persons without contagious diseases whose disability

197. 42 U.S.C. § 12113(d). The provision also allows states and localities to regulate food handling pursuant to the Secretary's list and a reasonable accommodation standard. *Id.*

198. 28 C.F.R. § 35.140(b)(1) (1993).

199. *Id.* § 35.140(b)(2).

200. 42 U.S.C. § 12201(b) (Supp. V 1993).

201. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 506, 106 Stat. 4344, 4428 (codified as amended at 29 U.S.C. § 794(d) (Supp. V 1993)).

poses a direct threat to safety. The legislative history of the provision merely indicates a desire to clarify the meaning of section 504.²⁰² The obvious goal of harmonizing the meaning of reasonable accommodation and undue hardship in the section 504 regulations with that of the same terms in the ADA is what the proponents of the law most likely had in mind. The word "standards" is most aptly seen as embracing only such fundamental terms as reasonable accommodation and not extending to specific matters like food handling and danger from contagious disease, which other particularized statutory language addresses.

In any case, because the section 504 regulations still stand as written, and the title II regulations incorporate them for entities not subject to title I, the employees of public entities with fewer than fifteen employees and no federal assistance can take advantage of these regulations even if the employees of federally assisted entities would not be able to do so under the 1992 amendment to section 504. This odd state of affairs is the only way to give meaning to the title II employment regulations' specific incorporation of section 504 rules for those small entities.

Case law interpreting reasonable accommodation and undue hardship under section 504 presents a salient possibility of a conflict with the meaning of the same terms in title I regarding reassignment of existing employees from their current jobs that they can no longer perform because of disability to vacant jobs they can. This accommodation seems reasonable enough, but courts interpreting section 504 have held on several occasions that reassignment need not be provided if the transfer would violate the provisions of a collective bargaining agreement.²⁰³

202. *See, e.g.*, S. REP. NO. 357, 102d Cong., 2d Sess. 108 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3819 (section-by-section analysis stating in its entirety: "This section amends section 504 of the Act on nondiscrimination under federal grants and programs to clarify the standards to be used to determine whether there has been a violation under this section."). The House version of the bill did not have a comparable provision; no mention of the section appears in the debates reported in the Congressional Record in either the House or the Senate.

203. *E.g.*, *Shea v. Tisch*, 870 F.2d 786 (1st Cir. 1989); *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987); *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985); *Daubert v. United States Postal Serv.*, 733 F.2d 1367 (10th Cir. 1984); *Davis*

Unlike section 504's regulations, title I specifically describes reassignment as a reasonable accommodation.²⁰⁴ Moreover, unlike section 504 in the reassignment cases, title I applies not just to the employer, but also to the union seeking to enforce the contract's provisions.²⁰⁵ In contrast with title VII of the Civil Rights Act, the ADA affords no special protections for seniority systems.²⁰⁶ Ideally, employers and unions, aware of their duties under title I, will create exceptions in new collective bargaining agreements for reassignment of workers with disabilities.²⁰⁷ If not, or if they attempt to follow existing contract provisions without bargaining for an ad hoc modification, they may be in violation of title I and subject to remedial orders barring application of the contract provision forbidding reassignment.²⁰⁸ This result certainly will contrast with the prevailing result under section 504, although the language noted above from the 1992 Rehabilitation Act Amendments incorporating the employment standards of title I may provide courts enforcing section 504 an opportunity to reject the old case law barring reassignment and to harmonize section 504 with title I.

v. United States Postal Serv., 675 F. Supp. 225 (M.D. Pa. 1987); *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982). *Contra* *Ignacio v. United States Postal Serv.*, 30 M.S.P.B. 471 (1986).

204. 42 U.S.C. § 12111(9)(B) (Supp. V 1993).

205. *Id.* § 12111(2).

206. See 42 U.S.C. § 2000e-2(h) (1988); Joanne J. Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 3 DETROIT C.L. REV. 925, 956-58 (1991).

207. See NLRB General Counsel's Memorandum to Field Personnel on Potential Conflicts Raised by the Americans with Disabilities Act, Daily Lab. Rep. (BNA) No. 158 (Aug. 14, 1992).

