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REHABILITATION ACT REDUX

Katie Eyert†

I. INTRODUCTION

The Americans with Disabilities Act (ADA) was hailed as an "emancipation proclamation" for people with disabilities at the time of its passage in 1990. Since then, the Supreme Court has significantly limited the scope and effectiveness of the ADA. Perhaps most significantly, in 2001, in the case of University of Alabama v. Garrett, the Court found that Title I of the ADA did not validly abrogate the sovereign immunity of the states. Three years later, in Tennessee v. Lane, the Court upheld Title II of the ADA, but only on an as-applied basis. Lane's as-applied approach, while favorable to its individual litigants, renders it highly likely that some applications of Title II will ultimately be subject to a successful sovereign immunity attack.

For obvious reasons, these developments have generated substantial concern within the disability rights and academic communities regarding the adequacy of alternative legal protections for individuals with disabilities. Despite this widespread concern, most of the legal scholarship that has addressed post-2001 legal protections for individuals with disabilities has discussed the ADA's predecessor, § 504 of the Rehabilitation Act, in only a cursory fashion, if at all. This relatively skimpy treatment of the Rehabilitation

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5. See generally infra Section II.B.
7. Section 504 of the Rehabilitation Act is codified at 29 U.S.C. § 794. Section 504 and § 794 will be used interchangeably throughout the article. Section 501 of the Rehabilitation Act, discussed infra, is codified at 29 U.S.C. § 791.
8. See, e.g., Colker & Milani, supra note 6, at 1078-81 (noting that "[s]ome courts have also applied sovereign immunity principles to conclude that... Section 504... cannot be used to obtain
Act’s protections has left a fairly substantial gap in the understanding of whether the Rehabilitation Act may serve as an adequate substitute for the ADA in the area of public employment and services.

While there has not been extensive academic treatment of the utility of § 504 since 2001, legal advocates have frequently raised § 504 claims since that time.\(^9\) Many advocates had done so even before the Court’s 2001 decision in Garrett, despite the fact that § 504 claims were typically construed as coextensive with claims brought under the ADA.\(^10\) Post-Garrett, advocates seeking damages have been compelled in many instances to rely on § 504 alone.\(^11\) Defendant states have fiercely contested § 504 claims on a number of grounds; most ominously, they have sought to extend Eleventh Amendment arguments to challenge the validity of § 504.\(^12\)

Despite the potential seriousness of these sovereign immunity attacks, they have garnered relatively little academic attention.\(^13\) This paucity of academic monetary damages against a state entity,” and therefore concluding that “state law may soon be the sole remedy for individuals who face disability discrimination by the state”); Jaclyn Okin, Has the Supreme Court Gone Too Far?: An Analysis of University of Alabama v. Garrett and Its Impact on People with Disabilities, 9 AM. U. J. GENDER SOC. POL’Y & L. 663, 689 (2001) (devoting a short paragraph to § 504 in a more extended discussion of alternatives for enforcement post-Garrett); Michael Russell, The Americans with Disabilities Act and the Eleventh Amendment: Do States Have a License to Discriminate?, 28 OHIO N.U. L. REV. 133, 146 (2001) (discussing post-Garrett alternatives for enforcement of disability discrimination protections against states, but mentioning § 504 only in a footnote); Comment, A Return to State Sovereignty: How Individuals with Disabilities in Maryland May Still Seek Relief Against State Employers After Board of Trustees of the University of Alabama v. Garrett, 31 U. BALTIMORE L. REV. 67, 100 n.323 (2001) (same).


11. See, e.g., Garrett, 223 F. Supp. 2d at 1251 (rejecting plaintiffs’ remaining § 504 claims on remand), rev’d 344 F.3d 1288 (11th Cir. 2003); Johnson v. Louisiana, 22 NDLR P 172 (E.D. La. 2002) (dismissing Title II claims against a state university, but declining to dismiss the plaintiff’s Rehabilitation Act claims).

12. See, e.g., Koslow, 302 F.3d at 167 (rejecting defendant’s arguments for § 504’s invalidity); Garrett, 223 F. Supp. 2d at 1251 (finding that § 504 did not validly abrogate defendants’ Eleventh Amendment sovereign immunity), rev’d 344 F.3d 1288 (11th Cir. 2003). For an academic piece arguing that § 504 should be invalid under Eleventh Amendment doctrine, see Steven Plitt, Valerie Pasolo, & Daniel Maldonado, Board of Trustees of the University of Alabama vs. Garrett: Is Constitutional Authority for Sale and Is State Sovereign Immunity the Purchase Price?, 13 GEO. MASON U. CIV. RTS. L.J. 151 (2003).

13. Where authors have addressed the sovereign immunity attacks that are being leveled on § 504, they have often, without extensive discussion, assumed that those arguments are valid, and are likely to lead to § 504’s invalidation. See, e.g., Colker & Milani, supra note 6, at 1079; Note, Board of Trustees of the University of Alabama v. Garrett: The Decision’s Impact on the Americans with Disabilities Act, 79 U. DETROIT MERCY L. REV. 281, 299 (2002). However, many of the lower court sovereign immunity arguments that are currently being raised against § 504 are either unsupported by existing precedent, or have been of only temporary importance during the period of uncertainty regarding the continued vitality of the ADA. See, e.g., Koslow, 302 F.3d at 170-76 (discussing reasons why defendants’ arguments against § 504 were not supported by precedent); Garcia v. S.U.N.Y. Health Scis. Ctr., 280 F.3d 98, 114-15 (2d Cir. 2001) (finding that the state had not waived its immunity under § 504 of the Rehabilitation Act, because at the time of the waiver, they would have thought that immunity was
attention is undoubtedly due in part to the informational gap that exists with respect to the adequacy of § 504 as an ADA substitute. To the extent that the significance of § 504 remains poorly understood, there is, and will continue to be, little incentive for academics to develop arguments in support of its continued validity. Thus, developing a better understanding of the scope of § 504’s coverage, and the extent to which it is substantively comparable to the scope of the ADA, may well prove critical in preserving the statute’s long-term enforceability.

In this Note, I will attempt to fill some of the gaps in existing legal scholarship by providing a detailed comparison of § 504 and the ADA. Part II will begin by providing an overview of Garrett and Lane and the degree to which they do (or might) prevent suits against state actors from proceeding under the ADA. Section III.A. will discuss the limitation of § 504’s applicability to entities that are recipients of federal funds, and will examine the extent to which this renders its coverage less comprehensive than that of the ADA. Section III.B. will explore specific differences between Title I of the ADA and § 504, including differences regarding: 1) who can sue and be sued; 2) the applicable procedural and remedial schemes; and 3) the substantive standards applied under the Acts. Section III.C. will address the same categories of differences with respect to Title II of the ADA and § 504. Finally, in Part IV I will discuss the conclusions that can be drawn regarding the overall vitality of § 504 as a substitute for the ADA in the new federalism era.

II. ELEVENTH AMENDMENT JURISPRUDENCE AND THE ADA

To understand how well the Rehabilitation Act may compensate for currently unviable ADA claims, it is first necessary to comprehend the scope of the gap that it needs to fill. In order to provide this background referent, the current treatment of the ADA under Eleventh Amendment law is discussed already lost pursuant to Title II); Brief of the United States as Intervenor, at 5-15, Patrick W. v. Anderson, 165 F. Supp. 2d 1144 (D. Haw. 2001), available at http://www.usdoj.gov/crt/briefs/lemahieu.pdf (last visited Oct. 19, 2004) (discussing at length reasons why the defendants’ arguments challenging the validity of § 504 were unsupported). Thus, developing persuasive arguments now may well be successful in forestalling negative development in the law in this area. For an article addressing in a limited fashion the sovereign immunity arguments that are being applied to § 504 in the lower courts, see Roger C. Hartley, Enforcing Federal Civil Rights Laws Against Public Entities After Garrett, 28 J.C. & U.L. 41, 89-92 (2001). For an interesting argument for why Spending Clause legislation, as a general matter, should not run afool of the Rehnquist Court’s sovereign immunity jurisprudence, see Rebecca Zietlow, Federalism’s Paradox: The Spending Power and Waiver of Sovereign Immunity, 37 WAKE FOREST L. REV. 141 (2002).

14. This section and, more generally, this Note will only discuss Titles I and II of the ADA, since the other Titles of the ADA either generally do not impose substantive obligations or generally do not apply to state actors. See 42 U.S.C. §§ 12181-12189 (2000) (Title III) (prohibiting discrimination in public accommodations, but defining public accommodations to only include private entities); 47 U.S.C. § 225 (2000) (Title IV) (prohibiting discrimination by common carriers of telecommunications); 42 U.S.C. §§ 12201-12213 (2000) (Title V) (setting out miscellaneous provisions of the ADA).

15. The Eleventh Amendment provides that “The Judicial power of the United States shall not be
below. The current availability of employment actions under Title I or Title II of the ADA is discussed in Section A, followed by a discussion in Section B of the availability of government programs and services actions\textsuperscript{16} under Title II.

A. Employment Actions Under Titles I and II of the ADA

As has been noted by both courts and commentators, both Titles I and II of the ADA may provide a basis for raising employment discrimination claims against state employers.\textsuperscript{17} While Title II (which deals generally with government programs and services) does not explicitly address discrimination in employment,\textsuperscript{18} Title I does and clearly prohibits such discrimination by all public and private employers exceeding certain minimum size requirements.\textsuperscript{19} Title I of the ADA has, therefore, provided the primary basis since the passage of the ADA for raising claims of disability-based employment discrimination against state entities.\textsuperscript{20} It was, accordingly, a significant blow to plaintiffs’ ability to seek redress for employment discrimination when Title I was found not to validly abrogate state sovereign immunity in University of Alabama v. Garrett.

i. Title I: University of Alabama v. Garrett

In University of Alabama v. Garrett, the Supreme Court found that Title I of the ADA did not constitute a “congruent and proportional” response to a history of unconstitutional state employment discrimination against people with

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construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The Supreme Court has made clear that it does not consider the Eleventh Amendment to be the source of the states’ sovereign immunity. See Alden v. Maine, 527 U.S. 706, 713 (1999). For the purposes of simplicity, however, I will refer to the states’ sovereign immunity as "Eleventh Amendment immunity," since that is the shorthand that the Court itself has traditionally utilized. See id.

16. “Government programs and services,” where used in the disability discrimination context, is a term of art that refers to the scope of coverage of Title II or § 504. It is not limited to what are traditionally thought of as “services, programs, or activities,” 42 U.S.C. § 12132, but rather extends to “virtually everything a public entity does.” Jones v. City of Monroe, 341 F.3d 474, 477 (6th Cir. 2003) (quoting Johnson v. City of Saline, 141 F.3d 564, 569 (6th Cir. 1998)).

17. See, e.g., Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 820-25 (11th Cir. 1998); Hartley, supra note 13 at 83.


20. Plaintiffs occasionally brought Title II employment claims against state entities even pre-Garrett. The primary reason for doing so was to avoid Title I’s requirement of exhaustion of administrative remedies. Since Title II does not require exhaustion of administrative remedies, plaintiffs who had failed to file a timely charge of discrimination with the EEOC could bring Title II employment claims, but were foreclosed from seeking Title I relief. See, e.g., Zimmerman v. Oregon Dep’t of Justice, 170 F.3d 1169, 1171, 1178 (9th Cir. 1999). In addition, post-Garrett, plaintiffs have brought employment discrimination claims against state entities under Title II in order to avoid the sovereign immunity restrictions that have been imposed on Title I. See, e.g., Koslow, 302 F.3d at 166 (discussing the district court’s dismissal of Plaintiff’s Title II employment claims); Winokur v. Office of Court Administration, 190 F. Supp. 2d 444, 448-49 (E.D.N.Y. 2002) (dismissing the plaintiff’s Title I claims on sovereign immunity grounds, but allowing his Title II claims to proceed).
disabilities.\textsuperscript{21} This type of showing was required under the Court’s \textit{City of Boerne} line of cases\textsuperscript{22} in order to uphold Congress’s attempted abrogation of state sovereign immunity under Section 5 of the Fourteenth Amendment.\textsuperscript{23} Finding evidence of a pattern of historical state employment discrimination to be lacking and the statutory response to be, in any event, disproportional to the alleged violations, the Court held that the Eleventh Amendment barred private parties from bringing damages actions under Title I.\textsuperscript{24}

\textit{Garrett}, however, did not foreclose all possible avenues for seeking relief from public employment discrimination pursuant to Title I. As observed by the Court, the Eleventh Amendment has long been construed to bar actions against state entities only in certain specific circumstances. As a result, there remain post-\textit{Garrett} several possible alternatives for individuals seeking relief from state-perpetrated employment discrimination. First, state employers continue to be liable under Title I for injunctive relief claims that are brought pursuant to \textit{Ex parte Young}.\textsuperscript{25} Second, Title I claims brought by the United States against state entities are not barred by the Eleventh Amendment, and can include claims for damages brought on behalf of private individuals.\textsuperscript{26} Finally, county and local entities, although they are considered for other purposes to be arms of the state, are usually not entitled to Eleventh Amendment immunity. Thus they continue, in most circumstances, to be directly liable for both damages and

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\textsuperscript{21} \textit{Garrett}, 531 U.S. at 374. \textsuperscript{22} In \textit{City of Boerne v. Flores}, 521 U.S. 507 (1997), the Supreme Court invalidated the Religious Freedom Restoration Act (RFRA) as not a “congruent[t] and proportional[]” exercise of Congress’s authority under Section 5 of the Fourteenth Amendment. \textit{Id.} at 520. Subsequent decisions reaffirmed this requirement of “congruence and proportionality”, and clarified the scope of the fact finding requirements imposed on Congress as a result. \textit{See, e.g., Nev. Dep’t of Human Res. v. Hibbs}, 538 U.S. 721, 737 (2003) (finding that the Family and Medical Leave Act (FMLA) was a congruent and proportional response to sex discrimination in state family and medical leave policies); \textit{Kimel v. Fla. Bd. of Regents}, 528 U.S. 62, 82-83 (2000) (finding that the Age Discrimination in Employment Act was not a congruent and proportional response to a history of unconstitutional age-based state employment discrimination); \textit{College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.}, 527 U.S. 666, 675 (1999) (finding that the Trademark Remedy Clarification Act did not protect “property rights” within the meaning of the Fourteenth Amendment and therefore that the Act exceeded Congress’s Section 5 powers).

