
Article

A New Vision of Public Enforcement

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To begin, consider the situation of a black man in Mississippi in 1964 who wanted to vote in a federal election. He would

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be within his “legal” rights to do so. Since 1870, the United States Constitution, the highest law of the land, had provided that “[t]he right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race.”¹ Two federal statutes protected this right.² But the reality is that the state and private individuals would vigorously attempt to stop him from voting, even to the point of subjecting him and his family to violence. People that attempted to help him vote could be beaten and even murdered.³

The point of this simple but sad hypothetical is that civil rights laws do not magically create change. Even the most far-reaching and thoughtfully drafted statutes need to be enforced to have any real impact. In the above example, it was not until the passage and enforcement of the Voting Rights Act of 1965⁴ that overt forms of racial exclusion in voting became, for the most part, confined to the history books.

Our collective antidiscrimination experiences have taught us that there can be a significant gap between law and reality. The spectrum and depth of federal civil rights statutes, including the Voting Rights Act of 1965,⁵ Titles II and VI of the Civil Rights Act of 1964,⁶ the Fair Housing Act,⁷ and, most recently, the Americans with Disabilities Act,⁸ are impressive and a source of national pride. But these statutes have not created a more inclusive society on their own. Behind every individual gain stands the efforts of social forces dedicated to their enforcement.

The process of enforcement therefore needs to be studied and analyzed as part of the larger debate over the form and di-

1. U.S. CONST. amend. XV, § 1.

2. See Civil Rights Act of 1957, 42 U.S.C. §§ 1971, 1975 (1964); see also Civil Rights Act of 1960, 42 U.S.C. §§ 1971(c)–(e), 1974e, 1975 (1964).

3. State-sanctioned practices to deny African Americans the right to vote included poll taxes, literacy requirements, and, in Mississippi, a discriminatorily applied constitutional requirement that voters be able to read any section of the Mississippi Constitution and give a reasonable interpretation thereof. See ROY BROOKS ET AL., CIVIL RIGHTS LITIGATION 559 (2005); see also DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 482–86 (2004). The violence of this era is well chronicled. *Id.* at 491.

4. 42 U.S.C. §§ 1971, 1973–1973p (1970).

5. *Id.*

6. 42 U.S.C. § 2000a–3a (2000) (nondiscrimination in places of public accommodation); *id.* § 2000e–2000e-17 (nondiscrimination in employment).

7. 42 U.S.C. §§ 3604–3606, 3617 (1988).

8. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

rection of civil rights laws. Of late, this discussion has increasingly turned toward the judicially and legislatively imposed limitations on private enforcement.⁹ To be sure, there is an important story to be told about how the ability of private lawyers to bring civil rights cases in the public interest (functioning as a “private attorney general”) has been systematically undermined. But what is being increasingly left out of the public and academic discussion is the role of the federal government as an enforcer of civil rights laws (what I will call “public enforcement”). Despite being almost entirely a function of presidential prerogative, public enforcement of civil rights laws is not often discussed in presidential races. And existing academic accounts tend to treat public enforcement as chronically ineffective and incapable of improvement.¹⁰ In the current political environment, it may seem naïve or overly ambitious to talk about a more systemic and effective role for public enforcement authorities. But administrations do not last forever, and when the pendulum swings back in a more pro-civil rights direction, it is important to have models of more proactive public enforcement behavior. Moreover, as will be discussed herein, history suggests that a casual dismissal of the effectiveness of public enforcement is not entirely warranted.

My goal is to enlarge the civil rights dialogue by renewing emphasis on the importance and form of public enforcement. The current decline of the private attorney general’s ability to fairly and consistently enforce our civil rights laws strengthens the argument for a renewed emphasis on the various enforcement apparatuses of the federal government. When the United States takes a strong stand to protect the civil rights of its citizens, it sends a symbolic message and expresses the will of the people in a way that cannot and should not be completely outsourced.

Focusing on the Americans with Disabilities Act (ADA),¹¹ this Article first makes the case that a stronger government role is needed, then explores what that role can and should look like. Within the context of the ADA, I will argue that the executive branch’s role should vary depending on the context. In the areas of failure-to-hire claims and those involving physical accessibility, public enforcement officials should focus on bringing

9. See *infra* Part I.A.2.

10. See *infra* Part I.B.1.

11. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

large systemic cases that advocate specific and concrete changes. Regarding reasonable accommodations in the workplace and a public entity's responsibilities not to discriminate in public programs and services, I will suggest that the executive branch can more effectively foster flexible solutions in a context-specific manner.

Federal disability laws have suffered from a lack of structural litigation, or a sustained pattern of cases against large power structures invoking the power of the courts to oversee detailed injunctive relief. Drawing examples from public enforcement of predecessor civil rights statutes, I will argue that these types of cases are an important, yet missing, feature of a successful antidiscrimination strategy. There are many theoretical and practical reasons why public enforcement authorities are uniquely suited to bring these cases and set the agenda for disability civil rights enforcement in a way that private attorney generals cannot currently do. Specifically, I identify two types of structural cases—claims involving failure to hire and physical accessibility—that public enforcement officials can and should be bringing on a systematic basis.

But, in a world where any enforcement official—public or private—cannot possibly bring every case, supplementary enforcement tools also need to be considered. Recent “new governance” scholarship in fields such as labor and environmental law posits that regulators should diversify the ways they interact with regulated entities.¹² This work focuses on collaborative, multiparty, multilevel, adaptive, problem-solving methods of public policy implementation that to varying extents supplant or supplement traditional regulation. Importing this theoretical concept into ADA enforcement yields some important insights. Specifically, I will suggest that to better realize the ADA's goals regarding reasonable accommodations in the workplace and public entities' responsibilities not to discriminate on the basis of disability, public enforcement officials should consider nontraditional enforcement options. Ultimately, the goal should be to engage stakeholders in defining these concepts in a context-specific and mutually acceptable way, rather than requiring courts to interpret and express statutory rights.

12. See, e.g., Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 471–78 (2004) (providing an explanation of “New Governance” from a leading environmental law expert).

This Article proceeds in three Parts. Part I starts by situating discussions of enforcement within the larger universe of scholarship critiquing the effectiveness of civil rights law.¹³ Part I then turns to a discussion of the rise and fall of the role of the private attorney general in the civil rights arena, a trajectory that opens the door for a renewed discussion of the role and effectiveness of public enforcement. Part II explains the need for, and importance of, structural public law litigation in the disabilities context, and argues that public enforcement officials are theoretically and practically equipped to take the lead. Failure-to-hire and physical access cases provide concrete examples where systemic litigation by public officials is needed. Part III moves beyond litigation, offering a novel application of new governance theory to ADA enforcement, and concludes with suggestions on how to maximize the benefits of these alternative types of enforcement activities.

I. THE ROLE OF ENFORCEMENT

There is a strong consensus in the literature (at least among progressive commentators) that many federal civil rights statutes—including Title VII of the Civil Rights Act of 1964, the Fair Housing Act, and the Americans with Disabilities Act—have not created as much social change as was originally hoped.¹⁴ Traditionally, academics have focused on either

13. Although the universe of civil rights laws is technically broader than antidiscrimination law, there is a large overlap. Because the primary focus of this Article is on the ADA, which fits both descriptions, I will use the terms somewhat interchangeably.

14. Regarding Title VII, see, for example, Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 758 (2000) (suggesting that employment discrimination law cannot “actually alter the dominant norms of most workplaces or the kinds of roles that men and women play within them”); Samuel R. Bagenstos, *The Structural Turn and the Limits of Anti-discrimination Law*, 94 CAL. L. REV. 1, 20–26 (2006) [hereinafter Bagenstos, *Structural Turn*] (arguing that Title VII has proven ill-suited to redistributing power and remedying unintentional discrimination); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1325–26 (1987) (asserting that Title VII “does not allow for challenges to male bias in the structure of business, occupations, or jobs”); and Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1331–32 (2003) (arguing that class action employment litigation has proven ineffective in creating meaningful change). Regarding the Fair Housing Act, see, for example, Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 383 (1988) (“Ultimately, in light of the limited changes in the nation’s housing patterns over the past 20 years, one has to ask whether the Fair Housing Act can ever generate a systematic and effective attack on housing discrimination in

critiquing court decisions of existing laws or suggesting how new legislation should be created or current laws modified. For example, within disability law, commentators have consistently criticized the Supreme Court's interpretation of the ADA's definition of disability.¹⁵ There has also been discussion of amending the ADA or other disability law statutes to more effectively create change in the lives of people with disabilities.¹⁶ Criticiz-

this country. Experience suggests that the answer is 'No.'). See also John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998) ("Among the modern civil rights laws, fair housing law persists as the least effective."); David A. Thomas, *Fixing up Fair Housing Laws: Are We Ready for Reform?*, 53 S.C. L. REV. 7, 9 (2001) (characterizing the Fair Housing Act as "ineffective"). Regarding the ADA, see, for example, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 3-4 (2004) (noting the "inability of antidiscrimination laws to eliminate the deep structural barriers to employment that people with disabilities face"); see also Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 240 (2001) (showing defendants' high success rates in ADA employment cases); and Bonnie Potras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L. J. 335, 229 (2001) (arguing that "judicial . . . hostility" has undermined the ADA's effectiveness).

15. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488-89 (1999) (holding that the plaintiffs were not "disabled" within the meaning of the ADA because eyeglasses improved their vision to 20/20); see also *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999) (holding that plaintiff may not be protected under the ADA, despite having vision in only one eye, because his brain has developed subconscious adjustments to compensate for reduced depth perception); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 518-19 (1999) (holding that the plaintiff was not protected under the ADA because, when medicated, his high blood pressure did not prevent him from functioning normally). For criticism of these decisions, see, for example, Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 438-512 (1997) (discussing courts' misconstructions of the ADA's definition of disability); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1299-1307 (2000) (discussing courts' restrictive interpretations of the "regarded as" definition); and Bonnie Potras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 325-26 (2000) (detailing legislative history that supports determining disability without considering mitigating measures and the Court's contrary decisions). Commentators have also noted the restrictive way that courts have interpreted the ADA's reasonable accommodation provisions. See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 92 (2005) (arguing that, with a different interpretation of "workplace essentialism," the ADA could have greater impact); see also Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 874-79 (2007) (arguing for increased group-based challenges to workplace exclusions).