208. Barbara K. Frankel, Note, *The Impact of the Americans with Disabilities Act of 1990 on Collective Bargaining Agreements*, 22 SW. U. L. REV. 257 (1992); see Mayerson, *supra* note 9, at 515. *But see* Mark C. Weber, *Comment on Bruyere*, 17 J. REHABILITATION ADMIN. 127 (1993) (arguing that in some circumstances negotiating a modification of the contract may constitute undue hardship); David S. Doty, Comment, *The Impact of Federal Labor Policy on the Americans with Disabilities Act of 1990: Collective Bargaining Agreements in a New Era of Civil Rights*, 1992 B.Y.U. L. REV. 1055 (stating that the Americans with Disabilities Act must accommodate federal labor policy).

2. *Accessibility and Title III*

The approach to accessibility employed in the section 504 and title II regulations differs somewhat from that found in title III of the ADA,²⁰⁹ which covers public accommodations such as privately owned stores and offices.²¹⁰ An enterprise covered by title III need not undertake all the effort that would be required to make each of its activities readily accessible, when viewed in its entirety, to persons with disabilities. For this reason, the standard imposed by title II is significantly higher than that imposed by title III.²¹¹ On the other hand, enterprises are required to make reasonable modifications in their policies, practices, and procedures to accommodate persons with disabilities, unless doing so fundamentally alters the nature of the enterprise.²¹² They must provide auxiliary aids and services, and remove all barriers when removal is readily achievable.²¹³

209. 42 U.S.C. §§ 12181-12189 (Supp. V 1993).

210. Private schools are covered by title III, 42 U.S.C. § 12181(7)(J) (Supp. V 1993), although the title does not apply to religious organizations or entities controlled by religious organizations. *Id.* § 12187. Private schools that receive federal financial assistance such as IDEA funds would of course be bound by § 504, 34 C.F.R. § 104.39(a) (1993), and must comply with § 504 standards for evaluation, placement, and systems of procedural safeguards, *id.* § 104.39(c); see Bangor (Me.) Pub. Schs., 20 Individuals with Disabilities Educ. L. Rep. (LRP) 278 (Dep't Educ., Off. Civ. Rts., May 28, 1993) (requiring accessible restrooms and drinking fountains, and ramps or elevators in private school receiving funding from school district). No funded private school may charge more to persons with disabilities than to those without disabilities unless the additional charge is justified by a substantial increase in cost to the school. 34 C.F.R. § 104.39(b) (1993). State laws may cover religious entities not bound by title III.

211. The "undue burden" obligation of title II and § 504 is higher than the "readily achievable" standard of title III.

Congress intended the "undue burden" standard in title II to be significantly higher than the "readily achievable" standard in title III. Thus, although title II may not require removal of barriers in some cases where removal would be required under title III, the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.

Nondiscrimination Notice, *supra* note 38, at 35,708; see Thomas, *supra* note 11, at 248 (comparing obligations of title II and title III).

212. 28 C.F.R. § 36.302(a) (1993); see 56 Fed. Reg. 35,708 (1991) (describing title II's standard as "significantly higher").

213. *Id.* §§ 36.303(a), .304(a).

The section 504 regulations and title II lack any language about removal of barriers when removal is readily achievable. Nevertheless, the legislative history of title II states that the committees intended the discrimination prohibited by title III, which includes failure to remove barriers when readily achievable, be considered discriminatory conduct in violation of title II for title II-covered entities.²¹⁴

New construction (that which was first occupied after January 26, 1993) must be readily accessible to persons with disabilities.²¹⁵ Alterations after January 26, 1992 must be readily accessible to the maximum degree feasible.²¹⁶ As with title II and section 504, settings must promote integration to the maximum extent appropriate to the needs of the individual.²¹⁷

Section 504 and title II impose self-evaluation,²¹⁸ notice,²¹⁹ and grievance procedures²²⁰ on public entities, requiring steps that should promote voluntary compliance with the general obligation of program accessibility. Public facilities of historical interest that cannot be modified must be made accessible by

214. The House Report states:

The Committee intends . . . that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation. Thus, for example, the construction of "discrimination" set forth in section 102(b) and (c) and section 302(b) should be incorporated in the regulations implementing this title. In addition, however, section 204 also requires that regulations issued to implement this section be consistent with regulations issued under section 504. Thus, the requirements of those regulations apply as well, including any requirements that go beyond titles I and II.