\textsuperscript{23} The Court had previously held that Congress may never, pursuant to its Commerce Clause authority, validly abrogate state sovereign immunity. \textit{See Seminole Tribe of Fla. v. Florida}, 517 U.S. 44, 72-73 (1996). Therefore, the plaintiffs in \textit{Garrett} did not rely on the Commerce Clause despite the fact that Congress indicated its intent to act pursuant to both its Commerce Clause and Fourteenth Amendment authority in enacting Title I. \textit{See Garrett}, 531 U.S. at 364.

\textsuperscript{24} \textit{Garrett}, 531 U.S. at 372-74. \textsuperscript{25} \textit{Garrett}, 531 U.S. at 374 n.9. \textit{See also Ex parte Young}, 209 U.S. 123, 159-60 (1908) (holding that state officials act \textit{ultra vires} when they act in contravention of federal law, and that they can thus be sued for injunctive relief for violations of federal law). \textit{Cf. Kaslow}, 302 F.3d at 178-79 (rejecting Eleventh Amendment challenge to plaintiffs’ claims for ADA injunctive relief post-\textit{Garrett}); \textit{Gibson v. Ark. Dep’t of Corr.}, 265 F.3d 718, 720-22 (8th Cir. 2001) (same).

\textsuperscript{26} \textit{Garrett}, 531 U.S. at 374 n.9. The Supreme Court has consistently held that states do not retain sovereign immunity in any action brought by the federal government. \textit{See, e.g., West Virginia v. United States}, 479 U.S. 305, 311 (1987). \textit{See also United States v. Mississippi Dep’t of Pub. Safety}, 321 F.3d 495, 499 (5th Cir. 2003) (overturning a district court decision dismissing Title I claims brought by the United States on behalf of an individual).
injunctive relief for actions taken in violation of Title I.\textsuperscript{27}

ii. Title II

In addition to these Title I avenues of redress, the question remains open post-\textit{Garrett} whether Title II provides a cause of action for employment discrimination perpetrated by public entities.\textsuperscript{28} There had been a circuit split pre-\textit{Garrett} on this issue,\textsuperscript{29} which the Court declined to address in \textit{Garrett} due to a lack of appropriate briefing.\textsuperscript{30} As a result, Title II employment discrimination actions remain available as a matter of statutory construction in some circuits, and could ultimately (depending on the resolution of the issue in the Supreme Court) be available nationwide.

Unfortunately, whatever the ultimate resolution of the statutory construction question, Title II seems unlikely as a matter of sovereign immunity law to be found to validly abrogate state sovereign immunity in the context of employment discrimination claims. As discussed at greater length below, the Supreme Court in \textit{Tennessee v. Lane} adopted an as-applied approach to determining the validity of Title II's abrogation of state immunity.\textsuperscript{31} Unlike a categorical determination of the validity of Title II's abrogation of state sovereign immunity, this as-applied approach almost certainly will lead courts to conclude that \textit{Garrett} controls the validity of Title II's abrogation of state immunity from employment discrimination suits. Therefore, while Title II employment claims may ultimately be available under the same restricted circumstances as Title I actions, they seem unlikely to afford plaintiffs a materially improved basis for avoiding sovereign immunity constraints.

B. Title II: Discrimination in Government Programs and Services

The scope of Title II of the ADA, however, extends far beyond the context of government employment. Utilizing exceedingly broad statutory language,\textsuperscript{32} Title II was, according to the Department of Justice, intended to extend to "anything a public entity does."\textsuperscript{33} As a result, \textit{Tennessee v. Lane} was expected

\textsuperscript{27} \textit{Garrett}, 531 U.S. at 369. \textit{See also} Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (holding that the Eleventh Amendment does not prevent counties in a state from being sued in federal court).

\textsuperscript{28} \textit{Garrett}, 531 U.S. at 360 n.1.

\textsuperscript{29} \textit{Compare} Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1184 (9th Cir. 1999) (finding that employment discrimination claims are unavailable under Title II) \textit{with} Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 825 (11th Cir. 1998) (finding that employment discrimination claims can be raised under Title II).

\textsuperscript{30} \textit{Garrett}, 531 U.S. at 360 n.1.

\textsuperscript{31} \textit{See} Lane, 124 S.Ct. at 1994.

\textsuperscript{32} \textit{See} 42 U.S.C. § 12132 (2000) (indicating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.").

to have dramatic results for the overall enforceability of the ADA. The Supreme Court’s approach in *Lane*, however, rendered the decision neither a clear defeat nor a clear victory for proponents of Title II.

The most obvious manner in which *Lane* constituted a victory for Title II’s enforceability was in its specific holding. The Court held in *Lane* that, as applied to the specific context of access to courts, Title II was “unquestionably” valid Amendment 14 § 5 legislation. Thus, *Lane* ensured that access to courts claims, as well as other comparable Title II claims, would remain fully enforceable against state actors.

*Lane* also marked a victory for civil rights statutory enforcement in other, less direct ways. Prior federalism decisions of the Rehnquist Court had taken a very narrow, ungenerous approach to evaluating the adequacy of plaintiffs’ evidence of a history of unconstitutional state action. In *Lane*, the newly forged majority moved away from this narrow approach, adopting a more expansive understanding of what evidence could be relevant in establishing the factual predicate for Section 5 action under *City of Boerne*.

*Lane* also, however, left broad areas of Title II’s coverage vulnerable to sovereign immunity attack. Under *Lane*’s approach, the congruence and proportionality test of *Boerne* will be applied to each of Title II’s many areas of applicability. *Lane*’s more generous approach towards the adequacy of statutes’ evidentiary foundations undoubtedly will result in the courts upholding more applications of Title II than they would have done applying the more stringent *Garrett* test. Nevertheless, it is clear that many areas of Title II’s applicability remain likely to fail under an as-applied approach, even with the benefit of *Lane*’s more generous standard.


35. See infra notes 43-50 and accompanying text for a discussion of the types of Title II claims that are comparable to the access to courts claims raised in *Lane*, and thus likely to be upheld.


37. It is not at all clear that the configuration of Justices that comprised the majority in *Lane* will continue to vote together in Section 5 cases. If they do not, *Lane*’s more expansive procedural approach to the necessary factual prerequisite for Section 5 action may not prove to be enduring. For an interesting discussion of the new voting alignment in *Lane* and its potential implications for future Section 5 cases, see Simon Lazarus, *Strategic Realignment on Sovereign Immunity and the Fourteenth Amendment?*, at http://www.acslaw.org/views/lazarus.htm (last visited June 13, 2004).

38. See *Lane*, 124 S.Ct. at 1988-92.


40. Discouragingly, initial applications of *Lane* by the lower courts suggest that almost all areas of Title II remain highly vulnerable to sovereign immunity challenges under *Lane*’s as-applied approach See e.g., Miller v. King, 384 F.3d 1248, 1275-76 (11th Cir. 2004) (concluding that Title II does not validly abrogate state sovereign immunity “as applied” to prison conditions claims); McNulty v. Bd. of Ed. of Calvert County, No. DKC 2003-2520, 2004 WL 1554401, at *3-4 (D. Md. July 8, 2004) (concluding that Title II does not validly abrogate state sovereign immunity “as applied” to education related claims); Haas v. Quest Recovery Servs., 338 F. Supp. 2d 797, 801-03 (N.D. Ohio 2004) (concluding that Title II did not validly abrogate state sovereign immunity as applied to claims sounding fundamentally in equal protection); Roe v. Johnson, 334 F.Supp.2d 415, 422-23 (S.D.N.Y. 2004)
While it will take years of litigation to resolve conclusively which areas of Title II remain enforceable against the states, it is clear that three factors are likely to play a significant role in making those determinations. First, as Lane itself demonstrates, the courts will have significant leeway in determining how to define the right at stake in any given as-applied challenge. This is important, as the Lane inquiry is contingent to a large extent on both the nature of the underlying rights, and the existence of a history of rights violation by state actors. Thus, this initial defining step may well be determinative of whether specific areas of Title II are upheld.  

The existence of a documented history of unconstitutional state action will also play a vital role in determining what applications of Title II constitute valid exercises of Congress’s Amendment 14 § 5 authority. Because Congress swept very broadly in enacting Title II, there are many applications of the statute that may not, standing alone, have a well-documented factual predicate. As a result, the existence (or non-existence) of a specific documented history of unconstitutional state action is likely to prove to be one of the most critical determinants of the validity of specific applications of Title II.

Finally, the nature of the Fourteenth Amendment rights that undergird the specific application of Title II being challenged is likely to be significant in two distinct ways. First, as indicated in Lane and in the Court’s prior decision in Hibbs, the Court will afford greater latitude in its congruence and proportionality inquiry where the underlying constitutional rights compel a heightened standard of review. As a result, applications of Title II that (concluding that Title II did not validly abrogate state sovereign immunity as applied to the state bar admission process). Cf. Phiffer v. Columbia River Corr. Inst., 384 F.3d 791, 792-93 (9th Cir. 2004) (adhering to pre-Lane circuit precedent that had found Title II to be valid in its entirety, and thus declining to take an as-applied approach).

41. The potentially critical nature of this initial determination is illustrated by the Court’s decision in Lane. One of the plaintiffs in Lane, Beverly Jones, was a court reporter who alleged that courthouse architectural barriers had caused her to miss out on the opportunity to participate in certain court proceedings. See Lane, 124 S.Ct. at 1983. Evidently, had the court chosen to construe her claims as fundamentally sounding in employment discrimination, they would have been barred in an as-applied challenge under Garrett. Cf. Reply Brief of Petitioner at *4, Tennessee v. Lane, 124 S.Ct. 1978 (2004) (No. 02-1667) (arguing that Jones' claims sounded fundamentally in employment discrimination and that there is no "fundamental right to earn one's living as a court reporter"). Even had the Court only considered the right implicated to be the right of the public to have access to court proceedings, rather than more generally the right of "access to courts" (which also incorporates the right of individuals to access to court process), Jones' claims might well have been found on an as-applied basis not to be supported by an adequate history of discrimination. Cf. Muntaqim v. Coome, 366 F.3d 102, 126 (2d Cir. 2004) (in a Voting Rights Act case, requiring the plaintiff, in defending the VRA "as applied" to felon disenfranchisement statutes, to demonstrate a history of unconstitutional attempts on the part of the state to use felon disenfranchisement statutes to discriminate on the basis of race, and concluding that the plaintiff had not adequately made such a showing), Reh'g en banc denied, 2004 WL 2211593 (2d Cir. 2004).

42. See, e.g., Lane, 124 S.Ct. at 1990-92 (discussing the history of discrimination that prompted the enactment of Title II); Garrett, 531 U.S. at 371 & n.7 (emphasizing the lack of evidence of a history of unconstitutional discrimination against the disabled in the employment discrimination context).

43. See Lane, 124 S.Ct. at 1988; Hibbs, 538 U.S. at 735-36.
implicate disabled individuals’ fundamental constitutional rights are more likely to be upheld than those that do not.  

Second, Title II applications that implicate Constitutional rights that may require reasonable accommodations seem significantly more likely to be upheld than those that derive from Constitutional rights that do not. As noted in Garrett, the ADA’s reasonable accommodation mandate offers protections that are materially different in kind than those that are afforded, for example, under the Equal Protection Clause. Other constitutional protections, however, such as the right to be free from cruel and unusual punishment, themselves incorporate an implicit right to reasonable accommodations in some circumstances. As a result, it should be easier to establish the congruence and proportionality of Title II where it can be seen as a response to those types of Constitutional violations.