16. For example, in the disability law context, academics and policymakers have discussed a need for some version of an ADA restoration bill. The

ing a conservative judiciary as undermining civil rights laws, or suggesting legislative fixes, is of course not unique to disability law.¹⁷

The thrust of the above criticisms is to modify existing statutes or interpretations of these statutes. The predicate argument for substantive change in the law, however, reflects a belief that the law as written is the same as the law in action. This view increasingly has been challenged.¹⁸ Neither the individual rights guaranteed in civil rights statutes nor the larger antidiscrimination ideals behind them are self enforcing. Statutes can confer only rights; to be meaningful, these rights

primary feature of this project would overturn Supreme Court interpretations of the definition of disability. See NAT'L COUNCIL ON DISABILITY, RIGHTING THE ADA 99–125 (2004), available at http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf (proposing an “ADA Restoration Act,” and noting that “[i]ncisive and forceful legislative action is needed to address the dramatic narrowing and weakening of the protection provided by the ADA”); see also Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law—What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 91–92, 128–29, 162 (2000) (criticizing the wording of the ADA and suggesting that Congress should amend the definition of disability). On July 26, 2007, House Majority Leader Steny Hoyer, introduced the ADA Restoration Act of 2007. H.R. 3195, 110th Cong. (2007). Representative Tom Harkin introduced a companion bill in the Senate. S. 1881, 110th Cong. (2007). This bill would amend ADA’s definition of disability. *Id.*

17. Civil rights advocates outside of disability law dislike a whole range of Court decisions. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), for example, tightening the reins on class certification in Title VII cases, has been criticized for beginning the end of employment discrimination class actions. See Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 820 (2004) (“In the years after the Court emphasized the importance of adherence to the requirements of Rule 23, the number of class action suits filed in federal court decreased significantly.”); see also John A. Tisdale, *Deterred Nonapplicants in Title VII Class Actions: Examining the Limits of Equal Employment Opportunity*, 64 B.U. L. REV. 151, 171 (1984) (noting the *Falcon* opinion’s role in the new, closer adherence to Rule 23 requirements in Title VII suits). On the legislative side, within the larger universe of employment discrimination law, Congress amended Title VII of the Civil Rights of 1964 in 1991 to make punitive and compensatory damages available to plaintiffs claiming intentional discrimination, finding that “additional remedies under Federal law are needed to deter . . . intentional discrimination in the workplace.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981a(a)(1) (2000)). Similarly, the Fair Housing Act was amended in 1988 to remove the cap on punitive damages. Fair Housing Amendments Act of 1988, Pub. L. 100-430, § 813, 102 Stat. 1619, 1633 (codified as amended at 42 U.S.C. § 3613(c) (2000)).

18. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (taking a pessimistic view of the ability of law to create social change without the support of the executive branch and the public).

must be defended from intrusion or violation, often in court. The scholarship identifying and critiquing this process increasingly has focused on the role and limitations of private enforcement,¹⁹ with public enforcement being little more than an afterthought or an option that is dismissed out of hand.²⁰ Because the role of private enforcement is an important part of why I believe a more robust discussion of public enforcement is needed, in this Section I will briefly summarize the rise and fall of the civil rights private attorney general. I argue that the continuation of this discussion—which has not yet taken place—should focus on public enforcement.

A. PRIVATE ENFORCEMENT

1. Background and Rise of Private Enforcement

The concepts of private enforcement and the private attorney general can mean several different things.²¹ Most broadly, any plaintiff whose private lawsuit vindicates the public interest by deterring unlawful behavior can be viewed as one variant of a “private attorney general.”²² Over time, however, an

19. See, e.g., Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1131–34 (2007) (arguing that court decisions have negative effects for private organizations that bring civil rights cases); Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1 (2006) (critiquing private enforcement of Title III of the Americans with Disabilities Act); Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 357 (1988) (undertaking an empirical study of cases brought by private attorneys general and concluding in part that their effectiveness “depends in crucial respects on a combination of private initiative and governmental commitment to regulation and enforcement”); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 187 (discussing court decisions that undermine the private attorney general’s ability to prosecute civil rights cases); William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2133–37 (2004) (describing the historical development of the private attorney general concept); Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 379–81 (1988) (illustrating the limitations of private enforcement of the Fair Housing Act); Selmi, *supra* note 14, at 1324–31 (arguing that the lack of governmental monitoring in civil rights class actions brought by private lawyers undermines their effectiveness in producing social change).

20. See *infra* notes 74–75 and accompanying text.

21. As academic lore has it, the term “private attorney general” was first used in Judge Jerome Frank’s opinion in *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). See Garth et al., *supra* note 19, at 357.

22. See Rubenstein, *supra* note 19, at 2133–35.

increasingly developed body of case law and literature has refined the concept. Within the civil rights arena, a private attorney general is a private citizen whose lawsuit, while perhaps benefiting her, also works to the advantage of the public by eliminating discriminatory behavior.²³ Traditionally, federal civil rights statutes have offered the possibility of attorneys fees and damage awards (presumably shared with the plaintiff's lawyer under a contingency fee arrangement) to entice private lawyers to take these cases.²⁴

Initially a "progressive" legal reform,²⁵ the private attorney general incentives in the enforcement of civil rights had support from both sides of the political aisle. Conservatives championed the role of the private attorney general because it privatized enforcement, thus shrinking the role of the federal government; and liberals supported private actors enforcing civil rights because it freed up civil rights enforcement from any conservative political agenda or administration.²⁶

Importantly, during the 1960s and 1970s, there was a pattern of vigorous private civil rights enforcement by public interest organizations.²⁷ These lawyers—who in and of them-

23. See *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) ("When a plaintiff obtains an injunction [under Title II of the Civil Rights Act of 1964], he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."); see also H.R. REP. NO. 94-1558, at 1 (1976) ("The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality.").

24. See BLACK'S LAW DICTIONARY 129 (6th ed. 1990) (subdefinition of "Attorney General") ("The 'private attorney general' concept holds that a successful private party plaintiff is entitled to recovery of his legal expenses, including attorneys fees, if he has advanced the policy inherent in public interest legislation on behalf of a significant class of persons.").

25. Garth et al., *supra* note 19, at 354.

26. *Id.*; see also Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1387 (2000) (advocating a private enforcement model "that harnesses the power of private citizens to reform unconstitutional practices, particularly in the . . . area of police-related rights violations").

27. These organizations are sometimes referred to as "social advocate" private attorneys general. See Garth et al., *supra* note 19, at 358 n.17. On the role of the NAACP in enforcing the Civil Rights Act of 1964, see generally JACK GREENBERG, *CRUSADERS IN THE COURTS* (1994). On the role of the ACLU along with the NAACP, see JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 22-24 (1978); see also Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest*

selves were considered private attorneys general²⁸—were generally financed by a blend of foundation and public money (the latter being primarily through the Legal Services Corporation (LSC)).²⁹ The procedural vehicle of choice for these lawyers was the civil rights class action.³⁰ There was a sort of symbiosis between the public-interest-minded private attorney general and the judicial and political systems.³¹

2. Backlash Against Private Enforcement

To the extent that this was a golden or even classic era,³² it did not last very long. The private attorney general as enforcer of civil rights soon faced a multilevel assault by the courts and Congress. In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,³³ the Court dramatically changed the ways that plaintiffs could recover attorneys' fees in civil rights cases. Rather than qualify-

Law," 2005 WIS. L. REV. 455, 456–61 (characterizing the 1960s and 1970s as the "classic" era of public interest law).

28. See Rubenstein, *supra* note 19, at 2146–48.

29. See Garth et al., *supra* note 19, at 359–60 (noting that in the late 1960s and 1970s the private attorney general "was supported by money from government and large foundations"). See also Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN. ST. L. REV. 1, 6 (2005) (noting that "the Carter administration increased funding for the [LSC] and generally supported its goals"); Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1253–54 ("[F]ederal legal services lawyers won almost two thirds of the eighty cases they argued to the United States Supreme Court through the mid-1970s, including landmark cases like *Goldberg v. Kelly*, which had far-reaching implications for the poor." (footnotes omitted)).

30. See Garth et al., *supra* note 19, at 355 ("The class action suit is the principal procedural mechanism characteristic of the private attorney general."); see also Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator for Civil Rights*, 137 U. PA. L. REV. 2179, 2184–85 (1989) ("The device of the class action is closely associated with the figure of the 'private attorney general.'"); Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997).

31. The government nurtured these lawyers and their work through the LSC. See Garth et al., *supra* note 19, at 370 (noting the role of the LSC in funding class action work). The revisions to the Federal Rules of Civil Procedure in 1966 contributed to a climate in which "the existence of structural opportunities and organizational resources fed a sense of optimism about the power of law to change society. A receptive federal judiciary, centralized federal agencies, and robust social welfare programs permitted public interest lawyers to extend rights, reform bureaucratic rules, and amplify government benefits." Cummings & Eagly, *supra* note 29, at 1253.

32. See Trubek, *supra* note 27, at 456–57.

33. 532 U.S. 598 (2001).

ing as “prevailing parties” by showing that their lawsuit was a catalyst for voluntary change by the defendant (the previously accepted “catalyst theory”), the Court held that plaintiffs must achieve a “material alteration of the legal relationship of the parties,” such as a favorable judgment on the merits or a consent decree.³⁴ This judicially imposed limitation has undermined the ability of the private attorney general to bring cases for injunctive relief.³⁵ In other cases the Court has curtailed Congress’s ability to authorize private damage suits against states³⁶ and restricted private rights of action to enforce the disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964.³⁷

Perhaps unintentionally, statutory developments have also been unkind to the private attorney general. In 1991, Congress amended Title VII to allow plaintiffs claiming intentional discrimination to seek compensatory and punitive damages and to request jury trials.³⁸ These changes were intended to bolster the private enforcement scheme.³⁹ Ironically, however, by complicating the class certification inquiry, they have stymied the ability of the private parties and their lawyers to bring civil rights class actions.⁴⁰

34. *Id.* at 604.

35. See Albiston & Nielsen, *supra* note 19, at 1088–92 (discussing *Buckhannon*’s negative effects on private organizations that bring civil rights cases).

36. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that a private litigant could not bring a damage claim under Title I of the ADA against Alabama).

37. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that Title VI was not intended “to create a freestanding private right of action . . . [T]herefore . . . no such right of action exists.”). On the judiciary’s assault on the private attorney general, see Karlan, *supra* note 19, at 186 (“[T]he Court has launched a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general.”).

38. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. §§ 1981a(a)(1), (c) (2000)).

39. See *id.*

40. See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 407–10 (5th Cir. 1998) (finding that, although the case could have proceeded as a class action before passage of the Civil Rights Act of 1991, that statute “ultimately render[s] this case unsuitable for class certification under Rule 23”). *But see* Hart, *supra* note 17, at 835–45 (arguing that real reasons courts will not certify employment class actions after the Civil Rights Act of 1991 have to do with perceptions that class actions are unfair, force defendants into blackmail settlements, and are no longer necessary). For a discussion of why these restrictions do not similarly impact government lawyers, see *infra* notes 146–52 and accompanying text.