H.R. REP. NO. 485, *supra* note 4, pt. 2, at 84, *reprinted in* 1990 U.S.C.C.A.N. at 367; Thomas, *supra* note 11, at 244, 247 (noting that title II adopts or incorporates specific provisions and concepts from title III); *see also supra* note 185 (citing additional legislative history). The language of the Report runs in a direction contrary to one sentence of Nondiscrimination Notice, *supra* note 38, which states that "title II may not require removal of barriers in some cases where removal would be required under Title III," *id.* at 35,708. The language in the legislative history should take precedence in light of the qualified nature of the comment in the Notice of Proposed Rulemaking and the fact that the regulations' text fails to embody it.

215. 28 C.F.R. § 36.401(a) (1993).

216. *Id.* § 36.402(a).

217. *Id.* § 36.203(a).

218. *Id.* § 35.105 (title II); *id.* § 42.505(c) (§ 504).

219. *Id.* § 35.106 (title II); *id.* § 42.505(f) (§ 504).

220. *Id.* § 35.107 (title II); *id.* § 42.505(e) (§ 504).

guides or other means, such as audio-visual presentations;²²¹ no comparable obligation exists for privately operated historic sites.

For new construction, entities covered by title III must apply the Americans with Disabilities Act Accessibility Guidelines (ADAAG) to ensure that they meet accessibility requirements.²²² In an effort to honor Congress's directive to impose obligations identical to those found in section 504, the Department of Justice's title II regulations permit title II entities to apply the Uniform Federal Accessibility Standards (UFAS).²²³ Still, those public entities that choose to follow the ADAAG for new or altered construction may not behave precisely as private enterprises do under title III. For example, the ADAAG's elevator exception for most buildings of fewer than three stories or 3000 square feet does not apply to entities covered by title II.²²⁴

3. Remedies Under Title I and Title III

Under title I of the ADA, private employers are subject to monetary awards from courts within the limits set out in the Civil Rights Act of 1991.²²⁵ Both compensatory and punitive damages are available against private employers in cases brought under section 504. Injunctions and damages are available against defendants in actions brought under title II or section 504.²²⁶ The remedies for employees or job applicants are thus generally consistent across title I, title II, and section 504. Nevertheless, title I, unlike section 504 or the best-supported interpretation of title II,²²⁷ has an exhaustion requirement for employment complaints.²²⁸ The administrative procedure need

221. *Id.* § 35.150(b)(2).

222. *Id.* pt. 36, app. A.

223. *Id.* § 35.151(c).

224. *Id.*

225. 42 U.S.C. § 1981a (Supp. V 1993).

226. *See supra* notes 103-17 and accompanying text.

227. *See supra* notes 88-101 and accompanying text.

228. *See* 42 U.S.C. § 12117(a) (Supp. V 1993) (incorporating powers, remedies, and procedures used by the Equal Employment Opportunity Commission (EEOC) and Attorney General to enforce title VII of the Civil Rights Act of 1964). Under the

not be pursued to its conclusion; the employment complainant may request a right-to-sue letter if the case is not resolved within 180 days.²²⁹

Private remedies under title III are limited to injunctive relief,²³⁰ although the United States may sue for statutory penalties and monetary relief (other than punitive damages) for aggrieved persons.²³¹ Unlike title III, section 504 and title II (by virtue of its incorporation of section 504) create monetary remedies for private litigants on accessibility matters.

Under section 504 or title II, persons harmed by an enterprise's failure to make its program accessible have a full range of remedial options, including injunctions and damages (and, in some instances, even punitive damages).²³² An administrative process to obtain changes in practice is also available. Persons denied access in violation of title III may bring an action in court and receive injunctive relief and attorneys' fees, but they will not receive damages. However, damages may be available in some locations if state law permits them²³³ and a state law claim is joined.²³⁴

exhaustion requirement, an aggrieved person with a disability files the employment complainant with the EEOC, which has the opportunity to investigate the case or promote a settlement. At the conclusion of the investigation, the EEOC may institute its own action against the employer, or it may issue a statement that it will not take action and that the complainant has a right to sue in court. The complainant may request the letter if the case has been on file more than 180 days. 29 C.F.R. § 1601.28(a)(1) (1993).