There are therefore significant areas of Title II’s applicability that seem likely to remain fully enforceable against state actors. Many other applications, however, seem unlikely to survive an as-applied challenge to their validity. Many, if not most of these other applications, furthermore, are probably not supportable as exercises of other areas of Congress’s legislative authority (e.g., the Commerce Clause). As such, they may well be rendered totally unenforceable, even in those circumstances where sovereign immunity exceptions such as Ex parte Young would otherwise apply.

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44. See, e.g., Hibbs, 538 U.S. at 735-36 (in case implicating sex discrimination, distinguishing Garrett based on the lower standard of scrutiny that is applied to disability discrimination). See also McNulty, 2004 WL 1554401, at *3 (emphasizing that education is not a fundamental right in concluding that Title II does not validly abrogate state sovereign immunity “as applied” to education).

45. See Garrett, 531 U.S. at 372.

46. Because the Eighth Amendment is applied to the states via the Fourteenth Amendment’s due process clause, it is among the Fourteenth Amendment protections that Congress may seek to enforce pursuant to Amendment 14 § 5.

47. See, e.g., LaFaut v. Smith, 834 F.2d 389, 394 (4th Cir. 1987) (concluding that a failure to provide accommodations necessary to allow a disabled prisoner to toilet hygienically and without undue effort constituted a violation of the Eighth Amendment).

48. Cf Lane, 124 S.Ct. at 1994 (noting that due process, like Title II, may impose affirmative obligations on the state to make modifications in their practices where required in order to afford an individual a meaningful opportunity to be heard). But cf. Miller v. King, 384 F.3d 1248, 1275-76 (11th Cir. 2004) (concluding that Title II does not validly abrogate state sovereign immunity “as applied” to prison conditions claims).

49. See, e.g., Klingler v. Dir., Dep’t of Revenue, 366 F.3d 614, 617-20 (8th Cir. 2004) (concluding that Title II did not constitute valid Commerce Clause legislation as applied to the context of surcharges imposed on handicapped parking placards); McCarthy v. Hawkins, 381 F.3d 407, 433 (4th Cir. 2004) (Garza, J., concurring in part and dissenting in part) (arguing that Title II is not valid Commerce Clause legislation insofar as “it regulates states’ decisions regarding who will participate in or receive the benefits of state entitlement programs,” and that the majority erred in declining to reach the issue as part of its interlocutory sovereign immunity inquiry); Brief for the United States at *11-12, Tennessee v. Lane, 124 S.Ct. 1978 (2004) (No. 02-1667) (collecting cases presenting Commerce Clause challenges to Title II).

50. See, e.g., Klingler, 366 F.3d at 614 (concluding that plaintiffs could not enforce Title II for Ex parte Young relief because as applied it did not constitute valid Commerce Clause legislation).
C. Conclusion

The full extent of the impact of the Supreme Court's decisions in *University of Alabama v. Garrett* and *Tennessee v. Lane* remains uncertain. It is clear, however, that disability discrimination claimants will not be able to enforce certain areas of ADA coverage against the states, and that they will accordingly require an alternative means of seeking redress. Most notably, employment discrimination claims for damages, whether brought under Title I or II, seem almost certain to be barred by sovereign immunity under the logic of *Garrett* and *Lane*. While government programs and services claims fare better under the logic of *Lane*, there are many areas of coverage where they too remain highly vulnerable to sovereign immunity attack. Because many of these Title II applications would not be supported by any alternate basis of Congressional authority, they may be rendered totally unenforceable in the event they are found to exceed Congress's powers under Section 5 of the Fourteenth Amendment.

As a result, § 504, as the precursor legislation to the ADA, will almost certainly be needed to provide an alternative remedy for all employment claims for damages and for many government services claims of any kind. In the following section, I will examine the degree to which § 504 can provide an adequate substitute in these areas, comparing its scope to the scope of the provisions of Titles I and II of the ADA.

III. APPLICATION OF THE REHABILITATION ACT WHERE THE ADA IS NO LONGER AVAILABLE

Evaluating the extent to which § 504 of the Rehabilitation Act may provide an adequate substitute for claims that are no longer viable under the ADA requires a detailed comparison of the two Acts. Below, I set out such a comparison, focusing on the three main categories of potential differences that might exist between the Acts: 1) who can sue and be sued under the Acts; 2)
what procedural and remedial provisions govern the Acts; and 3) what constitutes a substantive violation of the Acts. Because § 504's primary delimiting factor in the first category, federal funding, distinguishes it from both Titles I and II of the ADA, this factor is discussed first, in Section A. Section B discusses other differences between the provisions of Title I and § 504, following the category framework set out above. Finally, Section C applies the same framework to the differences the exist between the provisions of Title II and § 504.

It should be noted that this survey is limited in a number of respects. Title I and Title II are each governed by a complicated network of statutory provisions, regulations and precedent. Section 504 is governed by even more complex provisions, as it is subject to many different sets of regulations promulgated by the numerous federal entities that award grants. The courts have, in many cases, not addressed the proper application of these statutory provisions, regulations and precedents in the context of the respective acts themselves, much less vis-à-vis each other.

Thus, I have adopted a number of limits on the scope of the issues that are reviewed. First, and most significantly, consideration of § 504 regulations is generally limited to the core set of "coordination regulations" promulgated by the Department of Justice. Second, differences in the statutes' and/or regulations' texts are not addressed where: 1) the courts have not yet

52. Dozens of pages of statutory text govern Titles I and II of the ADA. Thousands of pages of regulations and regulatory guidance documents are also applicable to interpretation of the Acts. Finally, more than a decade of precedent under Titles I and II interpreting the relevance of both general statutory principles and specific statutory and regulatory textual mandates exist at the Supreme Court, Circuit and District Court levels and must be applied to the statutes. Much of this precedent, furthermore, is inconsistent both among, and often also within jurisdictions.

53. See, e.g., 28 C.F.R., Ch. I, Pt. 41 (Department of Justice coordination regulations); 45 C.F.R. Ch. 45, Pt. 84 (Department of Health and Human Services regulations); 14 C.F.R., Ch. V, Pt. 1251 (National Aeronautics and Space Administration regulations).

54. Occasionally, the regulations promulgated by the then-Department of Health Education and Welfare (HEW) (now the Department of Health and Human Services) shortly after initial passage of the Act are also discussed. See generally 42 Fed. Reg. 22,676 (May 4, 1977) (setting out the original HEW regulations). These regulations have often been treated by the courts as a valuable source of guidance on the proper construction of the Act, and thus are more broadly relevant than other agency-specific § 504 regulations. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 632 (1998) (noting that the 1977 HEW regulations are of "particular significance" in interpreting the ADA and the Rehabilitation Act); Alexander v. Choate, 469 U.S. 287, 305 (1985) (noting that the Court has frequently recognized the 1977 HEW regulations as "an important source of guidance on the meaning of § 504"); Consol. Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984) (noting the special status of the 1977 HEW regulations in interpreting § 504). All references to Rehabilitation Act regulations are to the Department of Justice coordination regulations, unless otherwise specified.

55. 28 C.F.R., Ch. I, Pt. 41.

56. The regulations of § 504 and the ADA are extensively relied on by the courts in adjudicating disability discrimination claims, and have very rarely been questioned as valid interpretations of the Acts. Given that Title I incorporates many § 504 regulations as part of its statutory text, and that Title II, by statute, requires the re-adoption of many of § 504's government programs and services regulations, this is probably a correct approach. See generally U.S. v. Awadallah, 349 F.3d 42, 54 (2d Cir. 2003) (noting that "when a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and the courts are bound
differentiated the statutes on the basis of those distinctions; and 2) there are substantial reasons (e.g., a mandate of consistency in the text of the statute) for thinking that they will not do so in the future. Finally, because Title I and Title II are each subject to a core provision mandating some sort of substantive consistency with § 504, my discussion of the differences in the substantive standards of each Title and § 504 is framed around these provisions.

Approaching the comparison of the statutes in this way, there appear to be very few significant distinctions between the Acts. As set forth below, both Titles I and II deviate little from § 504 along the categories of substance, suability, and procedural and remedial schemes. While there are, in some instances, textual differences between the Acts or their regulations, these distinctions are relatively minor, and tend in most instances to be minimized in application by the courts. In the following section, the primary distinction between the Acts—§ 504's limitation to recipients of federal funds—is discussed.

A. Entities That Can Be Sued: Federal Funding and § 504's Applicability to State Actors

The limitation of the applicability of the Rehabilitation Act to entities receiving federal funds is by far its most salient difference from the ADA, and was one of the primary constraints of the Act that advocates felt necessitated the passage of a broader statute. It is not surprising, therefore, that in the wake of Garrett, some academics have continued to cite this limitation in explaining why the Rehabilitation Act constitutes an inadequate substitute in disability discrimination suits against state entities. But while this limitation may substantially circumscribe the utility of the Rehabilitation Act in addressing discrimination by private actors, it should, as discussed below, generally be a minor impediment in the area of state-perpetrated discrimination. A very large proportion of state agencies are recipients of federal funds. The wording of § 504, furthermore, is sufficiently broad to encompass all of an agency's actions irrespective of the breadth of the funding or the nature of the funding's purpose. Therefore the vast majority of state actors who would otherwise be immune from suit under the ADA should be subject to § 504 liability.

thereby") (internal citation and punctuation omitted).
57. See 29 U.S.C. § 794(d) (indicating that "[t]he standards used to determine whether [§ 504] has been violated in a complaint alleging employment discrimination ... shall be the standards applied under Title I of the Americans with Disabilities Act. ..."); 42 U.S.C. § 12134(b) (indicating that, with limited exceptions, "[a]ll regulations [promulgated under Title II] ... shall be consistent with ... the [DOJ] coordination regulations ... [that] appl[y] to recipients of Federal financial assistance under section 504. ...").
59. See, e.g., Okin, supra note 8, at 689; Russell, supra note 8, at 147.
Rehabilitation Act Redux

i. **Section 504's Definition of "Program or Activity"**

Section 504 states that "[n]o otherwise qualified individual with a disability . . . 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." As initially construed by the courts, this language limited the availability of Rehabilitation Act suits to those cases where the specific program or activity against which the individual had alleged discriminatory practices was a recipient of federal funds. In other words, receipt of federal funds by a single program would be insufficient to subject all programs of a given entity to liability for discriminatory practices prohibited by § 504.

This interpretation was overturned by statutory amendment in 1988. In the Civil Rights Restoration Act, Congress inserted an extremely broad definition of "program and activity" into the Rehabilitation Act. Under that definition, if a state agency or other state entity receives federal funding for any purpose, it is subjected to § 504 liability for discriminatory practices in all of its programs or activities.

As a result, if a state agency receives federal funding for any of its operations or programs, it will be subject to § 504 suit. One can thus estimate the likely coverage of the Rehabilitation Act (at least as constrained by the Act's federal funding requirement) by assessing the extent to which most state agencies receive federal funds.

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63. See 29 U.S.C. § 794(b) (2002). Under the statutory amendment, "program or activity" is defined, in pertinent part, as all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government or entity) to which the assistance is extended, in the case of assistance to a State or local government; (2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or (B) a local educational agency . . . system of vocational education, or other school system; . . . any part of which is extended federal financial assistance.

64. On the rare occasions where the state is performing a service for the federal government (for example, by housing federal prisoners in state prisons), the funds received will not be considered federal funding that would subject the agency to § 504 liability. See, e.g., Logan v. United States, 193 F.3d 139, 1996 WL 717087, at *2 (9th Cir. 1996) (unpublished table decision). However, this type of quid pro quo exchange is quite rare, and therefore one can generally assume that if a state entity has received federal funds, it will be subject to § 504 liability.

65. See, e.g., Bentley v. Cleveland County Bd. of County Comm’rs, 41 F.3d 600, 602-03 (10th Cir. 1994).

66. While the "program or activity" definition enacted in 1988 was extremely broad, it appears that it did not extend § 504 liability to all state subdivisions where the state itself is a recipient of federal funds. See, e.g., Nelson v. Miller, 170 F.3d 641, 653 n.8 (6th Cir. 1999) (in dicta, rejecting argument that
ii. *State Agency Receipt of Federal Funds*

The most accurate means of assessing whether most state agencies are recipients of federal funds is to survey the proportion of entities receiving federal funds in each of the individual states. Three states, California, North Dakota, and New Hampshire, were selected for evaluation based on several factors: 1) range in per capita federal aid received; 67 2) geographic diversity; 68 3) population diversity; 69 and 4) availability of data. I then supplemented the results of this survey by searching for Rehabilitation Act cases dismissed on the basis of lack of receipt of federal funding. These combined approaches suggest that while the applicability of the Rehabilitation Act may vary from state to state, it is, in general, likely to be extremely broad.

California is the most populous state in the country, with approximately twelve percent of the U.S. population residing there as of the time of the last census. 70 Its state government has approximately 110 agencies, 71 with a cumulative annual budget of approximately $100 billion. 72 California ranks 27th among the states in per capita federal aid to state and local agencies, slightly below the national average. 73 Because California is so populous, the widespread receipt of federal funding by California agencies would be indicative of the Rehabilitation Act’s significance, if only because it would demonstrate the Act’s general applicability to more than one tenth of the U.S. population.