The political capital and popularity of the civil rights plaintiffs' bar has also faded. The first step was the dismantling of the (LSC). Organizations that had been effective private attorneys general in civil rights cases had their funds cut.⁴¹ Then, in 1996, Congress enacted a series of restrictions on the LSC, including prohibiting organizations that receive funding from the Corporation from bringing class actions.⁴² This was devastating to the LSC's ability to prosecute large cases on the public's behalf.⁴³

The civil rights private attorney general came to be viewed less as a social advocate and more akin to his mass tort or securities counterpart.⁴⁴ The recent passage of the Class Action

41. In 1982, the Reagan administration attempted to eliminate the LSC altogether. Blank & Zacks, *supra* note 29, at 6; see also William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 255–56 (1998) (noting that the Reagan budget scheduled the LSC for termination). Although this did not happen, the LSC's budget was continuously and dramatically reduced. See American Bar Association, Legal Services Corporation, <http://www.abanet.org/poladv/priorities/lsc.html> (last visited Nov. 5, 2007) (reporting that Congress reduced the LSC budget from \$400 million to \$278 million in 1996); see also Katja Cerovsek & Kathleen Kerr, *Opening the Doors to Justice: Overcoming the Problem of Inadequate Representation for the Indigent*, 17 GEO. J. LEGAL ETHICS 697, 698 (2004) ("In 2002, the federal government allocated only \$329 million dollars in 2002 to the Legal Services Corporation (LSC), a decrease from the \$400 million allocated in 1995. The LSC allocation is \$21 million below the 1981 level and far below the \$600 million that would be the inflationary equivalent of the 1981 levels." (citations omitted) (quoting Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 4 (2003))).

42. Omnibus Consolidated Revisions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. The class action restriction is found in section 504(a)(7) of the Act.

43. See BRENNAN CENTER FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 9 (2000), available at <http://www.brennancenter.org/dynamic/subpages/atj2.pdf> ("To understand just how the restrictions [in the 1996 law] are hurting poor clients, it is useful to look at a tool that LSC-funded lawyers used to be able to use on their behalf: the class-action suit."); see also Blank & Zacks, *supra* note 29, at 3 ("It is probable that since 1996, legal services lawyers have been prevented from filing a significant number of potential class action lawsuits."); David C. Leven, *Justice for the Forgotten and Despised*, 16 Touro L. REV. 1, 12–14 (1999). These restrictions meant that LSC-funded entities focused more on smaller, individual cases; those involving unemployment benefits, for example. See Christine Jolls, *The Role and the Functioning of Public-Interest Legal Organizations in the Enforcement of Employment Laws*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141, 167–68 (Richard B. Freeman et al. eds., 2005).

44. See Garth et al., *supra* note 19, at 360–65 (arguing that the private

Fairness Act (CAFA)⁴⁵ demonstrates the decreased political power of the plaintiffs' civil rights bar. Amongst other things, CAFA moves certain class action cases from state to federal court⁴⁶ on the stated rationale that the civil litigation system had been abused by plaintiffs' class action lawyers.⁴⁷ Various civil rights groups argued that CAFA was unnecessary in civil rights cases because there was no history of civil rights class action abuses in state court.⁴⁸ Despite vehement pursuit, the civil rights community was unable to get a carve-out for civil rights class actions.⁴⁹

Commentators also soured on the private attorney general. In a series of articles in the 1980s, Professor John Coffee started questioning the extent to which we could "sensibly rely on private litigation as a method of law enforcement."⁵⁰ In criti-

attorney general is no longer seen as a social advocate in light of economic interests); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659, 661 (2003) ("The large money stakes involved in many recent cases make it tempting to view the cases as just another form of mass tort, wherein the parties bargain to place a price on the risk of workplace discrimination."); see also Selmi, *supra* note 14, at 1280 ("[T]his model—where the money that changes hands is more important than structural reforms—has transformed civil rights class action litigation into something more akin to torts or consumer class actions . . .").

45. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2000 & Supp. IV 2006)).

46. CAFA amends 28 U.S.C. § 1332, the federal diversity jurisdiction statute, to vest the district courts with original jurisdiction of any class action in which the matter in controversy exceeds \$5 million, exclusive of interest and costs, and that is between citizens of different states, or citizens of a state and a foreign state or its citizens and subjects. 28 U.S.C. § 1332(d)(2).

47. 28 U.S.C. § 1711(a)(1).

48. Civil rights advocates even argued that CAFA would harm civil rights because it could move cases under more expansive state law civil rights statutes into federal court, and it would slow the resolution of federal civil rights cases because the expansion of federal jurisdiction would further bog down federal courts. See Letter from Leadership Conference on Civil Rights to U.S. Senate (Sept. 6, 2003), available at <http://www.aclu.org/rightsofthepoor/gen/13468leg20030916.html> (urging opposition to S. 274, the Class Action Fairness Act of 2003); see also Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 *STAN. L. REV.* 1521, 1540 (2005) (noting opposition of a civil rights bar to CAFA).

49. There is such a carve-out for securities class action cases, 28 U.S.C. § 1332(d)(9)(A), which are already regulated by the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended at 15 U.S.C. § 78bb (2000)).

50. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 *MD. L. REV.* 215,

cizing the private attorney general as a legal institution that had not lived up to its early promise to promote the public interest, Coffee noted that private lawyers may have different incentives than their clients, which leads to either poor representation (where plaintiffs' lawyers sell out their clients) or excessive litigation (because the parties to the litigation do not bear its costs).⁵¹ Although Professor Coffee's work focused on securities litigation, his basic criticisms have recently been extended to the civil rights private attorney general. Professor Michael Selmi conducted a recent study of high-profile employment class action cases with large settlements, all of which were brought by the private bar.⁵² Professor Selmi found, quite discouragingly, that these cases have little or no effect on stock price, create little or no meaningful substantive change within corporations, and produce only modest financial benefits for class members, despite the fact that the remedial focus of these cases was monetary relief.⁵³ He concludes that one of the few things these cases actually accomplished was enriching the lawyers that were involved.⁵⁴

3. The ADA and the Private Attorney General

Enacted at a time when Congress still professed a belief in the private attorney general but courts and the public had turned against it, the ADA has become a prime example of the concept's limited utility. Like the Fair Housing Act and Title VII, the ADA is heavily dependent on private enforcement. Each title of the ADA allows for a private right of action.⁵⁵ Under Title I (discrimination in employment), an aggrieved plaintiff can file a lawsuit after receiving a right-to-sue letter from the EEOC.⁵⁶ An individual may then sue for compensatory and

218 (1983).

51. *Id.* at 220. See generally John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 676-90 (1986) (noting the different incentives for plaintiff attorneys and the effects on social benefits).

52. See Selmi, *supra* note 14, at 1252-68.

53. See, e.g., *id.* at 1250, 1321.

54. *Id.* at 1275, 1285, 1292; Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & COMTEMP. PROBS. 137, 137-38 (2001) (noting the negative effects of private class action litigation).

55. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

56. *Id.*

punitive damages and request a jury trial.⁵⁷ Under Title II (discrimination by public entities), an individual may file a lawsuit.⁵⁸ Compensatory, but not punitive, damages are allowed.⁵⁹ Under Title III (discrimination in privately owned places of public accommodation), an individual may bring a private lawsuit but they are limited to injunctive relief.⁶⁰

The private attorney general project under the ADA has not gone well.⁶¹ Where damages are available within Title I, poor victims of discrimination have difficulty finding lawyers.⁶² Within Title II, courts have taken a narrow view of when private litigants can obtain compensatory damages,⁶³ and the Supreme Court has drastically limited the availability of damages through its expansion of sovereign immunity.⁶⁴ Finally, Title III never contained any claims for damages, and, as might be expected, it has the lowest number of cases of any part of the statute.⁶⁵

57. The remedies and enforcement of Title I of the ADA are those provided by Title VII of the Civil Rights Act of 1964, including the 1991 amendments. *See* 42 U.S.C. § 1981 (2000).

58. *Id.* § 12133 (“The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights that this title provides to any person alleging discrimination on the basis of disability in violation of [Title II].”).

59. *See Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (holding punitive damages unavailable under section 202 of the ADA).

60. 42 U.S.C. § 12188(a) (2000) (“The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter.”). The cited section only includes prospective injunctive relief. *Id.* § 2000a-3(a).

61. *See, e.g.,* Bagenstos, *supra* note 19 (critiquing private enforcement of Title III); *see also* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1853–74 (2005) (arguing that Titles II and III of the ADA are underenforced).

62. *See* Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 J. GENDER RACE & JUST. 595, 631–47 (2005).

63. *See e.g.,* *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138–39 (9th Cir. 2001) (limiting compensatory damages under Title II to cases of “deliberate indifference”).

64. *See* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that the ADA improperly infringes upon state sovereignty); *see also* *Tennessee v. Lane*, 541 U.S. 509, 534–34 (2004) (holding that state sovereign immunity was validly abrogated in claims involving access to courts under Title II); Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 794–801 (2005) (discussing the role of the ADA in the Court’s sovereign immunity decisions).

65. As of 2001, there were 720 Title I cases that made it to the courts of appeals, and as of 2004, there were 197 Title II cases that made it to the

Despite these limitations, the popular image of private enforcement under the ADA has been fairly negative. The harsh portrayal of the ADA in the print and other media has been well documented.⁶⁶ Besides generalized hostility to the ADA, a negative view of the lawyers bringing these cases and their clients is a theme running through media accounts of ADA cases.⁶⁷

B. PUBLIC ENFORCEMENT

This Article takes the current limitations of and hostile climate surrounding the private attorney general as a given.⁶⁸ Are we condemned to civil rights laws only offering a “hollow hope”?⁶⁹ Or are there other enforcement strategies that might be studied and ultimately pursued? Focusing primarily on the ADA, this Article discusses litigation by public officials and new governance forms of enforcement. Both of the following Sections will present a more forceful role for public enforcement officials.

1. Why Discuss Public Enforcement?

The decline of the private attorney general seemingly creates an opportunity to refocus on the other available means of enforcement—that by government officials. But by and large, a discussion of why this is so, what it might look like, and how it might work, has not yet taken place. Public civil rights enforcement has never been much of an issue in presidential

courts of appeals, and 82 Title III cases. See Waterstone, *supra* note 61, at 1853.

66. See, e.g., Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000) (discussing the negative portrayal of the ADA in media).

67. See *id.* at 227–31 (“One explanation for many people’s distaste for the enforcement of the ADA via serial litigation is that the plaintiffs and their attorneys stand to financially gain from each of the suits they file.”).

68. It is not that these developments are unimportant—very much to the contrary. The ideas to revive the private attorney general are relatively straightforward and usually involve legislatively overruling *Buckhannon* and increasing damage awards in civil rights cases. See Kyle A. Loring, Note, *The Catalyst Theory Meets the Supreme Court—Common Sense Takes a Vacation*, 43 B.C. L. REV. 973, 974 (2002) (proposing that Congress overturn *Buckhannon*); see also Selmi, *supra* note 14, at 1328–29 (suggesting a modification of fee incentives for private lawyers in civil rights class actions). If the legislative pendulum swings, however, and Congress enacts reform to make private litigation more effective, the importance of public enforcement could lessen.