229. 29 C.F.R. § 1601.28(a)(1) (1993). The letter may also be issued following the EEOC's disposition of the charge. *Id.* § 1601.28(b).

230. 42 U.S.C. § 12188(a) (Supp. V 1993).

231. *Id.* § 12188(b)(2), (4).

232. See *supra* notes 103-04 and accompanying text.

233. Many states have laws governing accessibility, with a wide variety of remedial provisions. *E.g.*, ILL. ANN. STAT. ch. 111 1/2 paras. 3711-3718 (Smith-Hurd 1992); IOWA CODE ANN. §§ 104A.1-7 (West 1984).

234. Federal law permits free joinder of pendent state law claims in non-diversity actions as long as the claims are part of the same case or controversy under Article III of the Constitution. 28 U.S.C. § 1367(a) (Supp. V 1993).

VI. EVALUATING THE DIFFERENCES BETWEEN GOVERNMENT AND PRIVATE OBLIGATIONS

The differences between obligations imposed on state and local government and those imposed on private entities may be evaluated under the topics of employment and accommodation.

A. *Employment*

The food handling and contagious disease provisions of title I were viewed as a compromise by proponents of the Act. The somewhat more liberal provisions that still may apply under section 504 to some title II entities are more in keeping with the spirit of both section 504 and the ADA as a whole than are the title I provisions. Existing evidence has demonstrated little use of the title I exclusions by employers, however, and so the comparative advantage of section 504's provision may, practically speaking, be trivial. The differences in reassignment duties under existing interpretations of section 504 and likely interpretations of title I are of greater significance, but the 1992 Rehabilitation Act provides an opportunity for the section 504 interpretation to change in the direction suggested by title I's reassignment language.

The title I exhaustion requirement and the title II—section 504 rule of no exhaustion presents an additional difference to evaluate. The difference, however, should not be overdrawn. Title I complainants do not have to exhaust in the sense of pursuing the administrative process to a final decision in the case. They may file suit after 180 days regardless of what the agency does. Thus exhaustion, though mandatory, need not amount to more than a six-month delay in the filing of a private action. Nor is it clear that exhaustion is much of a disadvantage to the title I claimant, even if few cases result in the Equal Employment Opportunity Commission filing suit on the complainant's behalf. Even in those cases in which exhaustion primarily means delay, in return for the delay the complainant receives the benefit of administrative investigation and conciliation efforts. The most serious disadvantage to the exhaustion requirement is that an individual may be unaware of it, failing to take necessary administrative steps until after the statute of limitations runs.

B. Accessibility

Accessibility includes administrative and record-keeping steps, general obligations of program accessibility, and the readily achievable removal of barriers. These two topics merit evaluation.

1. Administrative Steps

Because of the more pervasive nature of the obligations imposed on public entities under the program accessibility standard, the self-evaluation, notice, and grievance requirements found in section 504 and title II seem particularly appropriate. Congress did not impose similar requirements on private enterprise; the more limited obligations imposed on public accommodations would apparently justify the different standards. The idea of alternative means of access when historical preservation prevents facility alteration is also an extra obligation that fits with the idea of accessibility for the program as a whole—the standard found in title II but not in title III.

2. Program Accessibility

To the extent that title II of the ADA and section 504 confer greater accessibility obligations on public entities than title III imposes on private actors, the federal subsidies given to state and local government justify the difference.²³⁵ For those entities that receive no funding, the difference is supported by the special authority that the Fourteenth Amendment gives Congress over state and local activities that it believes violate equal protection.²³⁶ Except for the specifics provided in title III, how-

235. Some public agencies may not receive federal funding. These entities are bound by title II of the ADA, but not by § 504. Congress has power to regulate state and local enterprises that do not receive federal money under the Commerce Clause, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (permitting Congress to enforce the minimum wage and hour provisions of the Fair Labor Standards Act against a public mass transit authority), and the Equal Protection Clause of the Fourteenth Amendment, see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding the imposition of monetary liability on state government for civil rights violation). Congress invoked both commerce authority and enforcement of the Fourteenth Amendment in the ADA. 42 U.S.C. § 12101(b)(4) (Supp. V 1993).

236. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (describing congressional pow-

ever, the obligations imposed by title III are to be construed to be no lower than those imposed on covered entities by section 504.²³⁷ Conversely, public entities should under no circumstances be held to any lower standard than that to which privately owned public accommodations are held.²³⁸

The absence of damages remedies under title III has all the markings of a legislative compromise between business owners and persons with disabilities and their supporters. Experience under section 504 and state disability rights statutes demonstrates that a damages remedy is a useful deterrent to violations of accessibility standards and that it does not pose a serious threat to entities that are bound to follow the law.²³⁹ For a right to be fully effective, a full range of remedies should be available.²⁴⁰

er to interpret and enforce the Fourteenth Amendment against state governments); see also Mikochik, *supra* note 9, at 625-26 nn.44-45 (collecting authority on congressional power to extend the reach of the Fourteenth Amendment).

237. 28 C.F.R. § 36.103(a) (1993).

238. See H.R. REP. NO. 485, *supra* note 4, pt. 2, at 84, reprinted in 1990 U.S.C.A.N. at 366-67. Thomas, *supra* note 11, at 244-45; see also sources cited *supra* note 214 (drawing comparison). One possible exception to this rule is the proviso that entities covered by title II may continue to apply the Uniform Federal Accessibility Standards (UFAS), rather than the Americans with Disabilities Act Accessibility Guidelines (ADAAG) for new construction. 28 C.F.R. § 35.151(c) (1993). Some consider the UFAS to be generally less strict than the ADAAG. The regulators chose to permit continued use of UFAS to effectuate Congress' wish to harmonize title II with § 504. 56 Fed. Reg. 35,710 (1991). Preexisting § 504 regulations employed the UFAS, which is hardly surprising because they predate the issuance of the ADAAG. However, title II entities may no longer use the elevator exception of the UFAS. 28 C.F.R. § 35.151(c) (1993). Continued use of UFAS may be justified on the basis of public entities' reliance on the standards and adoption of long-term plans for compliance with § 504 predicated on those standards.

239. See Lavelle, *supra* note 10, at 1184 (analyzing § 504 employment cases and concluding that employers' fears are misplaced); see also Davenport, *supra* note 9, at 331 (noting the low likelihood of class action liability); Cooper, *supra* note 10, at 1425 (noting cautiousness of courts in construing disability discrimination regulations).

240. See *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1038 (1992) (noting that the normal approach is for damages to be available); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and 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.") (footnote omitted); see also *Smith v. Wade*, 461 U.S. 30 (1983) (upholding award of punitive damages in action under 42 U.S.C. § 1983 without a showing of malicious intent).

VI. CONCLUSION

Archaeologists benefit from the messiness of ancient civilizations. They can compare the old and the new by studying what was left behind and what was placed atop it. The apparent messiness of Congress may carry a similar benefit. Comparisons of section 504 and the ADA give the interested community a number of areas to study when considering future legislative reform. I believe that the overcautiousness on some aspects of safety in the title I employment rules is a good candidate for correction, so as to make them more like the rules developed under section 504. So too is the absence of monetary remedies for violations of title III an area that deserves legislative revision. Whether the legislative climate would permit expanding the accessibility obligations of title III to make them more like those of section 504 and title II is unclear. There are advantages to the latter approach in ensuring access for persons with disabilities, although businesses will certainly complain about increased cost.

Other potential areas of law reform efforts may take care of themselves: section 504's interpretation will probably move away from *Southeastern Community College v. Davis*²⁴¹ to a more expansive array of obligations. Removal of barriers when readily achievable should be part of the obligation of program accessibility under section 504 and title II even though not specifically mentioned. Exhaustion will not be necessary under title II cases even when they overlap with title I while it will remain necessary for other title I cases, but the advantages to either approach are not so obvious as to call for immediate efforts at adopting one or the other for all cases.

241. 442 U.S. 397 (1979).