A survey of the funding of California state agencies reveals that the vast majority of state entities are indeed subject to Rehabilitation Act liability.

general receipt of federal funding by the state would subject all state entities to liability under § 504). As a result, even if a state receives federal funding (as all do), it is necessary to establish that individual state agencies received federal funding in order to subject them to liability.

67. A state in each of three categories was selected: high per capita receipt of aid, low per capita receipt of aid, and average per capita receipt of aid. Per capita receipt of aid was relied on as the best available indicator of the likely extent of state agency receipt of aid.

68. Geographic location was used as a means of partially accounting for political variation among states in terms of attitudes toward participation in federal government funding programs. A state from each coast and one non-coastal state were selected.

69. Two low-population states and one high-population state were selected. Population diversity was included as a factor in state selection in order to account for the possibility that the distribution of federal funds received among state agencies may be different in low-population and high-population states.


Rehabilitation Act Redux

Although available data allow for only fairly rough estimates, those estimates suggest that approximately 95% of all California budget dollars allocated to state agencies are received by entities that are also recipients of federal funds. Therefore, although some California state entities that would have been subject to ADA liability will not be subject to the Rehabilitation Act's provisions, the proportion of such entities is quite low.

In contrast to California, North Dakota is the third least populous state in the country and is home to only approximately 0.23% of the United States population. Its state government has approximately 55 subdivisions, with a cumulative annual budget of approximately $4.4 billion. North Dakota ranks fourth in the nation, well above the national average, in terms of per capita receipt of federal aid. Despite these substantial disparities in per capita receipt of aid, population, and state government size, the proportion of North Dakota state entities that receive federal funds is remarkably similar to the proportion of federal fund recipients in California. Better data is available for North Dakota, and it can, therefore, be said with a fairly high degree of accuracy that approximately 96% of all North Dakota budget dollars that are allocated to state agencies or entities are received by entities that are also recipients of federal funds.

Finally, New Hampshire is the tenth least populous state in the country,

74. Estimates are drawn from data included in the California Governor's Budget Summary. See California Governor's Budget Summary, supra note 72, at 87. As per the broad definition of programs and services added in the 1988 amendments to the Rehabilitation Act, it was generally assumed that if a division of a state agency received federal funding, the entire agency would be considered a recipient of federal funding for § 504 purposes. Because of the relatively rough data used, estimates are not precise; in order to counter the possible inflationary effects of using broad budget categories, where it was clear from the data that a category included an agency not receiving federal funds that would likely be considered a separate entity for the purposes of § 504 funding, that category was deemed non-federally funded en toto for the purposes of the analysis. Funding estimates were based on 2002 budget data.

75. Proportion of budget dollars going to agencies that are also recipients of federal funds was relied on as an indicator of § 504's applicability, rather than proportion of agencies receiving federal funds, because the former was believed to be a better indicator of the breadth of § 504's applicability. Because state agencies have vastly differing budgets, and because agencies with smaller budgets are less likely to be involved in litigation, either as an employer or provider of public services, a straight calculation of proportion of agencies receiving federal funds was thought to provide an unrealistic estimate of § 504's total applicability.


79. See id. Because of the availability of better data, and because North Dakota has far fewer state sub-divisions and budget line items, the percentage of agencies directly receiving federal funds could be computed with greater precision than in the case of California.
with approximately 0.44% of the U.S. population residing there at the time of
the last census. Its state government has approximately 41 subdivisions, with
a cumulative annual budget of approximately $3.9 trillion. New Hampshire
ranks 42nd in per capita receipt of federal aid, well below the national
average. In accordance with this low per capita receipt of federal funds, a
somewhat lower, but still substantial, proportion of New Hampshire budget
dollars (88%) is allocated to state agencies or entities that are also recipients of
federal funds. Like North Dakota, reasonably good data is available for New
Hampshire.

An examination of California, North Dakota, and New Hampshire therefore
suggests that a very substantial proportion of state budget dollars are allocated
to state entities that are also recipients of federal funding. While the proportion
of coverage may vary some from state to state, even those states with a low per
capita receipt of federal funds have a substantial proportion of their budget
dollars going to state entities that are recipients of federal funds. As a result it
seems highly likely that in most states, federal funding should not pose a
substantial obstacle to § 504 liability.

This conclusion is further buttressed by the fact that, since the amendment
of § 504 in 1988, very few Rehabilitation Act cases against state actors have
been dismissed on the grounds that the defendant was not a recipient of federal
funds. Between the years 1988 and 2004, there have been only nine cases in
which Rehabilitation Act claims against state entities were dismissed for lack of federal funding.\textsuperscript{84} In all but three of these cases either the § 504 claim itself, or else identical ADA claims were rejected on the basis of defects adequate to justify dismissal irrespective of receipt of federal funding.\textsuperscript{85} Therefore, there have been even fewer cases in which a state entity’s lack of receipt federal funding was in fact dispositive of a § 504’s plaintiff’s success.\textsuperscript{86}

Combined, these two findings strongly support the conclusion that in most cases § 504’s federal funding requirement will not constitute a bar to suit.

B. Employment Discrimination: Title I of the ADA and § 504

Two background provisions frame and largely control any discussion of the differences between Title I of the ADA and § 504 of the Rehabilitation Act.\textsuperscript{87} First, and most significantly, § 504 was amended in 1992 to provide that “[t]he standards used to determine whether this section has been violated in a complaint alleging . . . employment discrimination . . . shall be the standards applied under title I of the Americans with Disabilities Act. . . .”\textsuperscript{88} Of lesser but also substantial import is a provision included in Title V of the ADA, but applicable to the entire Act, which provides that “[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a


\textsuperscript{85} For decisions where funding was the dispositive issue, see Ramos, 2002 WL 1492574, at *3; Root, 114 F. Supp. 2d at 1336; Arroyo, 1995 WL 611326, at *8.

\textsuperscript{86} From what minimal inferences can be drawn from the limited case law, it seems that the greatest difficulties likely to be encountered in substituting § 504 for ADA claims are in the area of voting rights. Apparently, the state entities responsible for implementing voting laws are frequently not the recipients of federal funds. See, e.g., Nelson, 170 F.3d at 653 n.8; Lightbourn, 118 F.3d at 426-27; Herschaft, 2001 WL 940923, at *2 n.4. Fortunately voting, as a fundamental right, may well be one of the areas of Title II’s application that is ultimately upheld under \textit{Lane}.

\textsuperscript{87} Because it remains unsettled whether Title II of the ADA applies to employment discrimination actions, this section will focus exclusively on Title I. It should be noted, however, that if Title II is ultimately found to extend to employment discrimination, some of the disadvantages that ADA employment plaintiffs may face vis-à-vis § 504 employment plaintiffs would be rendered immaterial. Most importantly, as discussed \textit{infra}, Title II adopts § 504’s procedural and remedial scheme. Thus, if employment plaintiffs had the option of bringing claims under Title II, many of the differences discussed in Section III.B.i. would be rendered unimportant. Similarly, Title II extends to all public entities. Thus, some of the distinctions discussed in Section III.B.i. would be irrelevant if Title II were construed to extend to employment claims. The substantive standards applied to Title II employment claims are, however, simply those that would otherwise apply. See 28 C.F.R. § 35.140 (2004) (indicating that Title I’s substantive standards should apply where the defendant entity is also subject to Title I liability, and that § 504 substantive standards should apply where the defendant entity is not subject to Title I liability).

\textsuperscript{88} 29 U.S.C. § 794(d) (2000).
lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title.\(^8\)^\(^9\)

Taken together, these two provisions have usually led the courts to construe Title I and § 504 claims as coextensive.\(^9\) This tendency has been further buttressed by the fact that the core anti-discrimination provisions of Title I and § 504 are very similar, and that much of the remainder of the far more extensive Title I statutory text was modeled after pre-existing § 504 regulations.\(^9\) There is, therefore, fairly little case law discussing in any detail the relevant differences between the Acts, beyond the obvious contingency of § 504 claims on the entity’s receipt of federal funds.

It is clear nevertheless that there are several significant differences between § 504 and Title I. Most notably, courts have generally found that the 1992 amendments apply only to differences in what constitutes a substantive violation of the Acts.\(^9\) As a result, differences continue to exist in who can sue and be sued under the Acts, and in the Acts’ procedural and remedial schemes. In addition, some courts have, despite the 1992 amendments, continued to recognize a substantial difference in the substance of what constitutes a violation of the Acts. These recognized differences between the Acts, as well as the possibility of further distinctions being drawn by the courts, are discussed below.

i. Entities that Can Sue and Be Sued Under Title I and § 504

As has been noted by the courts, the 1992 amendments to § 504 “address[] only the substantive standards for determining what conduct violates the Rehabilitation Act, not the definition of who is covered under the . . . Act.”\(^9\) Thus, to the extent that there are text-based distinctions between who can sue and be sued under Title I and § 504, they should remain, despite the 1992 amendments. And indeed, where applicable, courts have continued to recognize

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90. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 644-45 (1998) (applying § 504 case law to Title I claim as per § 12201); Olveras-Sifre v. Puerto Rico Dep’t of Health, 214 F.3d 23, 25 n.2 (1st Cir. 2000) (analyzing Title I and § 504 claims together as per 794(d)).

91. See 42 U.S.C. § 12112 (2000); 29 U.S.C. § 794 (2000); 28 C.F.R. §§ 41.52-.55 (2004). See also McDonald v. Pennsylvania, 62 F.3d 92, 94-95 (3d Cir. 1995) (noting that many of the requirements of the ADA were based on pre-existing § 504 regulations and therefore analyzing § 504 and ADA claims together).

92. See, e.g., Freed v. Consol. Rail Corp., 201 F.3d 188, 194 (3d Cir. 2000) (rejecting the argument that § 794(d) requires incorporation of Title I administrative exhaustion requirements and noting that the aim of § 794(d) “is to achieve substantive conformity” between the statutes). But cf. McCachren v. Blacklick Valley Sch. Dist., 217 F. Supp. 2d 594, 599 (W.D. Pa. 2002) (stating in dicta in a Title II case that in all disability employment cases, Title I remedies and exhaustion requirements apply as per the 1992 amendments).

93. Schrader v. Ray, 296 F.3d 968, 972 (10th Cir. 2002).
textual differences in who can sue and be sued under the Acts.\textsuperscript{94}

These differences are not particularly extensive. Section 504 and Title I define the class of plaintiffs entitled to sue identically, and there were and are, therefore, no distinctions between which plaintiffs may sue under the Acts.\textsuperscript{95} Differences in the type of employers that can be sued under the Acts exist, but they are also relatively minimal. Section 504 applies only to entities that are recipients of federal funds.\textsuperscript{96} Meanwhile, Title I applies to employers who have fifteen or more employees.\textsuperscript{97} As a result, prospective § 504 litigants will be able to raise claims against a class of defendants that is similar to the class of defendants subject to Title I suit.

\textit{ii. Procedural and Remedial Measures Applicable to Title I and § 504}

Much more substantial differences exist between Title I’s and § 504’s procedural and remedial schemes. Title I provides, “The powers, remedies, and procedures set forth in [relation to Title VII of the Civil Rights Act of 1964] shall be the powers, remedies, and procedures this subchapter provides . . . .”\textsuperscript{98} In contrast, § 504 provides, “The remedies, procedures, and rights set forth in [Title VI of the Civil Rights Act of 1964 . . .] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . .”\textsuperscript{99} The adoption of separate remedial and procedural frameworks for § 504 and Title I has a number of implications, which are largely favorable for § 504.

\textsuperscript{94} See, e.g., \textit{id.} (rejecting the argument that the 1992 amendments were intended to extend to who can be sued under the Acts); Johnson v. N.Y. Hospital, 897 F. Supp. 83, 86 (S.D.N.Y. 1995) (same). \textit{But cf.} Romand v. Zimmerman, 881 F. Supp. 806, 812 (N.D.N.Y. 1995) (indicating that the ADA’s definition of “employer” extends to the Rehabilitation Act by virtue of the 1992 amendments (§ 794(d))).

\textsuperscript{95} See 42 U.S.C. § 12112(a) (2000) (Title I) (indicating that “[n]o covered entity shall discriminate against a qualified individual with a disability”) (emphasis added); 29 U.S.C. § 794(a) (2000) (Rehabilitation Act) (indicating that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be subjected to discrimination”) (emphasis added). \textit{See also} 29 U.S.C. § 705(20)(B) (2000) (Rehabilitation Act) (stating that “the term ‘individual with a disability’ means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such an impairment”); 42 U.S.C. § 12102 (2000) (ADA general provisions) (indicating that “[t]he term ‘disability’ means . . . (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment”); 42 U.S.C. § 12112 (2000) (Title I) (stating that “[t]he term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”); 28 C.F.R. § 41.32 (2004) (Rehabilitation Act) (stating that “[a] qualified handicapped person means . . . a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question”).