69. ROSENBERG, *supra* note 18, at 336–43.

campaigns,⁷⁰ despite the fact that the means and methods of public enforcement of civil rights is largely a presidential prerogative.⁷¹ Existing academic commentary has proposed narrow areas of targeted enforcement⁷² or focused only on the Equal Employment Opportunity Commission (EEOC).⁷³ An undercurrent running through the larger body of work on private en-

70. The “major newspapers” database in LexisNexis for coverage of the candidates’ positions on public enforcement of civil rights laws in the 2000 and 2004 presidential elections includes United States newspapers with circulation rates in the top fifty, and English-language newspapers published outside the United States that have circulation rates in their own countries’ top five percent or are listed as national newspapers in Benn’s World Media Dictionary. In a search time frame set at one year before each election the following results were yielded: in the 2004 presidential election, the only campaign-related coverage of public civil rights enforcement related to the Bush administration’s decision to transfer enforcement of partial-birth abortion legislation to the Civil Rights division of the Department of Justice (DOJ). See Dana Milbank, *Bush Signs Ban on Late-Term Abortions into Effect; Civil Rights Agency to Enforce Law; Lawsuits Filed*, WASH. POST, Nov. 6, 2003, at A23; see also Julian Borger, *Fury at Bush’s Civil Rights Policing of Abortion Ban*, GUARDIAN, Nov. 8, 2003, at 15. For information on the Justice Department’s preparations to enforce voting rights in the election, see Tom Brune, *A Record Deployment: Feds Plan to Monitor Voting Rights Tuesday*, NEWSDAY, Oct. 29, 2004, at A4. In the 2000 presidential election, there were only five campaign-related articles mentioning public enforcement of civil rights laws, three of which reported on a speech then-candidate Bush made to the NAACP in July of 2000. See Jena Heath, *Bush Vows to Enforce Rights: He Pledges to Work to End Prosperity Gap*, ATLANTA J. & CONST., July 11, 2000, at A3 (stating that Bush pledged to make civil rights enforcement a “cornerstone” of his administration if he won the presidency).

71. See, e.g., AUGUSTUS J. JONES, LAW, BUREAUCRACY AND POLITICS: THE IMPLEMENTATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 15–41 (1982) (highlighting the role of presidential decision making in civil rights enforcement).

72. See, e.g., Holly James McMickle, *Letting DOJ Lead the Way: Why DOJ’s Pattern or Practice Authority Is the Most Effective Tool to Control Racial Profiling*, 13 GEO. MASON U. CIV. RTS. L.J. 311, 312 (2003) (arguing that the DOJ should control racial profiling); Sara Robenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of Alexander v. Sandoval*, 3 YALE J. HEALTH POL’Y L. & ETHICS 215, 219 (2003) (proposing to “grant civil rights enforcement to federal agencies with power to make expenditure decisions”).

73. See Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 5 (2001); Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L. J. 1, 1–4 (1996) [hereinafter Selmi, *EEOC*]. But see Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Cases of Housing and Employment*, 45 UCLA L. REV. 1401, 1403 (1998) [hereinafter Selmi, *Public vs. Private*] (concluding the private bar is a more effective vehicle to enforce Title VII and the Fair Housing Act).

forcement seems to be that government enforcers do not have enough resources to make a difference,⁷⁴ or that the political nature of civil rights means that public enforcement cannot be trusted.⁷⁵

Most public enforcement officials are essentially administrative agencies. At the most general level, there are criticisms that vesting administrative agencies with broad powers inevitably leads to administrative capture, whereby the private interests of regulated groups tend to drive policy decisions to the point where agencies are no longer acting in the “public interest.”⁷⁶ Slightly less pessimistically, public choice theorists focus on understanding administrative decision making as being the product of the relationship between interest groups and government officials trying to protect their own interests.⁷⁷ More specifically, Professor Selmi has opined that the government is inherently poorly suited to enforce civil rights given the behavioral incentives of its attorneys, including a desire for trial experience, lack of financial interest in the case, and desire to avoid controversial cases.

To be sure, these views have power, and were essentially the rationale for the creation of the private attorney general in

74. See Adam Milani, *Wheelchair Users Who Lack “Standing”: Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69, 112–13 (2004) (noting the “small cadre of lawyers” in the DOJ’s Disability Rights Section).

75. See Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 818 (1989) (noting the federal government’s “abdication of aggressive enforcement role”); see also Bagenstos, *supra* note 19, at 35 (“Government enforcers have limited resources in the best of times, and recent years have made painfully apparent just how much the vigor of government enforcement can vary with the political winds.”); Selmi, *Public vs. Private*, *supra* note 73, at 1439 (“[T]he political nature of civil rights and the nature of the attorneys entrusted with enforcing civil rights laws mean that the government inevitably acts cautiously—choosing to pursue only those cases that are near certain winners or that are politically uncontroversial.”).

76. Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, “Agency Capture,” and Airline Security*, 10 AM. U. J. GENDER SOC. POLY & L. 381, 387–88 (2002); see Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 459 (1999) (noting that broad agency discretion could mean that special interest groups would dominate).

77. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 561 (2000) (characterizing administrative decision making as involving “interest group pressure brought to bear on bureaucrats seeking rewards such as job security, enhanced authority, or the favor of powerful legislators upon whom the agency depends”).

the first place. But for several reasons, none should be conversation stoppers regarding public enforcement. First, the recent broad and systemic undermining of the private attorney general discussed above demands an exploration of different enforcement alternatives. Second, it is clearly true that decisions about governmental enforcement priorities and resources are subject to the political process. Rather than an end point, however, this creates an opportunity to influence change in this arena. Although traditionally below the public's political radar, our public officials (and by extension, the polity) are constantly making decisions about how to fund, organize, or even eliminate public enforcement entities.⁷⁸ It is therefore important to stimulate a discussion on why public enforcement is needed and how it can be effective. At the very least, this effort can provide guidance when the political pendulum swings in a pro-civil rights direction.⁷⁹ Finally, the view that political volatility renders public enforcement inherently suspect may be overstated. Although the evidence is somewhat mixed,⁸⁰ some commentators have found similar enforcement patterns in both Republican and Democratic administrations.⁸¹

Moreover, this Article is not so much arguing for an expansion of the role of the public enforcement *vis-à-vis* the private attorney general (although, for the reasons I have discussed above, in the real world the private attorney general's role has diminished). Instead, I am advocating that public enforcement agencies perform the role that they are already tasked with more effectively. I take as a given—and support—the idea that

78. See, e.g., Selmi, *EEOC*, *supra* note 73, at 57–59 (proposing to eliminate the EEOC).

79. The author thanks Sam Bagenstos for helping to develop this point.

80. See TRANSACTION RECORDS ACCESS CLEARINGHOUSE, CIVIL RIGHTS ENFORCEMENT BY BUSH ADMINISTRATION LAGS, <http://trac.syr.edu/tracreports/civright/106/> (last visited Nov. 5, 2007) (“Key data from the Justice Department and the federal courts show that the government's enforcement of civil rights cases—an extremely rare event under all recent presidents—sharply declined during the Bush years.”). Of late, there have also been accounts of politicization of the Justice Department, and the Civil Rights Division in particular. See, e.g., Neil A. Lewis, *Justice Dept. Reshapes Its Civil Rights Mission*, N.Y. TIMES, June 14, 2007, at A1.

81. See Selmi, *Public vs. Private*, *supra* note 73, at 1430–31 (concluding that there were no significant differences in EEOC employment discrimination enforcement between Republican and Democratic administrations); Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL'Y 131, 138 (1996) (noting that neither the George H.W. Bush nor Clinton administrations were “aggressive” in enforcing Title IX).

the ADA and other antidiscrimination statutes allow for both public and private enforcement.⁸² This diffusion of enforcement power avoids some capture problems, to the extent they exist.⁸³ To be sure, my proposals for more effective and robust public enforcement might take the enforcers in a more aggressive direction than their “natural” incentives might otherwise take them. Civil rights enforcement is political,⁸⁴ and strong executive leadership—something that the ADA had at its passage⁸⁵—is needed to shake public enforcement agencies from their path dependent behaviors.⁸⁶ This is especially needed with the ADA. Deemed the “first true civil rights legislation of the 21st century,”⁸⁷ the Warren Court, as well as the Kennedy and Johnson administrations, never had the opportunity to interpret this statute.⁸⁸

2. The Case for Public Enforcement

The broad theoretical case for a renewed emphasis on public enforcement is surprisingly easy to make. As any high school civics student should know, the President is responsible for executing the laws of the United States.⁸⁹ The various enforcement apparatuses of the executive branch are similarly

82. A primary criticism of the Help America Vote Act has been its lack of a private remedy. See Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 382 (2003).

83. See Seidenfeld, *supra* note 76, at 459 (1999) (noting that broad agency discretion could mean that special interest groups would dominate). There is no literature I know of suggesting the two enforcement agencies I will be discussing below, the Department of Justice and the Equal Employment Opportunity Commission, have been “captured” in any relevant sense by any entity under their jurisdiction.

84. Professor Selmi likely shares this view. See Selmi, *Public v. Private*, *supra* note 73, at 1444 (discussing the “politically infused” nature of civil rights litigation).

85. President George H.W. Bush was a visible supporter of the ADA, and used his political capital to help ensure the Act's passage. See Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 414 n.3, 420, 437, 495, 520 (1991).

86. See *infra* Part II.A (defining the “path dependent behaviors”).

87. Letter from the Leadership Conference on Civil Rights to J. Dennis Hastert, Speaker of the House, U.S. House of Representatives (July 26, 2002), available at http://www.nlchp.org/content/pubs/CR_voting_letter.pdf.

88. On the civil rights enforcement efforts of the Kennedy and Johnson administrations, see *infra* note 100.

89. U.S. CONST. art. II, § 3, cl. 4 (“[H]e shall take Care that the Laws be faithfully executed.”).

tasked.⁹⁰ When the government enforces any set of laws, it acts as a representative of its people. Therefore, when the government enforces the antidiscrimination ideals contained in civil rights statutes, it expresses the will of the people to live in a more just society. This expressive function of the law cannot be completely outsourced to private actors⁹¹ and is lost when civil rights lawsuits become profit-driven enterprises.⁹² More globally, when the private market fails to provide a particular public good,⁹³ the government has an obligation to do so for the betterment of its people.⁹⁴

As Gerald Rosenberg recognized over a decade ago, the executive branch's support is a necessary condition for meaningful change in the civil rights arena.⁹⁵ Experience suggests that Rosenberg is right. Before Title II of the Civil Rights Act of 1964 was passed, African Americans were customarily denied access to public places in the Jim Crow South.⁹⁶ The Civil Rights Act played a major role in ending these pernicious practices.⁹⁷ Similarly, during that same era, literacy tests and other forms of subtle and overt discrimination regularly denied African Americans the right to vote.⁹⁸ The Voting Rights Act has been judged a historical success in eliminating overt racial dis-

90. See Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111, 116–17 (1997).

91. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1652 (2000) (dismissing the relationship between legal signals and societal expectations); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021–25 (1996).

92. See Green, *supra* note 44, at 722–23 (discussing the desirability of the EEOC's role in protecting the public interest through Title VII systemic cases).

93. In this case, one form of the “public good” would be meritorious cases that would enforce the civil rights laws. As will be discussed below in more detail, the private market is not adequately serving this public good. See Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 238, 242 (1997) (observing that the market for civil rights class actions is “dramatically underserved” and meritorious claims are not being brought).

94. See Jolls, *supra* note 43, at 9.

95. ROSENBERG, *supra* note 18, at 36.

96. See BROOKS ET AL., *supra* note 3, at 267 (“Prior to the Civil Rights Act of 1964, racial segregation was an accepted way of American life.”).

97. See, e.g., HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, *LAW AND SOCIAL CHANGE* 66 (1972) (discussing the impact of the Civil Rights Act in the South); Drew S. Days, III, “Feedback Loop”: *The Civil Rights Act of 1964 and Its Progeny*, 49 ST. LOUIS U. L.J. 981, 981 (2005) (“This legislation has brought broad, positive change and progress to American society.”).

98. See BROOKS ET AL., *supra* note 3, at 560–61.

crimination in voting.⁹⁹ The successes of these statutes have been in large part attributed to aggressive enforcement by public enforcement authorities.¹⁰⁰

I now turn to the issue of what exactly public enforcement authorities can and should be doing differently. While I am specifically focused on the ADA, the arguments herein should offer valuable insights for the larger universe of antidiscrimination and civil rights law.

II. STRUCTURAL LITIGATION

The traditional civil litigation model is bilateral and seeks adjudication of specific grievances. This type of case is relatively self-contained and primarily asks for retrospective remedies.¹⁰¹ What has been alternatively termed public law, structural, or systemic litigation, in contrast, is different.¹⁰² Although there is no uniform definition for this type of litigation, I will use it to describe cases that are filed against large corporations or government entities or other large power structures, and seek structural remedies, meaning that they invoke the power of the courts to oversee institutional reform.¹⁰³ They

99. See *id.* at 577–78; Chandler Davidson & Bernard Grofman, *Editors' Introduction to QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990*, at 3, 3 (Chandler Davidson & Bernard Grofman eds., 1994).

100. See U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 10 (1971) (“Within a few months after enactment, the Department . . . brought several enforcement actions that tested the constitutionality of the public accommodations law.”); see also RICHARD CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES 27 (2001) (“If the enforcement of the Civil Rights Act was to occur in the courts, rather in the streets as President Johnson feared, the primary burden would fall on the Civil Rights Division of the Department of Justice, headed by Assistant Attorney General Burke Marshall.”). Cortner proceeds throughout this book to note the key contributions made by the Civil Rights Division and the efforts of Marshall in particular. See generally *id.*

101. See Abe Chayes, *The Role of Justice in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

102. Commentators use these terms interchangeably. See JOHN C. JEFFRIES ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 745 (2000) (“Suits of this type have come to be known as ‘structural reform,’ or ‘institutional’ or ‘public law’ litigation.”). I will do the same.

103. See *id.* (“Other cases, however, involve broader attacks on the way government does business. Such suits are typically brought as class actions for injunctive relief. Often they seek systemic reform of government operations or procedures, relief that far exceeds any preventative or compensatory objective that would make whole any particular plaintiff before the court.”); see also Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent De-*

are usually brought as class actions.¹⁰⁴ Although certain commentators have questioned the procedural and remedial fairness of these institutional cases,¹⁰⁵ there is a strong counterargument if not consensus about the propriety and effectiveness of structural reform litigation.¹⁰⁶

In any event, the effectiveness of structural litigation in reforming institutions cannot be disputed. Structural litigation campaigns have desegregated schools,¹⁰⁷ reformed prisons,¹⁰⁸ attacked deplorable health care conditions in institutions,¹⁰⁹ challenged police abuse,¹¹⁰ and targeted discrimination in large

crees and the Fairness of Negotiated Institutional Reform, 1984 DUKE L. J. 887, 888–90 (discussing how large-scale Title VII lawsuits against private companies are public law litigation, whereby courts take responsibility for extensive institutional reforms while acting independently of the adversarial process).

104. See JEFFRIES ET AL., *supra* note 102, at 745.

105. See Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 733 (1978) (criticizing institutional cases as examples of judicial violations of the separation of powers); see also Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661–62 (1978) (criticizing the judiciary's use of new and expansive remedies).

106. See Chayes, *supra* note 101, at 1316 (arguing that involving courts and judges in public law litigation is legitimate and inevitable if justice is to be done in an increasingly regulated society); see also Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1–4 (1979) (arguing that structural litigation serves as a means for the judicial branch to articulate constitutional values, which is necessary to create change in large-scale public organizations).

107. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that racial segregation in public schools was unconstitutional).

108. See, e.g., *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam) (affirming the lower court's holding that racial segregation of prisons violated the Equal Protection Clause); see also Greenberg, *supra* note 30, at 577 (“Since the federal class action rule was revised in 1966, prisoners’ rights litigation has utilized the mechanism of class action to bring broad relief to inmates and detainees throughout the country.”).

109. See, e.g., *N.Y. State Ass’n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975) (addressing conditions in the Willowbrook institution for the developmentally disabled in New York City).

110. The Department of Justice has negotiated consent decrees with various police departments, requiring, among other things, revision of use-of-force policies. See, e.g., Consent Decree at 23–27, *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002) (No. 00-11769 GAF (RCX)), available at <http://www.cacd.uscourts.gov> (follow “search site” hyperlink; search “00-11769”; follow the hyperlink for the first result); see also ROBERT C. DAVIS ET AL., *VERA INST. OF JUSTICE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH’S EXPERIENCE WITH A FEDERAL CONSENT DECREE 7–8* (2002), http://www.vera.org/publication_pdf/180_326.pdf.

private employers.¹¹¹ Historically, these cases have been brought by both public and private enforcement authorities.¹¹²

Despite their effectiveness, systemic and class litigation in civil rights cases have declined in recent years. Reports kept by the Administrative Office of the United States Courts show a decline in civil rights class action filings. From July 1983 through June 1984, civil rights class actions constituted a sizeable amount of the class action suits filed in federal court.¹¹³ From October 2003 through September 2004, this number was down to 11.2%.¹¹⁴ The total number of civil rights class actions went down, from 369 from July 1983 through June 1984 to 241 in 2004 (despite the passage of the ADA in 1991).¹¹⁵ As discussed above, these numbers can be partially explained by the reduced ability of the private attorney general to bring and prosecute these kinds of systemic, broad cases.¹¹⁶ Public enforcement officials have not picked up the slack. From July 1978 through June 1979, the United States filed 8 civil rights class actions; from July 1983 through June 1984, it filed 1, and from October 2003 through September 2004, it filed 5.¹¹⁷

111. See, e.g., *United States v. Bethlehem Steel*, 446 F.2d 652 (2d Cir. 1971) (ordering an employer to desegregate job assignments); *EEOC v. Int'l Union of Elevator Constructors Local 5*, 398 F. Supp. 1237, 1264–65 (E.D. Pa. 1975) (ordering an employer to develop training programs for minority employees); see also Schwarzschild, *supra* note 103, at 890 (“Title VII litigation is an excellent example of ‘public law’ or ‘structural’ litigation.”).

112. For an example of cases brought by public authorities, see *supra* notes 110–11 and accompanying text. For a classic and fascinating narrative of a litigation campaign waged by the NAACP, see generally GREENBERG, *supra* note 27.

113. See 1984 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 486–88 tbl.X-5 [hereinafter 1984 ANN. REP.].

114. See 2004 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. tbl.X-5 [hereinafter 2004 ANN. REP.], available at <http://www.uscourts.gov/judbus2004/appendices/x5.pdf>. The trends are similar within the subcategory of employment discrimination law. While 1174 employment class actions were filed in federal court from July 1975 through June 1976, the number was only 73 in 2002. Hart, *supra* note 17, at 820.

115. See *supra* notes 113 & 114.

116. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1019–21 (1991) (attributing virtual disappearance of class action employment litigation to changes in legal rules, particularly the Court’s decisions in *East Texas Freight System* and *Falcon*); Garth et al., *supra* note 19, at 371 (noting that the economic incentive of attorney fees does not serve a sufficient incentive for lawyers to bring civil rights class action cases); see *supra* Part I.B.2.

117. See 1979 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 674 tbl.X-5; 1984 ANN. REP., *supra* note 113; 2004 ANN. REP., *supra* note 114.

A. LACK OF ADA STRUCTURAL LITIGATION

These general trends are exacerbated in the ADA context. There has been a notable lack of systemic and class action litigation under the ADA, particularly with regard to the law's employment provisions.¹¹⁸ Very recently, there have been several large class action lawsuits brought by private lawyers alleging discrimination on the basis of sex,¹¹⁹ but none relating to disability.¹²⁰

There are several executive branch agencies charged with public enforcement of the ADA.¹²¹ I will focus my discussion on the EEOC and Department of Justice (DOJ), which have the most robust statutory role for public enforcement.¹²² Generally speaking, these agencies have not made structural litigation a high priority. The EEOC has acknowledged as much, noting its failure to bring and develop broad, systemic cases (while recognizing that they could serve the public interest better by doing a better job).¹²³ Commentators have confirmed that the EEOC has generally shied away from bringing large systematic cases, both in the ADA and larger civil rights contexts.¹²⁴ The DOJ's

118. See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 19 (1996) ("Few of the cases brought under the ADA are class actions . . ."); Stein & Waterstone, *supra* note 15, at 890–94 (arguing that there is a lack of class action litigation under the ADA).

119. See, e.g., *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1233 (9th Cir. 2007) (certifying a large class of female workers bringing Title VII claims).

120. While Wal-Mart, like other large defendants, has been sued for disability discrimination by private lawyers, these cases have typically not been brought as class actions. See Wal-Mart Watch, Issues: Discrimination, <http://walmartwatch.com/issues/discrimination> (last visited Nov. 5, 2007) (presenting information on only smaller, individual discrimination suits).