\textsuperscript{96} Obviously, this could potentially constitute a major distinction between the Acts, if many members of the defendant class were not recipients of federal aid. However, as discussed in Section III.A, \textit{supra}, the vast majority of state entities receive federal funds.


\textsuperscript{98} 42 U.S.C. § 12117(a) (2000).

plaintiffs in the employment discrimination arena.

Most notably, because § 504 adopts the procedural framework of Title VI of the Civil Rights Act of 1964 (CRA), rather than Title VII of the CRA, § 504 plaintiffs are not required to exhaust administrative remedies prior to filing suit. As a result, where a comparable Title I plaintiff would be barred from filing in court for failure to first file a charge with the EEOC, a § 504 plaintiff would not. Similarly, the statute of limitations that accompanies § 504 claims often significantly exceeds that afforded Title I plaintiffs. While clearly these issues will not arise in every case, where they are present, they typically will mean the difference between a dismissal of claims and proceeding on the merits.

Section 504 plaintiffs also have a more favorable remedial scheme available to them once a showing of a violation of the act has been made. Under Title I, plaintiffs who are suing government entities are subject to capped compensatory damages awards. Depending on the size of the employer, the plaintiff will be limited in their recovery to an award of between $50,000 and $300,000 (not including backpay or other equivalent equitable relief). In contrast, compensatory damages awards under the Rehabilitation Act are uncapped and in fact sometimes exceed even the highest Title I statutory cap of $300,000. Punitive damages are not available against public entities under either Title I or § 504.

Title I additionally limits award of damages to cases in which intentional discrimination (defined in the Act as “not an employment practice that is unlawful because of its disparate impact”) or a failure to provide reasonable accommodations is shown. A complete defense to damages is afforded to

100. Title VI of the Civil Rights Act of 1964 prohibits racial and national origin discrimination by recipients of federal funds. 42 U.S.C. § 2000d.
102. See, e.g., Freed v. Consol. Rail Corp., 201 F.3d 188, 194 (3d Cir. 2000) (rejecting the argument that § 794(d) incorporates Title I administrative exhaustion requirement).
103. Id.
104. See, e.g., Alberti v. City of San Francisco Sheriff’s Dep’t, 32 F. Supp. 2d 1164, 1171-72 (N.D. Cal. 1998) (noting that a Title I plaintiff must file a complaint with the EEOC within 180 days of the occurrence of alleged discrimination, but that § 504 plaintiffs are generally subject to a longer statute of limitations, often based on the statute of limitations for personal injury actions); Winfrey v. City of Chicago, 957 F. Supp. 1014, 1018, 1023 (N.D. Ill. 1997) (same).
106. Id.
employers who fail to provide reasonable accommodations, but who engaged in “good faith efforts” to provide reasonable accommodations to the disabled employee.\textsuperscript{110} It appears that § 504 similarly requires a showing of intentional discrimination, although this requirement has been interpreted differently than it is defined in the remedial provisions governing Title I.\textsuperscript{111} In general, damages may be awarded for any kind of violation of § 504 so long as the plaintiff has demonstrated “deliberate indifference” to the rights protected by § 504 on the part of the employer.\textsuperscript{112} “Deliberate indifference” is defined by the defendant’s “knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that the [sic] likelihood.”\textsuperscript{113} In practice, it seems likely that these two standards will result in damages being awarded for substantially the same kinds of conduct in violation of the Acts, namely disparate treatment, and failure to make good faith attempts at reasonable accommodations.\textsuperscript{114}

### iii. Differences in the Substantive Standards Applied to Assess Violations of Title I and § 504

As articulated in the Senate Report accompanying the 1992 amendments, the amendments were intended to “ensure uniformity and consistency of interpretations” in the courts’ determinations of what constitutes an employment violation of the disability discrimination acts.\textsuperscript{115} The core import of the 1992 amendments was, therefore, to ensure consistency in the substance of what is found to be a violation under Title I and § 504. Courts have, accordingly, rarely distinguished between § 504 and Title I in discussing the types of employer actions that may violate the Acts.\textsuperscript{116} There are, nevertheless,
a few opinions suggesting that courts may not construe the 1992 amendments as eliminating all differences in the proper interpretation of what constitutes a substantive violation of the Acts.\textsuperscript{117} The primary area in which courts have continued to distinguish between the Acts is discussed below, together with the reasons why further differences between the Acts seem relatively unlikely to emerge.

(a) The Causation Quandary and the Meaning of the 1992 Amendments

Aside from the requirement of federal funding, the most obvious difference between the text of § 504 and Title I is in the standards of causation apparently required by the Acts. Section 504 provides that “[n]o otherwise qualified individual . . . shall, solely by reason of her or his disability . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.”\textsuperscript{118} In contrast, Title I’s core provision provides that, “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . . .”\textsuperscript{119} In accordance with this statutory distinction, some courts have, subsequent to the 1992 amendments, continued to list the showing required under the Rehabilitation Act as that of demonstrating that discrimination occurred “solely”\textsuperscript{120} by reason of disability.\textsuperscript{121}

If the courts’ treatment of the “solely” requirement were limited simply to continuing to list it in summarizing the elements required in § 504 employment claims, it could be interpreted as a perhaps unfortunate, but not terribly
Rehabilitation Act Redux

troubling, artifact of the history of § 504. What is far more concerning for § 504 employment plaintiffs is that some courts have taken the subsequent step of applying this distinction in analysis to find qualitative differences in the standards to be applied to employment claims brought under the respective acts.122

Although very few courts have engaged in this type of more extended analysis, where they have, it has generally resulted in adverse outcomes for the standards used to evaluate § 504 employment claims.123 In particular, the few courts to have considered the question directly have generally found that § 504’s textual “solely” requirement means that § 504 employment plaintiffs must establish that their disability was not just a motivating factor for the employer’s actions, but rather that it was a but-for cause of such actions.124 As a result, they have found that the Price Waterhouse mixed-motive formulation does not apply to § 504 employment claims.125

The Price Waterhouse mixed-motive formulation was a burden-shifting test developed in the context of Title VII case law that was subsequently codified in the text of the CRA.126 While it remains unsettled whether the case law or codified version of the test applies to Title I claims,127 the mixed-motive formulation is generally acknowledged to apply in some form to ADA employment discrimination claims.128 As a result, Title I plaintiffs are entitled to have the burden of proof shifted to the employer where, in a disparate treatment case, they have demonstrated via direct evidence (e.g., statements)129


123. See, e.g., Soledad, 304 F.3d at 505; Justus v. Clinch Indep. Living Serv., 2001 WL 848592, at *6 n.8 (W.D. Va. 2001). Cf. Hendler v. Intelecom USA, 963 F. Supp. 200, 204 n.1 (E.D.N.Y. 1997) (stating in dicta that Rehabilitation Act plaintiffs must prove that they were discriminated against “solely” on the basis of disability, whereas ADA plaintiffs can employ a mixed-motive formulation).

124. See, e.g., Soledad, 304 F.3d at 505.

125. Id. The Fifth Circuit is the only circuit to have explicitly held that the Price Waterhouse formulation is not applicable to § 504 employment discrimination claims. See Soledad, 304 F.3d at 505.


127. See, e.g., Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 n.2 (1st Cir. 2002).


129. It may be also that a strong circumstantial case can be adequate to allow resort to the Price Waterhouse formulation, but this issue is unsettled in the courts. See, e.g., Patten, 300 F.3d at 25 n.1. This uncertainty was in part a carry-over from the state of Title VII law, where the issue was similarly unresolved until very recently. In Price Waterhouse the main opinion carried only a plurality of the Court’s members. There were two opinions concurring in the judgment, one of which would have
that their disability was a motivating factor in the employer’s decision to take an adverse employment action. In the event that the statutory version of the Price Waterhouse test is ultimately found to be applicable to Title I, ADA plaintiffs would also be entitled to attorney’s fees and limited injunctive relief even if the employer succeeded in demonstrating that they would have taken the same action in the absence of discrimination.

Although clearly, in certain instances, the availability of this test may be dispositive of the outcome of a plaintiff’s claim, there are several reasons why its unavailability may not be significant in most § 504 employment discrimination claims. As an initial matter, many, if not most, disability discrimination claims hinge on the employer’s failure to provide reasonable accommodations, where the employee’s disability is acknowledged, and not illegitimate factor in the employer’s decisionmaking process. Even where required the demonstration of “direct evidence” in order for a plaintiff to be entitled to the application of a mixed-motive standard. See Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O’Connor, J., concurring). Because one or both of these concurrences were required in order to make a majority, direct evidence was arguably a prerequisite for application of the mixed-motive formulation. The Supreme Court has recently clarified that the mixed-motive test as codified modifies this result, allowing resort to a mixed-motive formulation even where there is no direct evidence of the defendant’s motive. See Desert Palace Inc. v. Costa, 539 U.S. 90, 101-02 (2003). Therefore, whether or not circumstantial evidence will suffice to secure a mixed-motive test in the ADA context will likely depend on whether or not the courts ultimately find the statutory or case law version of the Title VII test to be controlling.

Unlike many other federal discrimination statutes, there are multiple different types of claims that can be brought under the disability discrimination statutes. The three predominant forms of claims that can be brought pursuant to the ADA and § 504 are disparate treatment claims, reasonable accommodations claims, and disparate impact claims (although the extent to which a robust disparate impact cause of action exists under the disability discrimination statutes remains in doubt, see infra note 168). In addition to these three primary types of claims, numerous regulations provide alternative bases for raising claims under the Acts. For example, one can challenge the failure to provide services in an integrated setting (which may, but need not, also constitute disparate treatment); the failure to effectively communicate with disabled individuals (which may constitute a failure to provide reasonable accommodations, but which is also subject to more specific regulatory standards); and the failure to operate a program in a fashion which is accessible when viewed as a whole (which may, but need not, constitute a failure to provide reasonable accommodations).

Although not all courts have specified that the mixed motive test is not applicable to reasonable accommodations claims, as a logical matter it is very difficult to envision how it might apply. By definition, in order for a plaintiff to be raising a reasonable accommodations claim, the employer must have admitted or been shown to have relied in some way on the disability in taking the adverse employment action. It is clear that plaintiffs are not, however, thereby relieved of any burden of demonstrating that there are possible reasonable accommodations that would have allowed them to perform the job, even under the ADA. See, e.g., US Airways v. Barnett, 535 U.S. 391, 401-02 (2002). It is, furthermore, clear that a demonstration of but-for causation in the sense of the disability playing a dispositive role in the adverse employment action is not, in and of itself, adequate to establish liability in a reasonable accommodation claim, unlike in a disparate treatment claim. On the contrary, if there are no “reasonable” accommodations that would allow the plaintiff to perform the job, it is perfectly legitimate for the employer to rely on the disability in taking adverse employment actions. Applying the
the question is one of disparate treatment, thereby potentially making the test applicable, the employee may lack the necessary direct evidence (or strong circumstantial case) that is a necessary prerequisite to the imposition of the Price Waterhouse burden-shifting framework. Indeed, in many of the § 504 cases that have been dismissed on causation grounds, the courts have found that the plaintiff did not demonstrate that their disability was even a motivating factor in the employer's decision making process.

There are also substantial arguments that these interpretations of the causation standard applicable under § 504 are simply erroneous in light of the 1992 amendments. The text of § 794(d) seems to plainly mandate that all substantive Title I standards be used in evaluating § 504 employment discrimination claims. Furthermore, the application of different standards of causation appears to undermine the core intent of the 1992 amendments, namely to ensure that employers are subject to consistent substantive requirements under the Acts. Given that relatively few courts have, as of yet, fully considered the question of the causation standard to be applied in § 504 employment claims, it seems plausible that the weight of judicial opinion could ultimately cut against the stance taken by the few courts to have considered the question to date.

Price Waterhouse framework to the reasonable accommodations context therefore becomes a nonsensical endeavor. Some courts have explicitly stated that the question of whether the discrimination was "soley" by reason of disability is not the correct question in reasonable accommodations cases. See, e.g., Peebles v. Potter, 354 F.3d 761, 767 n.5 (8th Cir. 2004); Vinson v. Thomas, 288 F.3d 1145, 1154 n.9 (9th Cir. 2002). Instead, such cases address the causation element by looking at whether the employee could have been accommodated reasonably without undue burden. See e.g., Peebles, 354 F.3d at 767 n.5 & 768. Where such accommodation could have been achieved, causation is established for the purposes of the Acts. See, e.g., id.

134. See, e.g., Dratz v. Johnson, 60 F.3d 837, *3 (10th Cir. 1995) (unpublished) (finding, in a § 504 case, that "[t]he evidence . . . failed to create a material issue of fact as to whether the challenged decisions were even motivated in part by handicap discrimination. . . ."); Burns v. City of Columbus, 91 F.3d 836, 843 (6th Cir. 1996) (same).

135. See, e.g., Dratz, 60 F.3d at *3; Burns, 91 F.3d at 843. Cf. Lussier v. Runyon, 1994 WL 129776, at *10 (D. Me. 1994) (not reaching the question of whether the mixed motive formulation would apply in a § 791 case, because it was clear that disability was a but-for cause of the termination). This assessment, however, may be skewed by the fact that most discussions of this issue occur in the context of decisions on summary judgment or on a motion to dismiss. A jury instruction that discrimination must be "solely because of disability," rather than just a "motivating factor" may well play a role in the outcome of cases in certain instances. Cf. Soledad v. United States Dep't of Treasury, 304 F.3d 500, 505 (5th Cir. 2002) (finding that it was error for the judge to instruct the jury that the Plaintiff could prevail upon a showing that his disability was a "motivating factor" in the defendant's adverse employment action, but declining to issue judgment for the employer, since a reasonable jury could find that the plaintiff's disability was the sole cause of that action).


(b) Impact of the 1992 Amendments Outside of the Causation Context

Fortunately, the courts have not, as of yet, extended their differential treatment of Title I and § 504 to other aspects of the Acts' substantive standards. However, Title I and § 504 (and their implementing regulations) have many other textual differences. These differences could, potentially, be seized upon by the courts as a basis for treating differently the substance of what constitutes a violation of the Acts. As discussed below, the courts seem, for a number of reasons, unlikely to adopt this type of approach. This prediction is borne out by the limited case law to address the relevance of the 1992 amendments for textual differences other than the Acts' "solely / because of" distinction.

The first, and most compelling, reason why the courts seem unlikely to engage in extensive parsing of the texts of Title I, § 504, and their respective regulations, is obviously the language and intent of the 1992 amendments. Unless the courts are willing to completely disregard the intended import of those amendments, they cannot engage in a detailed comparison of what constitutes a substantive violation of the Acts. Indeed, any judicial attempts to draw text-based distinctions between what constitutes a violation of Title I and § 504 seems precisely contradictory to the expressed intent of Congress in the 1992 amendments. As noted above, this has not deterred some courts from differentiating between the causation standards required under the Acts. However, even if one does not contest the validity of those decisions, they need not be applied outside of the causation context.

The basis for the courts' decisions in the causation context, i.e., the "solely / because of" distinction between the statutes, is the only significant distinction (aside from federal funding) contained in the core statutory text of § 504.

139. See 42 U.S.C. §§ 12111-12117 (2000) (Title I); 29 U.S.C. § 794 (2000) (§ 504); 29 C.F.R. §§ 1630.1-1630.16 (2004) (Title I regulations); 28 C.F.R., Ch. I, Pt. 41 (2004) (§ 504 Department of Justice coordination regulations). There are a number of other sets of regulations that are applicable to employment discrimination claims under the Rehabilitation Act in certain instances. In addition, there are hundreds of pages of regulatory guidance documents and interpretative regulations that apply to Title I and/or § 504.

140. See, e.g., Woodman v. Runyon, 132 F.3d 1330, 1339-41 (10th Cir. 1997) (holding that the 1992 amendments mandated a change in pre-1992 interpretations of § 504); Shiring v. Runyon, 90 F.3d 827, 831-32 (3rd Cir. 1996) (same). See also Oliveras-Sifre v. Puerto Rico Dep't of Health, 214 F.3d 23, 25 n.2 (1st Cir. 2000) (analyzing Title I and § 504 claims together as per § 794(d)); Cash v. Smith, 231 F.3d 1301, 1305 (11th Cir. 2000) (same).


142. See, e.g., S. REP. NO. 102-357 (1992), reprinted in 1992 U.S.C.C.A.N. 3712, 3782 (stating that the specific incorporation of Title I standards was intended to "ensure uniformity and consistency of interpretations" by courts evaluating disability employment discrimination claims).

143. Compare 42 U.S.C. § 12112(a) (indicating that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability"); with 29 U.S.C. § 794(a) (indicating that "[n]o otherwise qualified individual with a disability....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"). The core anti-
Rehabilitation Act Redux

Because it is included in § 504's core text, one arguably would have to judicially rewrite the language of § 504 in order to render its causation standard consistent with Title I. In contrast, most of the other potential distinctions between § 504 and Title I arise from differences between Title I's text and § 504's case law or regulations. Thus, construing § 504 consistently with Title I in those areas would not require disregarding significant aspects of § 504's statutory text.

It seems likely, as a result, that courts might be less reluctant to give the 1992 Amendments their full import outside of the causation context. And indeed, in those circumstances where courts have been called upon to evaluate the non-causation implications of the 1992 Amendments, they have found the Amendments to mandate consistent interpretation of the Acts. A prominent example of this is in the reasonable accommodation context.

Prior to the passage of the ADA, reassignment to another position was generally not considered a "reasonable" accommodation under § 504. Title I, in contrast, explicitly provides that "[t]he term 'reasonable accommodation' may include . . . reassignment to a vacant position . . . ." Subsequent to the passage of the 1992 amendments, the courts have found Title I's statement of what is reasonable to be controlling in § 504 employment cases. As a result, they have found, contrary to prior interpretations of § 504, that Rehabilitation Act plaintiffs may be entitled to reassignment as a reasonable accommodation.

It thus seems likely that § 504 employment discrimination plaintiffs will be subject to evaluation of their claims under standards that are very similar to those applied to Title I plaintiffs. As noted, the courts at present treat Title I and § 504 employment claims as largely coextensive. In light of the specific discrimination provision of Title I also delineates specific employment related practices that are covered, see 42 U.S.C. § 12112(b), whereas § 504 includes more general prohibitions on exclusion from and denial of benefits of programs, see 29 U.S.C. § 794(a). These differences seem unlikely to prove significant however, as it is well-established that § 504 provides a cause of action for employment discrimination, see, e.g., Consol. Rail Corp. v. Darrone, 465 U.S. 624, 631-34 (1984), and most of the specific employment related practices prohibited in Title I's statutory text were drawn from § 504 regulations. Cf. 42 U.S.C. § 12112(b) (setting out specific forms of discrimination prohibited by Title I); 28 C.F.R., Ch. I, Pt. 41 (prohibiting many of the same practices under § 504); see also Rosalie K. Murphy, Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act, S. CAL. L. REV. 1607, 1608 (1991) (noting that many of the provisions of Title I were drawn from § 504's implementing regulations).

144. See, e.g., Woodman, 132 F.3d at 1339-41; Shiring, 90 F.3d at 831-32.
145. See, e.g., Woodman, 132 F.3d at 1339 n.9. See also Barbara A. Lee, Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent, 14 BERKELEY J. EMP. & LAB. L. 201, 206 (1993) (noting that "the ADA includes reassignment as a potential accommodation" and that "[i]n contrast, the federal Rehabilitation Act (and its implementing regulations) . . . do not include reassignment, and many judges, prior to the ADA's passage, ruled that reassignment to a different position [wa]s not required by [the] law.")
147. See, e.g., Woodman, 132 F.3d at 1339-41; Shiring, 90 F.3d at 831-32.
148. See, e.g., Woodman, 132 F.3d at 1339-41; Shiring, 90 F.3d at 831-32.
mandate of the 1992 amendments, it seems very likely that they will continue to do so into the future. Although a few courts’ treatment of the “solely / because of” distinction between the Acts raises some concerns, it seems likely to prove to be an aberrant example of the courts’ treatment of the two statutes, at least in the area of employment discrimination claims.

C. Government Programs, Services, and Benefits: Title II of the ADA and § 504

Congress did not, in amending § 504 in 1992, impose a blanket mandate requiring the application of Title II standards to § 504 or vice versa. There are however, a number of provisions that require some form of consistent interpretation of the two Acts, even in the government programs and services area. Most notably, Title II provides (and has provided since its enactment) that except for certain exceptions mandated by statute, all regulations promulgated pursuant to Title II, “shall be consistent with the coordination regulations” of the Rehabilitation Act.\(^{149}\) Given that Title II as enacted included, like § 504, only a very minimal core anti-discrimination provision\(^{150}\) (which itself is virtually identical to § 504),\(^{151}\) this requirement of consistent regulations has had the effect of compelling consistent treatment of the Acts in most circumstances.\(^{152}\) Furthermore, all interpretations of Title II are, like Title I, also subject to Title V’s requirement that “[e]xcept as otherwise provided [by statute], nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title.”\(^{153}\)

As a result, the two Acts have been in most circumstances treated as identical by reviewing courts.\(^{154}\) There are, however, a few circumstances in

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150. Title II also includes fairly extensive provisions governing public transportation systems. See 42 U.S.C. §§ 12141-12150 (2000). These provisions, however, are also explicitly applicable to § 504, and therefore do not provide any basis for differential interpretation of the Acts. Id.
151. See Burgdorf, supra note 2, at 445 (noting that “[t]he language of [Title II] appears to be the most completely tied into the wording of section 504”). Compare Title II, 42 U.S.C. § 12132 (2000) (“[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.”), with § 504, 29 U.S.C. § 794 (2000) (“No otherwise qualified individual with a disability . . . 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. . . .”).
152. See, e.g., Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir. 1995) (noting that all regulations promulgated under Title II are to modeled on the Rehabilitation Act’s regulations); see also Burgdorf, supra note 2, at 444-45 (noting that “[T]itle II of the [ADA] was largely an attempt to apply the prohibition against discrimination . . . set out in the section 504 regulations to all programs, activities, and services of state and local governments”). Compare 28 C.F.R. § 35 (2004) (Department of Justice Title II regulations), with 28 C.F.R. § 41 (2004) (Department of Justice § 504 coordination regulations).
154. See, e.g., MX Group, Inc. v. City of Covington, 293 F.3d 326, 332 (6th Cir. 2002) (noting that § 504 and Title II are generally coextensive, and discussing claims together); Davis v. University of
which the Acts have been or could be differentiated on the basis of their statutory or regulatory texts. Below, these circumstances are discussed, and their implications for § 504 plaintiffs are explored.

i. *Entities That Can Sue and Be Sued Under Title II and § 504*

Like Title I, Title II defines the class of individuals who can bring suit identically to § 504. There is therefore, no difference in who may sue under one or the other of the respective acts. Different entities will sometimes be subject to suit under § 504 and Title II, because of § 504’s federal funding requirement. However, both Title II and § 504 otherwise apply to all public entities. As a result, in the absence of a federal funding issue, all public entities are subject to suit under both Title II and § 504.

ii. *Procedural and Remedial Measures Applicable to Title II and § 504*

Title II is also not distinct from § 504 in the procedural and remedial mechanisms that it adopts. Title II in fact specifically co-opts § 504’s procedural and remedial scheme, providing that “[t]he 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 . . . .” As a result, Title II and § 504 plaintiffs will be faced with identical procedural and remedial frameworks in pursuing government programs and services claims.

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North Carolina, 263 F.3d 95, 99 (4th Cir. 2001) (same); Cercpac v. Health and Hospitals Corporation, 147 F.3d 165, 167 (2nd Cir. 1998) (same).

155. See 29 U.S.C. § 705(20)(B) (Rehabilitation Act) (stating that "individual with a disability" means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment’); 42 U.S.C. § 12132 (2000) (Title II) (indicating that “no qualified individual with a disability shall, by reason of such disability, [be subjected to discrimination’]) (emphasis added); 29 U.S.C. § 794 (2000) (Rehabilitation Act) (indicating that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability [be subjected to discrimination’]”) (emphasis added); see also 42 U.S.C. § 12131 (2000) (Title II) (stating that “[t]he term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services’); 28 C.F.R. § 39.103 (2004) (Rehabilitation Act) (stating that “‘qualified handicapped person’ means . . . a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, [a] program or activity’); 42 U.S.C. § 12102 (2000) (ADA general provisions) (indicating that “[t]he term ‘disability’ means . . . (1) A physical or mental impairment that substantially limits one or more of the major life activities of [an] . . . individual; (B) a record of such impairment; or (C) being regarded as having such an impairment’); Alexander v. Choate, 469 U.S. 287, 299 n.19 & 300 (1985) (indicating that program eligibility criteria must be adjusted under the Rehabilitation Act where necessary to provide reasonable accommodations to individuals with disabilities).

156. 42 U.S.C. § 12133.
iii. Differences in the Substantive Standards Applied to Assess Violations of Title II and § 504

Unlike Title I and § 504, Title II and § 504 are not subject to any overarching mandate of substantive consistency. As a result, to the extent that there are salient textual differences in the substantive standards set out by the Acts and their regulations, one would expect the courts to differentiate between the Acts. There are several such potential bases for differentiation. Most significantly, the statutory text of Title II, like Title I, appears to incorporate a different standard of causation than is articulated in the statutory text of § 504. There are, in addition, several textual distinctions between the regulations promulgated under Title II and § 504. Finally, there is at least one area where defendants have urged differential interpretation of the Acts, despite the existence of textually identical implementing regulations. Each of these potential bases for differentiating between the Acts is discussed in turn below.