121. These include the EEOC (Title I), the DOJ (Title II), the Department of Transportation (Titles II and III), the Department of Agriculture (Title II), the Department of Education (Title II), the Department of Health and Human Services (Title II), the Department of Housing and Urban Development (Title II), the Department of the Interior (Title II), the Department of Labor (Title II), and the United States Access Board (Titles II and III). Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

122. See 42 U.S.C. §§ 12113, 12117(a), 12188 (2000).

123. See LESLIE E. SILVERMAN ET AL., EEOC, EXECUTIVE SUMMARY, SYSTEMIC TASK FORCE REPORT 1 (2006), available at http://www.eeoc.gov/abouteeoc/task_reports/systemic.pdf ("[W]e found that EEOC does not consistently and proactively identify systemic discrimination. Instead, the agency typically focuses on individual allegations raised in charges.").

124. See Selmi, *EEOC*, *supra* note 73, at 16 ("Consistent with the EEOC's history and current litigation trends, a relatively small percentage of the cases were filed as class allegations—forty-seven of the cases which constituted

enforcement efforts have also come under criticism for being “overly cautious, reactive, and lacking any coherent and unifying national strategy.”¹²⁵

Aside from improving compliance, large-scale litigation efforts can also serve an important law development function. For example, in the early years of Title VII, the Civil Rights Division of the DOJ concentrated on establishing that Title VII prohibited not only purposeful discrimination but also practices with a discriminatory impact.¹²⁶ The DOJ was a plaintiff in four cases that made it to the court of appeals level, and established early precedent that neutral practices with a disparate impact violated Title VII.¹²⁷ This line of cases was a key part of the road to the Supreme Court’s decision in *Griggs v. Duke Power Co.*,¹²⁸ which “held that facially neutral ‘practices, procedures, or tests’ that are discriminatory in effect cannot be used to preserve the ‘status quo’ of employment discrimination.”¹²⁹ In contrast, despite the fact that the EEOC promulgated regulations explicitly stating that disparate impact is covered under

13.5% of the claims.”); *see also* Moss et al., *supra* note 73, at 18 (discussing Professor Selmi’s data and conclusions). In the ADA failure to hire context discussed *infra*, only four briefs reflecting EEOC participation as a plaintiff demonstrated representation of more than an individual applicant. *See* EEOC, Commission Appellate and Amicus Briefs (Sept. 6, 2007), <http://www.eeoc.gov/litigation/appbriefs.html> (providing a search mechanism for EEOC positions that “discuss significant legal issues which could affect the manner in which employment laws are interpreted”).

125. NAT’L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 2 (2000) (examining the enforcement of the ADA between 1990 and 1999 by using statistical and other federal agency data). Regarding Title II of the ADA, the report also argues that the DOJ has not taken sufficiently strong positions in important litigation. *Id.* at 4–6; *see also infra* notes 137, 231–35 and accompanying text (noting the limited use of the DOJ’s power to bring ADA cases in the public interest).

126. David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1139 (1989).

127. *See* Local 189 United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); United States v. Sheet Metal Workers Int’l Ass’n, Local No. 36, 416 F.2d 123 (8th Cir. 1969); United States v. Hayes Int’l Corp., 415 F.2d 1038 (5th Cir. 1969); Local 53, Int’l Ass’n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969). *But see* Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 353–54 (1977) (“[A]n otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination”).

128. 401 U.S. 424 (1971).

129. Rose, *supra* note 126, at 1140–41 (citing *Griggs*, 401 U.S. at 430).

Title I of the ADA,¹³⁰ neither the EEOC nor the DOJ have taken steps to develop the case law in this area.¹³¹

This underwhelming public enforcement at the federal level has been paralleled at the state level. Outside of a few selected states, federal protection is as strong as or stronger than what is provided by state law.¹³² And while one commentator has urged a move to the state law battlefield to enforce disability rights,¹³³ there are few examples of state public enforcement officials bringing systemic cases under state or federal law.¹³⁴ Because this is an area where federal protection has, at least on paper, been out in front of state law, and because many state courts have looked to the ADA for guidance on interpreting state law,¹³⁵ it is important for federal enforcement officials to take the lead in litigating ADA cases.

130. 29 C.F.R. § 1630.15(c) (2007) (providing a potential defense to the charge of disparate impact).

131. On the lack of ADA disparate impact litigation, see Stein & Waterstone, *supra* note 15, at 889–90.

132. See Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 601–02 (2004); see also Sande L. Buhai, *In the Meantime: State Protection of Disability Civil Rights*, 37 LOY. L.A. L. REV. 1065 app. (2004) (listing state disability antidiscrimination laws). Some states, like California and Minnesota, offer more generous definitions of disability than have been interpreted under federal law. Long, *supra*, at 629–30; see also CAL. GOV'T CODE § 12926.1(a) (West 2005); see also MINN. STAT. § 363A.03(12) (2006).

133. Buhai, *supra* note 132, at 1066.

134. There are exceptions. Then New York Attorney General Eliot Spitzer negotiated consent decrees with Priceline.com and the Ramada Franchise Systems, asserting that their respective websites were inaccessible to the blind and visually impaired in violation of state and federal law. See Assurance of Discontinuance, *In re Ramada Franchise Systems, Inc.* (Att'y Gen. of the State of N.Y., Aug. 12, 2004), available at <http://www.icdri.org/News/Ramada%20AOD>; Assurance of Discontinuance, *In re Priceline.com* (Att'y Gen. of the State of N.Y. Apr. 8, 2004), available at <http://www.icdri.org/News/Priceline%20AOD>. Similarly, the Massachusetts Attorney General recently brought a complaint under state law against a bus company for refusing carriage to a blind couple because the husband used a guide dog. This case resulted in over \$60,000 in damages and injunctive relief. *Commonwealth v. Fung Wah Bus Transp., Inc.*, No. 05-BPA-00758, 2007 WL 2068081, at *1–2 (Mass. Comm'n Against Discrimination July 9, 2007).

135. See, e.g., *Grant v. May Dep't Stores*, 786 A.2d 580, 583–84 (D.C. Cir. 2001) (“We have considered [federal] decisions construing the ADA as persuasive in our decisions construing comparable sections of [the District of Columbia Human Rights Act].”); *Garcia v. Allen*, 28 S.W.3d 587, 598 (Tex. App. 2000) (using *Sutton v. United Airlines*, 527 U.S. 471 (1999), as persuasive when interpreting the Texas statute’s definition of disability).

B. A MORE STRUCTURAL LITIGATION ROLE FOR PUBLIC ENFORCEMENT AUTHORITIES

There are both legislative and regulatory bases for a stronger structural litigation role for ADA public enforcement authorities. The EEOC and DOJ are both authorized to bring ADA lawsuits that are in the public interest. The EEOC, responsible for enforcing Title I against private employers, has the ability to bring suit as a plaintiff, and its claims are not limited to the complaints made by a charging party.¹³⁶ Similarly, the DOJ is authorized to bring cases involving a “pattern or practice” of discrimination by public employers under Title I,¹³⁷ although it appears it has only done so once.¹³⁸ The DOJ’s enforcement powers under Title II in cases involving public employers are the same as they are in the Title I context.¹³⁹ Under Title III, the DOJ can bring lawsuits if it has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination, or in any other case that raises an issue of general public importance.¹⁴⁰

Apart from being *allowed* to play a structural role, public enforcement authorities are uniquely suited to fill the structural enforcement gap. Most of the limitations that apply to private attorneys general do not apply to public enforcement authorities. These strengths of public enforcement authorities *vis-*

136. EEOC v. Caterpillar, Inc., 409 F.3d 831, 833 (7th Cir. 2005) (“[A] suit by the EEOC is not confined to claims typified by those of the charging party.” (quoting Gen. Tel. Co. of the Southwest v. EEOC, 446 U.S. 318, 331 (1980))); see also EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002) (“[O]nce a charge is filed . . . the EEOC is in command of the process.”).

137. The DOJ’s role under Title I of the ADA (as well as that of the EEOC) is determined by various provisions of the Civil Rights Act of 1964, including the 1991 amendments set forth in the Civil Rights Act of 1991. 42 U.S.C. § 12117 (2000). These provisions provide that the EEOC should refer employment cases involving governments, governmental agencies, or political subdivisions to the Attorney General. *Id.* § 2000e-5(f). The Attorney General is further authorized to bring civil actions whenever there is “reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by” the ADA. *Id.* § 2000e-6(a).

138. See Davoll v. Webb, 194 F.3d 1116, 1124 (10th Cir. 1999) (alleging disability discrimination by the Denver police department).

139. See 42 U.S.C. § 12133 (2000) (stating that enforcement of Title II is the same as 29 U.S.C. § 794a, the Rehabilitation Act); 29 U.S.C. § 794a (2000) (providing that enforcement provisions are the same as those found in the Civil Rights Act of 1964).

140. 42 U.S.C. § 12188(b)(1)(B) (2000).

à-vis the private attorney general help to assess when public officials should devote resources to systemic litigation.

First, by not being tied to attorneys' fees and a case's ability to pay for itself, public enforcement authorities can truly bring and prosecute cases in the public interest. Therefore, whereas private attorneys general increasingly can no longer afford to bring large class action civil rights cases,¹⁴¹ public enforcement authorities can. Systemic litigation is expensive, and few private lawyers can match the government's resources when it decides to use them in a particular direction.¹⁴²

Freedom from attorneys' fees and damages as a means of financing litigation also allows public enforcement officials to bring cases for injunctive relief, which has traditionally been the structural remedy of choice.¹⁴³ Professor Selmi has recently criticized privately brought employment discrimination class action lawsuits as being too focused on obtaining large settlements, which primarily enriched the plaintiffs' lawyers.¹⁴⁴ Lawsuits brought by public enforcement authorities that focus on institutional injunctive relief as opposed to damage awards could help revive the public nature of these types of civil rights class actions.¹⁴⁵

141. Davies, *supra* note 93, at 238 ("In the civil rights class action context, for example, there is higher demand than supply of attorneys because the attorneys can only afford to litigate cases that are virtually guaranteed to win."); *see also* Albiston & Nielsen, *supra* note 19, at 41–42 ("*Buckhannon* reduces litigation not by promoting settlement, but by discouraging plaintiffs from bringing meritorious but expensive claims in the first place . . ."); Davies, *supra* note 93, at 258 (noting private civil rights class actions have gone down because of financial factors).

142. The extent to which these agencies are funded or defunded is essentially a political decision. *See supra* notes 78–81.

143. Fiss, *supra* note 106, at 2 ("The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted."); *see also* David Rudenstine, *Institutional Injunctions*, 4 CARDOZO L. REV. 611, 616 (1983) (noting the importance of institutional injunctions and arguing that they are not in conflict with federalism and democratic process values); Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 561–64 (2006) (detailing the transformative effect of injunctions in prisons).

144. *See Selmi, supra* note 14, at 1280.