(a) Distinctions in the Statutory Text of § 504 and Title II: The “Solely” Conundrum in the Context of Government Programs and Services

The only significant substantive distinction between § 504 and Title II’s statutory texts is in their articulation of the applicable standard of causation. Section 504 provides that “[n]o otherwise qualified individual . . . shall, solely by reason of her or his disability . . . be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .” Similarly to Title I, Title II annunciates what appears to be a different standard of causation, requiring only that claimants demonstrate that they were “subjected to discrimination” “by reason of . . . disability.” Some courts have accordingly found that the causation standards of the two statutes must be construed differently.

As in the case of Title I, the primary context in which this distinction has been addressed is in evaluating the availability of a motivating factor or mixed-motive formulation. Although few courts have directly addressed the issue,
those that have have generally found that Title II requires only a showing that disability was "a motivating factor," whereas § 504 requires a showing of but-for causation. As in the employment discrimination arena, however, it is difficult to evaluate to what extent this affects § 504 plaintiffs' prospects for success. In general, relatively few government services or programs claims are premised on a disparate treatment cause of action. Where they are, and where the liability issue turns on causation, there is often either substantial evidence that would support a finding of but-for cause, or else there is virtually no evidence supporting such a finding. It appears to be quite rare that there is in fact sufficient evidence to support the Price Waterhouse burden-shifting paradigm, but insufficient evidence to support an inference of but-for causation. As a result, it is not at all clear to what extent the courts' finding of different standards of causation in fact disadvantages § 504 plaintiffs.

It is even more difficult to discern what potential impact the "solely / by reason of" distinction might have outside of the burden-shifting context. Given the complicated causation structure of the disability discrimination statutes,
particularly in the area of government programs and services, there are numerous areas in which the "solely / by reason of" distinction between Title II and § 504 could potentially be significant. In particular, some of the restrictive readings that were given to § 504 prior to the passage of the ADA were arguably contingent on an understanding of § 504's standard of causation, and thus potentially distinguishable on the basis of Title II's distinctive language. As a result, government programs and services plaintiffs seem unlikely to face a significantly worse causation standard as a result of § 504's "solely" requirement. Although the inability to utilize the Price Waterhouse standard may, in certain instances, disadvantage plaintiffs pursuing disparate treatment claims, it appears in most cases that the causation standards under Title II and § 504 will be treated by the courts as identical.

168. The most obvious area in which Title II might have been construed more broadly than § 504 is in the availability of disparate impact actions. Under pre-ADA case law, courts had found that government policies having a disparate impact on the disabled were actionable under § 504, but only inasmuch as the program denied "meaningful access" to the disabled. See Alexander v. Choate, 469 U.S. 287, 301-02 (1985). Arguably, the exclusion of the word "solely" from the ADA's statutory text could have been read to incorporate a broader disparate impact mandate. As courts have noted, the omission of the "solely" requirement from the ADA renders the statute's causation language more akin to that of Title VII of the Civil Rights Act than that of § 504. See, e.g., Baird ex rel. Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999); McNely v. Ocala Star-Banner Corp. 99 F.3d 1068, 1075-76 (11th Cir. 1996). See generally 29 U.S.C. 794 (2004) (Rehabilitation Act) (prohibiting discrimination "solely by reason of" disability); 42 U.S.C. § 2000e-2 (2004) (Title VII of the CRA) (prohibiting discrimination "because of" race, color, religion, sex or national origin); 42 U.S.C. § 12132 (2004) (Title II of the ADA) (prohibiting discrimination "by reason of" disability). Given that Title VII has long been recognized to have a robust disparate impact requirement, not limited by any conception of "meaningful access," this distinction could potentially have provided the basis for reading a broader disparate impact cause of action into Title II than exists under § 504. See generally Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989-91 (1988) (holding, in the Title VII context, that subjective or discretionary employment practices can be challenged via disparate impact claims); Conn. v. Teal, 457 U.S. 440, 451 (1982) (holding, in the Title VII context, that "bottom line" results in which minority applicants are proportionally represented does not constitute a defense to an intermediate evaluation practice having a racially disparate impact). Courts have, however, generally not made this type of distinction, finding that Title II is violated only where disabled individuals are denied "meaningful access" to the challenged program. See, e.g., Wright v. Giuliani, 230 F.3d 543, 547-48 (2nd Cir. 2000); Theriault v. Flynn, 162 F.3d 46, 48 (1st Cir. 1998). Cf. Olmstead v. L.C., 527 U.S. 581, 619 (1999) (Thomas, J., dissenting) (arguing in a Title II case that Alexander v. Choate should have compelled a different result if it had been followed by the majority); Inmates of the Allegheny County Jail v. Wecht, 93 F.3d 1124, at *13 (3rd Cir. 1996) (applying broader Title VII disparate impact standards to both Title II and § 504 claims), reh'g en banc granted, 93 F.3d 1146, appeal dismissed as moot, 1996 WL 907824 (1996).

169. See, e.g., Wright, 230 at 547-48 (applying § 504's requirement that a program deny "meaningful access" to the disabled in order to establish a disparate impact violation in the Title II context); Theriault, 162 F.3d at 48; Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1015-19 (6th Cir. 1997) (applying pre-ADA § 504 case law which had held that discrimination vis-à-vis other categories of disabled individuals (e.g., exclusion of people with mental disabilities from a generally applicable disability benefit) was not actionable under the statute in the Title II context); Easley v. Snyder, 36 F.3d 297, 305-06 (3rd Cir. 1994) (same). But cf. Olmstead, 527 U.S. at 619 (1999) (Thomas, J., dissenting) (arguing that majority had departed from § 504 in interpreting Title II, adopting a more lenient understanding of comparative discrimination).
Rehabilitation Act Redux

(b) Title II and § 504 Regulations

As noted above, the forms of discrimination prohibited under both Title II and § 504 are primarily defined by regulation. As a result, the textual consistency (or inconsistency) of the regulatory mandates of the two statutes is at least as critical to their consistent interpretation as the consistency of the language of the statutes themselves. It is significant therefore that, as per Title II's statutory mandate, the regulations that have been promulgated to enforce the ADA in the government programs and services arena are virtually identical to the § 504 coordination regulations.

There are, however, a few significant differences in the text of the regulations promulgated under the Rehabilitation Act and Title II. As set out below, § 504 lacks a "reasonable modifications" regulation altogether. There are, additionally, significant distinctions in the text of § 504 and Title II's communications and accessibility regulations. Finally, although Title II and § 504 share a textually identical regulation dealing with community integration of the disabled, defendants have argued for different interpretation of the integration mandates of the Acts. The textual differences between the regulatory mandates of the two statutes, as well as the differences in interpretation that defendants have urged on the courts, are discussed in turn below.

(i) The Duty of "Reasonable Modifications" and Affirmative Defenses to the Duty

The only substantial difference between the Title II and § 504 regulations that was not specifically authorized by statute is the ADA regulations' specific requirement that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

Although the § 504 coordination regulations include a very similar regulation in the employment context they have no comparable counterpart in the provisions addressing non-employment programs and services.

This disparity in the respective statutes' regulations, however, is unlikely to

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173. See infra notes 204-211 and accompanying text.
lead to differential interpretations in most instances. The duty to make reasonable modifications where necessary to avoid discrimination was a component of the requirements of § 504 that was well established by case law prior to the passage of the ADA. A defendant was, furthermore, absolved of this duty under § 504 case law in circumstances where a "fundamental alteration" of the challenged program or service would result. Thus, the only material difference between the Title II regulation and the duty previously recognized under § 504 case law is that the duty recognized under § 504 was traditionally further limited to those instances where the modification would not impose "undue financial or administrative burdens."

Although this difference in the affirmative defenses available to defendants is not insignificant, under current Supreme Court case law, it in fact constitutes a relatively limited distinction in the standards to be applied. Because of Title II's statutory requirement that (with very limited exceptions) Title II regulations must be consistent with § 504's coordination regulations, the Supreme Court in the case of Olmstead v. L.C. interpreted the "fundamental alteration" defense broadly so as to harmonize it with the "undue burden" standard. As a result, the affirmative defenses available to § 504 defendants are unlikely to be materially broader than those available to Title II defendants. While there is still some possibility that the fundamental alteration defense will not ultimately be construed to be as broad as the "undue administrative and financial burdens" defense available under § 504, it is clear that the Court's decision in Olmstead significantly narrowed the differences between the two standards.

177. In addition to the reasons discussed, infra, it is also interesting that courts sometimes simply apply 28 C.F.R. § 35.130 in discussing the Rehabilitation Act. See, e.g., Vinson v. Thomas, 288 F.3d 1145, 1154 (9th Cir. 2002).
179. See, e.g., Arline, 480 U.S. at 287 n.17.
180. Id.
182. It should be noted that the Court's logic on this point was somewhat questionable. Although Title II does, as the Court notes, require the promulgation of regulations that are consistent with § 504 regulations, there is no government programs and services regulation on this issue, and accordingly, nothing for the Title II regulations to be consistent with. The Court compared the Title II regulation to the § 504 employment discrimination regulation, apparently not recognizing that different standards might be applicable in government programs and services claims than in employment claims. See Olmstead, 527 U.S. at 606 n.16. In fact, however, there may well be reasons to impose more stringent requirements on state entities' provision of services and programs to the public than on employers in their actions vis-a-vis employees.
183. See, e.g., Popovich v. Cuyahoga Court of Common Pleas, 227 F.3d 627, 639 (6th Cir. 2000) (noting that the Supreme Court's decision in Olmstead apparently made the fundamental alteration defense less stringent), rev'd upon reh'g en banc for diff. reasons, 276 F.3d 808 (6th Cir. 2002); Hahn ex rel. Barba v. Linn County, 130 F. Supp. 2d 1036, 1045 (N.D. Iowa 2001) (same); Tsombanidis v. City of West Haven, 180 F. Supp. 2d 262, 292 (D. Conn. 2001) (relying on Olmstead in stating that "undue
(ii) Communications

The second significant distinction between the regulations governing § 504 and those governing Title II of the ADA is in the area of communications. As mandated by Title II’s statutory text, the Title II regulations establishing requirements for ensuring effective communication with disabled individuals are modeled on the § 504 regulations applicable to federal programs rather than the § 504 regulations applicable to federally funded programs. This distinction is important, as the § 504 regulations governing federal programs set out communications requirements in considerable more detail and breadth than the § 504 regulations governing federally funded entities.

In accordance with the regulations they were modeled after, the Title II regulations governing communication provide that “[a] public entity shall take appropriate steps to ensure that communications with applicants, participants and members of the public with disabilities are as effective as communications with others.” The regulations go on to provide that “[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity,” and to set out additional specific requirements designed to ensure effective communications with disabled individuals. In contrast, the § 504 coordination regulations provide only that “[r]ecipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.” As a result, there arguably should be significant differences in the treatment of communication-based claims under § 504 and Title II.

Courts, however, have treated claims raised under the two statutes as virtually identical. Some courts have simply applied ADA standards to communication-based claims under both Acts, finding them to be equally applicable to § 504. In other cases, the courts have engaged in an independent analysis of the communication standards applicable to § 504

hardship” constitutes an affirmative defense under Title II).

187. 28 C.F.R. § 41.51(e) (2004).
claims, but have arrived at the same result as would be achieved under Title II.\textsuperscript{189} Under either method of analysis, courts have generally concluded that the statutes’ mandates in the area of effective communications are coextensive. This is probably partially the result of the courts’ overall tendency to construe the statutes consistently, but also might be due to a number of more specific factors.

As an initial matter, while the coordination regulations promulgated under § 504 do not include detailed and comprehensive regulations specific to communication with disabled individuals, the regulations promulgated by the Department of Health and Human Services pursuant to the Act do.\textsuperscript{190} While these regulations are not technically applicable to all § 504 claims, they were part of the initial set of regulations promulgated under the Act and have been afforded substantial deference as a generally applicable interpretation of the requirements of the Act.\textsuperscript{191} As a result, the courts have not infrequently looked to these regulations in evaluating what is required under the Rehabilitation Act in terms of effective communication with disabled individuals.\textsuperscript{192}

In addition, the non-communication-specific proscriptions of the Rehabilitation Act are in most instances adequate to raise communication-based claims that are equivalent to those available under ADA regulations. For example, in most instances the failure to provide for effective communications with disabled individuals will unquestionably deny them the benefits of, or provide them with an unequal opportunity to benefit from, the service, program or other governmental benefit in question.\textsuperscript{193} This clearly violates § 504’s general terms.\textsuperscript{194} Similarly, failure to ensure effective communications may


\textsuperscript{190} 45 C.F.R. § 84.52(b)-(d), app. A (2003). Although the HHS regulations are not as comprehensive as the Title II regulations regarding communications, they are much more comprehensive than the communications provisions included in the § 504 DOJ coordination regulations. Compare id.; with 28 C.F.R. § 35.160 (Title II regulation) and 28 C.F.R. § 41.51(e) (§ 504 regulation).