145. Within civil rights law generally and disability law in particular, these suits do happen. They are often brought by public interest organizations. For example, in *Barden v. City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002), Disability Rights Advocates, a prominent nonprofit law firm dedicated to bringing high profile ADA cases, sued the city of Sacramento for inaccessible

Second, class action structural litigation has been curtailed by the Supreme Court's decision in *General Telephone Co. of the Southwest v. Falcon*, which held that named class representatives had to demonstrate a greater unanimity of interest with the proposed class.¹⁴⁶ This tightened Federal Rules of Civil Procedure Rule 23's reins for class certification: plaintiffs who suffered discrimination in hiring, for example, cannot represent plaintiffs who were discriminated against in promotion decisions.¹⁴⁷ This decision, combined with the 1991 amendments to the Civil Rights Act that allowed Title VII plaintiffs increased damages and jury trials, has led courts to view employment cases as less amenable to class treatment.¹⁴⁸ This restricts private litigants, however, far more than the government, particularly in disability cases.

Under the ADA, both the EEOC and DOJ have far more procedural breathing room to pursue class-type relief than pri-

sidewalks. The requested relief was a structural injunction requiring the City to formulate a plan for sidewalk accessibility. *Id.* But these cases are the exception, not the norm. Public interest organizations do not have adequate staff or funds to bring all of these cases, and government officials have not taken the lead in doing so. *See* Bagenstos, *supra* note 61, at 35. The most prominent disability-based public interest organizations are in large cities. Large segments of the country have no similar operations. In Mississippi, for example, the largest disability rights organization has no lawyers. Mississippi Coalition for Citizens with Disabilities, <http://www.mscoalition.com/> (follow "Staff and Board" hyperlink) (last visited Nov. 5, 2007). Additionally, Mississippi's Protection and Advocacy Office has only one staff attorney and does not typically litigate. Mississippi Protection and Advocacy System, <http://www.mspas.com/staff.htm> (last visited Nov. 5, 2007).

146. 457 U.S. 147, 158 (1982).

147. *Griffin v. Dugger*, 823 F.2d 1476, 1493–94 (11th Cir. 1987) (holding that a class could not be certified when one representative complained promotion practices were discriminatory and others alleged the qualification exam was discriminatory); *see also* *Wagner v. Taylor*, 836 F.2d 578, 595–96 (D.C. Cir. 1987) (holding supervisors are not in the same class as nonsupervisors because they may have conflicting interests); *Roby v. St. Louis Sw. Ry. Co.*, 775 F.2d 959, 962–63 (8th Cir. 1985) (holding that employees could not represent a class of individuals affected by the railroad's promotion policies or those who were discharged for violating company rules because the employees' complaint did not derive from either of these circumstances).

148. *See* Hart, *supra* note 17, at 820 ("In the years after the Court emphasized the importance of adherence to the requirements of Rule 23, the number of class action suits filed in federal court decreased significantly."); *see also* Scotty Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act*, 23 U. ARK. LITTLE ROCK L. REV. 925, 935 (2001) (indicating that *Falcon* ended widespread certification of across-the-board class actions in discrimination lawsuits "because [i]t was no longer sufficient for one plaintiff, represented by one law firm, to allege across-the-board discrimination").

vate litigants. In *General Telephone Co.*, the Supreme Court held that the EEOC could seek class-wide relief for sex discrimination under Title VII without certification as a class representative under Rule 23.¹⁴⁹ The same is true under the ADA,¹⁵⁰ which has allowed the EEOC, in the few class-type cases it has brought, to escape thorny class issues of individualized inquiries that courts usually view as necessary to determine disability.¹⁵¹ Similarly, when the DOJ brings “pattern or practice” suits under Title I of the ADA, the government, when establishing its prima facie case, is not required to show individual discrimination with respect to each person for whom it seeks relief.¹⁵²

Third, the ability of private litigants to sue state governments has been dramatically curtailed by the Court’s recent “new federalism” jurisprudence. The ADA has been at the center of the development of this body of law. In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that, under the principle of state sovereign immunity, individuals may not sue the state for damages under Title I of the ADA.¹⁵³ Insofar as the ADA is concerned, the Court has retreated from this principle somewhat in *Tennessee v. Lane*¹⁵⁴ and *Goodman v. Georgia*,¹⁵⁵ where it held that individuals may sue state enti-

149. 446 U.S. 318, 319, 326, 330 (1980) (“When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination. . . . Forcing EEOC civil actions into Rule 23 model would in many cases distort the Rule as it is commonly interpreted . . . Rule 23(a) imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation. When considered in the light of these requirements, it is clear that the Rule was not designed to apply to EEOC actions brought in its own name for the enforcement of federal law.”).

150. See, e.g., *EEOC v. Northwest Airlines, Inc.*, 216 F. Supp. 2d 935, 937 (D. Minn. 2002) (“The EEOC may properly bring the current ADA class action lawsuit notwithstanding the Fed. R. Civ. P. 23 class requirements.”).

151. *Id.* at 938 (holding that the status of the EEOC as a plaintiff obviates the argument for an individualized inquiry attack on class certification). For an alternative view as to how courts should conceive of group identity through the lens of pandisability, see Stein & Waterstone, *supra* note 15, at 905–16.

152. *United States v. City and County of Denver*, 943 F. Supp. 1304, 1309 (D. Colo. 1996) (“In seeking to protect the public’s interest, it is sufficient that the government show specific evidence of company discrimination regarding some of the employees that it seeks to represent, and that a broad-based policy of employment discrimination existed.” (quoting *Coe v. Yellow Freight Sys.*, 646 F.2d 444, 449 n.1 (10th Cir. 1981) (citations omitted))).

153. 531 U.S. 356, 374 n.9 (2001).

154. 541 U.S. 509 (2004).

155. 546 U.S. 151, 151, 157–60 (2006).

ties for damages under Title II where they are seeking to vindicate fundamental rights. It is still uncertain how far this exception will extend. Under *Garrett*, individuals may sue state officials for prospective injunctive relief under *Ex parte Young*,¹⁵⁶ but the limitation on damage remedies further undercuts the financial ability of private lawyers to bring these kinds of cases. In the ADA context this is significant, because state governments are a major provider of programs, services, and activities to people with disabilities.¹⁵⁷ Again, however, these discouraging restrictions do not apply to the government, which can bring cases for damages regardless of new federalism sovereign immunity rules.¹⁵⁸

If the government possesses an array of systemic advantages to the private attorney general in bringing structural cases, how should it use this power? Public enforcement officials should focus on bringing cases where the profit motive for plaintiffs and private attorneys is low (either because of the lack of damage remedy or limitations on attorneys' fees recovery), noncompliance appears to be systemic, case law is undeveloped, and individual plaintiffs will have standing difficulties challenging various forms of discrimination. I now turn to discussing specific ways, in the context of disability litigation, that the government should take an active role in bringing structural litigation.

1. Employment-Hiring Cases

Before the enactment of the ADA, people with disabilities existed only at the fringes of the labor market.¹⁵⁹ The ADA

156. 209 U.S. 123, 154 (1908) (holding that the Eleventh Amendment does not protect state officials from suit if the suit would enjoin the official from enforcing an unconstitutional statute); *see also* *Armstrong v. Wilson*, 124 F.3d 1019, 1025–26 (9th Cir. 1997) (holding that the plaintiffs' ADA Title II claims for prospective injunctive relief fell within the *Ex parte Young* exception to state sovereign immunity).

157. According to a 2005 study, 32% (63 out of 197) of Title II cases brought before the courts of appeals involved state actors as defendants. *See* Waterstone, *supra* note 61, at 1861–62.

158. *See Garrett*, 531 U.S. at 374 n.9.

159. According to the federal government's National Health Information Survey, when disability was defined as an impairment that imposes limitations on any life activity the employment rate for working-age people with disabilities was 49% in 1990. *See* H. STEPHEN KAYE, IMPROVED EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES 9 fig.1 (2003), available at http://sdc.ucsf.edu/pub_listing.php?pub_type=report; *see also* Walter Y. Oi, *Employment and Benefits for People with Diverse Disabilities*, in *DISABILITY*,

hoped to address this disparity and, by working to eliminate employment discrimination, increase the number of people with disabilities in the workplace. Unfortunately, its success in doing so has been limited.¹⁶⁰

To be sure, the Supreme Court's definition of disability has dramatically limited the number of potential employees that can invoke the statute's protections.¹⁶¹ But there are still groups of people that consistently qualify as meeting the definition of disability.¹⁶² Regarding these groups, one reason that the reach of the ADA's employment law provisions have been limited is the infrequency with which they are used to open employment opportunities at the hiring stage. Even before the ADA was passed, researchers began to chart the changing nature of employment discrimination litigation, noting that anti-discrimination laws protecting women and minorities were used predominantly to protect the existing positions of incumbent workers.¹⁶³ This trend is even stronger under the ADA, where failure-to-hire cases are dramatically outnumbered by discharge or accommodation for existing employee cases.¹⁶⁴

It is in one sense understandable that there are not more hiring cases. Legal prohibitions against hiring discrimination

WORK AND CASH BENEFITS 103, 121 (Jerry L. Mashaw et al. eds., 1996) (showing that the percentage of people with disabilities with jobs in 1986 was 33%).

160. See THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 1–2 (Richard V. Burkhauser & David C. Stapleton eds., 2003) [hereinafter DECLINE IN EMPLOYMENT]; see also Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 528–30 (2004) (reviewing DECLINE IN EMPLOYMENT, *supra*).

161. See Amy L. Allbright, *Special Feature: 2003 Employment Decisions Under the ADA Title I—Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 320 (2004) (“A clear majority of the employer wins in this survey were due to employee’s failure to show that they had a protected disability.”).

162. Individuals who are blind or wheelchair users make up 4% of EEOC charges. See ADA Charge Data by Impairments/Basis—Merit Factor Resolutions, <http://www.eeoc.gov/stats/ada-merit.html> (last visited Nov. 5, 2007).