\textsuperscript{193} See, e.g., Hahn ex rel. Barta v. Linn County, 130 F. Supp. 2d 1036, 1047 (N.D. Iowa 2001) (“[C]ommunication is an integral component of ensuring that [the plaintiff] has an equal opportunity to participate in, and enjoy the benefits of Linn County’s services . . . .”); Civic Ass. of the Deaf of N.Y. City, Inc. v. Giuliani, 915 F. Supp. 622, 635-36 (S.D.N.Y. 1996) (reaching a similar conclusion).

\textsuperscript{194} See 29 U.S.C. § 794(a) (2000) (“No otherwise qualified individual with a disability . . . shall solely by reason of her or his disability . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”); 28 C.F.R. § 41.51(b) (2003) (“A recipient . . . may not . . . on the basis of handicap . . . [p]rovide a qualified handicapped person with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.”).
often deny disabled individuals access to government programs or services, thereby violating § 504 program accessibility requirements. As a result, courts have frequently imposed communications requirements under the Rehabilitation Act that are equivalent to those mandated under the ADA, despite the absence of an extensive universally applicable communications regulation.

(iii) Program Accessibility

The final significant textual distinction between the regulations that govern § 504 and Title II is that the Title II regulation governing overall program accessibility is, per statutory mandate, modeled after the Rehabilitation Act regulations governing federal programs, rather than the Rehabilitation Act regulations governing federally funded programs. In contrast to communications, however, the § 504 regulation governing accessibility of federally funded programs is in fact the more stringent of the two. As a result, the § 504 regulation governing state entity program accessibility imposes stricter requirements than the comparable Title II regulation.

The Title II regulation, while similar in wording and structure to the § 504 regulation applicable to federally funded entities, provides exemptions for buildings of historic value and states that compliance is not required where it would cause an undue hardship or fundamental alteration. In contrast, the § 504 regulation flatly states that every program or activity must be operated such that, when viewed as a whole, it is readily accessible to and usable by individuals with disabilities.

Although there is virtually no case law dealing with this issue, it seems likely that the affirmative defenses that have been generally deemed available as a matter of statutory construction under § 504 would be available as a defense to the § 504 program accessibility regulation. Since these affirmative

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195. See, e.g., Hahn, 130 F. Supp. 2d at 1048-49 (discussing the possibility that inadequate communication might deny the plaintiff meaningful access to county programs). See also Katie Eyer, Litigating for Treatment: The Use of State Laws and Constitutions in Obtaining Treatment Rights for Individuals with Mental Illness, 28 N.Y.U. REV. L. & SOC. CHANGE 1, 10-11 & n. 68, 70 (2003) (discussing non-architectural aspects of the ADA and RA’s program accessibility requirements).
199. 28 C.F.R. § 41.57 (2004).
200. Cases citing to the DOJ Coordination regulation regarding accessibility (28 C.F.R. § 41.57 (2004)) and the HHS regulation regarding existing facilities (45 C.F.R. § 84.22 (2004)) were searched for the words "undue" or "fundamental." In addition, the Westlaw ALLFEDS database was searched for the following: "readily accessible"/150 (504"rehabilitation act")/150 ("undue burden" "undue fiscal" "undue financial" "undue administrative" "fundamental alteration" historic!). Only one relevant case was located. This search was performed in April, 2003, and updated in October, 2004.
defenses are largely identical to those explicitly provided for in the Title II regulation, it seems unlikely that the differences between the two regulations will afford § 504 plaintiffs a materially better opportunity to prove their claims than Title II plaintiffs.\textsuperscript{202} It is, however, possible that the courts might find that § 504’s general affirmative defenses are not applicable where a plaintiff is not specifically raising a “reasonable accommodation” claim, since those defenses effectively serve to define what is not “reasonable.”\textsuperscript{203} Therefore, it is plausible that § 504’s mandate that all programs be, viewed in their entirety, accessible, is in fact broader than that included under Title II.

(iv) Integration Mandate

Finally, although both Title II and § 504 include substantively identical\textsuperscript{204} regulations requiring administration of programs in the “most integrated setting appropriate,” some defendants have argued that different standards should be applied in this regard under the Acts.\textsuperscript{205} In so doing, they have largely relied on a footnote in \textit{Olmstead v L.C.}, stating, “[u]nlike the ADA, § 504 of the Rehabilitation Act contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination. Section 504’s discrimination proscription, a single sentence attached to vocational rehabilitation legislation, has yielded divergent court opinions.”\textsuperscript{206}

This footnote, which was inserted in response to the defendants’ reliance on negative circuit court § 504 case law, was not directed at actual Rehabilitation Act claims (which were not raised in the case), a fact that has generally been recognized by the courts in the case law subsequent to the \textit{Olmstead} decision.\textsuperscript{207}

Furthermore, as has also generally been recognized by the lower courts subsequent to \textit{Olmstead}, there are strong reasons for finding the Rehabilitation Act’s integration mandate to be coextensive with that of the ADA. First, and

\textsuperscript{202} Cf. 28 C.F.R. § 35.150 (2004) (providing that a public entity need not take actions in order to achieve program accessibility that would result in 1) a fundamental alteration to the program; 2) an undue financial or administrative burden; or 3) the destruction of the historical value of an historic property); and Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987) (indicating that the “undue burden” and “fundamental alteration” defenses are generally available under § 504). Section 35.150’s exemption for buildings of historic value would not be encompassed within the § 504 case-law.

\textsuperscript{203} See Putnam, 1995 WL 873734, at *13-14.

\textsuperscript{204} See 28 C.F.R. § 41.51 (2004) (§ 504 regulation) (providing that “[r]ecipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons”); 28 C.F.R. § 35.130 (2004) (Title II regulation) (providing that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities”).


\textsuperscript{206} Olmstead v. L.C., 527 U.S. 581, 600 n.11 (1999).

\textsuperscript{207} See, e.g., \textit{Frederick L.}, 157 F. Supp. 2d at 535.

308
most notably, the text of the integration regulations promulgated under the Acts is identical. It would therefore be difficult to justify differentiating between the Acts in this regard. Unless there were some persuasive basis extrinsic to the Acts’ regulatory texts for treating § 504 and Title II’s integration mandates differently, their regulations’ identical texts would seem to mandate consistent treatment of the Acts.

In fact, no such extrinsic basis for differentiation exists. On the contrary, the Rehabilitation Act, like the ADA, incorporated findings regarding the negative impact of segregation of the disabled in its initial legislative history.\(^{208}\) Even more significantly, § 504 was explicitly amended in 1992 in order to ensure that it reflected “the precepts and values embedded in the Americans with Disabilities Act.”\(^{209}\) Accordingly, it now incorporates findings regarding the pernicious effect of institutionalization and segregation of the disabled that are comparable, although not identical, to those included in the ADA.\(^{210}\) Therefore, while the issue has not been definitively clarified by the Courts of Appeals or Supreme Court, it seems highly unlikely that they will ultimately find that the Rehabilitation Act’s integration mandate to be of lesser significance or validity than that incorporated in Title II.\(^{211}\)

IV. CONCLUSION

The Supreme Court’s sovereign immunity decisions have been widely decried\(^{212}\) by advocates and scholars as posing a serious and unwarranted threat to the civil rights protections afforded to disabled Americans. And properly so. Garrett and other immunity decisions of the Supreme Court have unnecessarily undermined the strength of the constitutional foundation for all federal civil rights laws. In terms of the actual availability of federal disability discrimination claims, however, it appears that they are unlikely to wreak substantial changes. Despite significant textual differences between the ADA, § 504, and their respective regulations, § 504 has generally been construed as coextensive with the ADA. As a result, claims comparable to those previously

\(^{208}\) See id. (discussing § 504’s legislative history).


\(^{211}\) See, e.g., Frederick L., 157 F. Supp. 2d at 535 (rejecting the notion that § 504 and Title II’s integration mandates should be differentiated on the basis of the Olmstead footnote). See also Pa. Prot. and Advocacy, Inc. v. Dept’ of Pub. Welfare, 243 F. Supp. 2d 184, 190 (M.D. Pa. 2003) (not discussing Olmstead footnote, but noting that the integration standards of the two statutes are coextensive); W.R. v. Conn. Dept’ of Children and Families, 2003 WL 1740672, at *1 n.3 (D. Conn. 2003) (same). But cf. Martin v. Taft, 222 F. Supp. 2d 940, 967 (S.D. Ohio 2002) (implying that Title II’s integration mandate is broader than that included in § 504, but declining to dismiss claims under either).

available under the ADA should typically continue to be available under § 504.

To be sure, there are limited areas in which § 504 plaintiffs will be disadvantaged vis-à-vis ADA claimants. Most notably, the "solely / because of" distinction between the two statutes' texts will, in certain instances, disadvantage § 504 plaintiffs in terms of their ability to establish causation, and, therefore, liability. There will, additionally, be some prospective § 504 plaintiffs who will be unable to establish that the entity in question was a recipient of federal funds, and these plaintiffs will be totally barred from bringing suit. These limitations, however, should constitute relatively minor impediments to § 504 plaintiffs' ability to seek relief. As noted above, the vast majority of state entities that are no longer subject to the ADA are recipients of federal funds. Similarly, the more stringent § 504 causation standard appears to be dispositive in a relatively limited number of cases. 213

There are, furthermore, even some potential advantages to pursuing disability discrimination claims under § 504 rather than the ADA. Most notably, § 504 offers a more favorable procedural and remedial scheme than Title I in the employment discrimination arena. In addition, it is possible that § 504's regulations may impose more stringent requirements on entities to ensure the overall accessibility of their programs and services to individuals with disabilities. These advantages, while relatively limited in most circumstances, may, in certain instances, be dispositive of a disability discrimination claimant's success.

As a general matter, however, § 504 plaintiffs are unlikely to be subject to either more favorable or less favorable terms in the evaluation of their claims. Courts, perhaps because of the overwhelming complexity of the statutes, have tended in the vast majority of circumstances to treat their mandates as coextensive. Given the many similarities between the statutes, as well as their multiple mandates of consistency of interpretation, it seems highly likely that the courts will continue to do so into the future. As a result, disability discrimination plaintiffs who are barred by sovereign immunity holdings from bringing cases pursuant to the ADA will typically have a substantively quite similar statutory basis for raising their claims against state entities.

This conclusion highlights the importance of taking litigation alternatives seriously in the new federalism era. Although there will rarely be a pre-existing statute which fills the gap left by Supreme Court jurisprudence as comprehensively as § 504, there will often be significant alternative means for pursuing claims where, as here, a flagship statute is limited or struck down. 214

213. The "solely / because of" distinction could of course also be remedied by Congress in the event in proves to be substantially limiting. Cf John Dinan, Congressional Responses to the Rehnquist Court's Federalism Decisions, PUBLIUS, Summer 2002, at 32 (discussing congressional responses to the Rehnquist Court's federalism decisions).

214. For example, where a statute remains valid as an exercise of Congress's Commerce Clause authority, Section 1983 might provide a vehicle for bringing individual capacity claims for damages
Rehabilitation Act Redux

As litigators make increased use of those alternatives in the wake of the Supreme Court’s new federalism decisions, the alternatives themselves will become the subject to federalism-based attacks. Academics can play an important role in developing theoretical support for remaining alternatives, but will do so only to the extent that those alternatives are perceived as significant.

In the case of § 504, the need for this type of academic attention is pressing. State defendants are vigorously contesting the use of § 504 in the lower courts, most often on sovereign immunity grounds. Academics have largely failed to address this developing federalism onslaught, despite the fact that it may pose a significant threat to § 504’s continued validity. To the extent that they wait to do so until defendants’ arguments gain significant purchase, they may well have missed their most effective opportunity to decisively forestall further erosion of the law in this area.

That there are persuasive arguments to be made for § 504’s continued validity is clear. Although some courts have decried allowing plaintiffs to use § 504 “to get where [they] could not go in a frontal assault,” there are substantial federalism-based justifications for treating § 504 differently from the ADA. Section 504 applies only to recipients of federal largesse. If it applies to the vast majority of state entities, it is only because the states have exponentially increased their willing receipt of federal assistance over the course of the last century. Section 504’s broad applicability is, in that way, simply indicative of a federalism revolution chosen by the states themselves. The requirement that they, in exchange, play a central role in eliminating disability discrimination seems only just.

against state actors. See 42 U.S.C. § 1983 (2000) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”). See also Nick Daum, Note, Section 1983, Statutes and Sovereign Immunity, 112 YALE L.J. 353 (2002) (arguing that 42 U.S.C. § 1983 could be used to bring damages claims for violations of the ADA).


216. But cf. Zietlow, supra note 13 (discussing arguments for why the spending power continues to be a valid basis for enforcing congressional goals that have been invalidated where promulgated pursuant to the Commerce Clause or Section 5 of the Fourteenth Amendment). There have been several articles that have addressed arguments for and against the continued vitality of Spending Clause legislation in the aftermath of the Supreme Court’s recent federalism jurisprudence. Most of these, however, have considered the question on a general level, rather than focusing on the specific attacks that are being waged on § 504. The only article to address in a limited fashion the types of arguments that are likely to be leveled against § 504 in the aftermath of Garrett is Hartley, supra note 13.