163. See Donohue & Siegelman, *supra* note 116, at 1015–17.

164. See Steven L. Willborn, *The Nonevolution of Enforcement Under the ADA: Discharge Cases and the Hiring Problem*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 103, 103–04 (Peter David Blanck ed., 2000) (“[O]ver the short life of the ADA, the ratio of discharge to hiring cases has been about 10 to 1, a ratio that is substantially higher than for Title VII cases . . .”). This was also the case for employment cases under section 504 of the Rehabilitation Act. See Karlan & Rutherglen, *supra* note 118, at 33–34.

are inherently difficult to enforce.¹⁶⁵ It is hard for applicants to detect discrimination and to prove they are capable of performing the job for which they applied.¹⁶⁶ Potential plaintiffs have less incentive to pursue a lawsuit than existing employees,¹⁶⁷ and are less likely to find a lawyer even if they are so inclined.¹⁶⁸ Disability is seen as individualized and incapable of aggregation, meaning that how an employer views one class of persons with disabilities may not lead them to fail to hire another type, which has exacerbated this trend.¹⁶⁹ Yet this leaves a void of enforcement, because this is exactly where employers have the greatest incentives to discriminate.¹⁷⁰

This void is troubling, and needs to be filled in order to realize the ADA's goal of increasing the number of people with disabilities in the workforce.¹⁷¹ What would a structural approach to litigating hiring discrimination look like? Broadly speaking, there are two scenarios. In the first, a formal policy keeps some category of people with disabilities out of the workforce. *Sutton v. United Air Lines, Inc.* was such a case.¹⁷² Plaintiffs, twin sisters with myopia, claimed that defendant's policy requiring uncorrected vision acuity of 20/100 or better discrimi-

165. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 275 (2000) (“[I]t is generally quite difficult for disadvantaged workers to establish that they were unlawfully refused employment by an employer.”).

166. See Richard V. Burkhauser & David C. Stapleton, *A Review of the Evidence and Its Implications for Policy Change*, in DECLINE IN EMPLOYMENT, *supra* note 160, at 396.

167. *Id.* (noting how disappointed applicants decline to pursue litigation for reasons such as a “less[er] chance of success, a desire to focus their energy on searching for other jobs, fear of creating a negative reputation for themselves, [and] lack of support from fellow employees or employee organizations”); see also Willborn, *supra* note 164, at 115 n.2.

168. See Donohue & Siegelman, *supra* note 116, at 1003–09 (noting that employees with more means have an easier time securing representation than those with lesser means).

169. See Bagenstos, *supra* note 160, at 538. For an alternative approach suggesting courts should take a broader view of disability discrimination, see Stein & Waterstone, *supra* note 15, at 916–22.

170. Employers have at least two disincentives to hiring people with disabilities: first, it increases firing costs because of potential lawsuits, and second, employers need to provide accommodations at their own expense for disabled employees. See Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 924 (2001); Jolls, *supra* note 165, at 273–76.

171. See Bagenstos, *supra* note 160, at 555–56 (arguing that one hope for increasing the effectiveness of Title I of the ADA is strengthening enforcement of the antidiscrimination and accommodation requirements at the hiring stage).

172. 527 U.S. 471 (1999).

minated against them.¹⁷³ Assuming plaintiffs meet the definition of disability,¹⁷⁴ cases like this turn on whether the requirement is job related and consistent with business necessity,¹⁷⁵ whether the requirement protects the health or safety of that worker or other workers from a direct threat,¹⁷⁶ or whether a reasonable accommodation that will enable the applicant to meet the standard is possible.¹⁷⁷ These types of cases are an analogue to an earlier wave of Title VII litigation: what has been described as easier-to-identify “blanket prohibitions from good jobs.”¹⁷⁸ Whether pursued under a disparate treatment or disparate impact theory, commentators generally view Title VII as removing the most egregious examples of these types of restrictions.¹⁷⁹ It is less obvious that this has been the case in ADA litigation.¹⁸⁰

The second type of failure-to-hire case is more complicated. Here, there may be no formal (or at least apparent) policy that excludes people with disabilities. Hiring decisions can be made on the basis of even subconscious biases or discomfort with bringing a previously excluded and stigmatized group into the workforce.¹⁸¹ In both the Title VII and ADA contexts, this discrimination has proven harder to tackle,¹⁸² although, at least in

173. *Id.*

174. In *Sutton*, the Court held that the plaintiffs did not meet the definition of disability. *Id.* at 488–89.

175. 42 U.S.C. § 12112(b)(6) (2000).

176. *Id.* § 12113(b); see also *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86–87 (2002) (holding that an employer can refuse to hire an individual with a disability whom the employer reasonably believes is a threat to himself).

177. 42 U.S.C. § 12112(b)(5)(B).

178. Donohue & Siegelman, *supra* note 116, at 1015.

179. *Id.*; see also Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 137 (2003) (“[D]isparate impact theory has proven an invaluable tool for reducing employer reliance on job requirements that are unrelated to job performance but that stand in the way of minority progress. Without such a tool, employers would have been free to adopt facially neutral job requirements that maintained the exclusion of blacks and minorities from vast areas of employment.”).

180. See Stein & Waterstone, *supra* note 15, at 861–62 (arguing that even a basic application of disparate impact litigation involving neutral formal policies has been lacking under the ADA).

181. According to Professor Susan Sturm, unconscious biases are part of a “second-generation” of discrimination. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

182. See Bagenstos, *Structural Turn*, *supra* note 14, at 3–4 (averring that disparate treatment and impact models of discrimination are ill-suited to redi-

regards to the ADA, I have previously argued that this is not inevitable.¹⁸³

Public enforcement authorities are the institutional actors that are best suited to bring both categories of these failure-to-hire cases. Both types present greater challenges for private attorneys general to challenge because they are resource-intensive, have lower probability of high damage awards, and plaintiffs themselves are less likely to want to pursue them. These disincentives, however, apply far less to public enforcement authorities. Both the DOJ and EEOC can pursue cases on their own behalf in the public interest without finding a plaintiff who is ready and able to participate in long, difficult litigation,¹⁸⁴ and have information-gathering mechanisms in place to identify problematic patterns and trends in the employer community.¹⁸⁵ Government lawyers are also not beholden to the same financial incentives as the private bar. For these reasons, they are in a better position to negotiate detailed injunctive relief creating forward-looking change in employment-hiring practices.¹⁸⁶ The goal is to use court oversight via injunctions to create and enforce changes in the way employers perceive and react to putative employees with disabilities.

tribute power and remedy unintentional discrimination); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 738–67 (2006) (arguing that disparate impact theory has only proven useful in a limited universe of testing cases).

183. See Stein & Waterstone, *supra* note 15, at 902–22 (arguing that a new construction of group identity and an increased use of disparate impact theory could more readily attack structural barriers). For more optimistic views of Title VII's ability to attack "structural" discrimination, see Charles A. Sullivan, *Re-Reviving Disparate Impact*, 54–67 (Seton Hall Pub. L. Res. Paper No. 9, 2004), available at http://papers.ssrn.com/abstract_id=581503.

184. See, e.g., *EEOC v. Northwest Airlines, Inc.*, 216 F. Supp. 2d 935, 937–38 (D. Minn. 2002) (holding that when the EEOC brings a case in its own name pursuant to statutory authority, it may bypass the requirement of class certification under Rule 23, thereby obviating the need for individual inquiry).

185. Before filing an ADA (or Title VII) employment case, an individual needs to file a charge with the EEOC. See 42 U.S.C. § 2000e-5(e)(1) (2000). The EEOC then classifies and investigates the case. See Moss et al., *supra* note 73, at 4 (detailing EEOC investigation procedures for ADA claims). Employers with over one hundred employees are also required to file an "EEO-1" form each year with the EEOC. See 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.7–1602.14 (2007). These reports contain information on enforcement, self-assessment by employers, and research.

186. See Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 469 (1993) ("[T]he EEOC is more likely than a private party to obtain injunctive relief.").

Regarding the first category of cases involving formal barriers, there are some limited examples of public enforcement authorities bringing these kinds of cases. In *EEOC v. Northwest Airlines, Inc.*, the EEOC argued that Northwest Airlines's blanket policy barring anti-seizure medicated epileptics and insulin-dependent diabetics from holding cleaner or equipment service employee positions violated the ADA.¹⁸⁷ Although a private litigant may have had trouble establishing class status, the EEOC did not.¹⁸⁸ Similarly, in *EEOC v. United Parcel Services, Inc.*, the EEOC challenged a policy excluding monocular drivers without regard to their actual safety records and driving abilities.¹⁸⁹ And in *EEOC v. SPS Temporaries, Inc.*,¹⁹⁰ the Commission challenged a temporary employment agency's hiring practices regarding applicants with disabilities. But these cases are the exception, not the rule, in the limited pool of government litigation dealing with employer hiring.¹⁹¹

Public enforcement authorities have no visible strategy for or history of bringing failure-to-hire cases that involve less formal policies. Although difficult, these cases need to be part of an effective employment enforcement scheme, as subtle bias, stigma, and views of people with disabilities as inauthentic workers run deep.¹⁹² Case development in this area necessitates a robust view of disparate impact law¹⁹³ and pushes the boundaries of tethering an employment decision to a "specific

187. 216 F. Supp. 2d 935, 935 (D. Minn. 2002).

188. *Id.* at 938.

189. 149 F. Supp. 2d 1115, 1121–22 (N.D. Cal. 2000).

190. *EEOC v. SPS Temporaries, Inc.*, No. 04-CV-0052 E(SC) (W.D.N.Y. filed Jan. 27, 2004). This case was brought in the Western District of New York, and was resolved in November of 2005. See EEOC, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2006 (2006), available at http://www.eeoc.gov/abouteeoc/plan/par/2006/results_objective1.html.

191. There are more cases that have been brought on behalf of existing employees. For example, see *United States v. City and County of Denver*, 943 F. Supp. 1304 (D. Colo. 1996), where the DOJ brought a pattern and practice suit against the city and county regarding nonaccommodation of Denver police officers. See also Press Release, EEOC, Denny's Sued by EEOC for Disability Bias Against Class of Workers Nationwide (Sept. 28, 2006) (covering an EEOC nation-wide suit brought on behalf of Denny's workers for nonaccommodation and termination).

192. See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 604–08 (2004) (describing how people with disabilities are viewed as "inauthentic workers").

193. See Stein & Waterstone, *supra* note 15, at 910–15 (discussing how an older iteration of disparate impact law could attack systemic barriers in the workplace).

employment practice,”¹⁹⁴ a theory for which there is limited success under Title VII.¹⁹⁵ The troublesome statutory provision governing the proof structure of Title VII disparate impact, however, does not technically apply to the ADA.¹⁹⁶ Moreover, unlike Title VII, the EEOC is uniquely positioned to provide leadership under the ADA because it is responsible for promulgating regulations under Title I.¹⁹⁷ The regulations that the EEOC has promulgated support the ADA’s inclusion of disparate impact regime,¹⁹⁸ yet the EEOC has not pushed this position in failure-to-hire cases.¹⁹⁹

One way to develop failure-to-hire cases involving informal policies would involve testing. Testing has been a valuable tool in other areas of antidiscrimination law in helping to ferret out difficult-to-detect discrimination.²⁰⁰ Primarily used by public interest groups, testing has been used under the Fair Housing Act and Title VII.²⁰¹ In the employment context, testers are

194. 42 U.S.C. § 2000e-2(k)(1)(A)–(B) (2000). The burden of proof required by statute demands an identification of a specific practice. *See id.*

195. Most commentators and courts, however, seem settled that intangible factors have trouble translating into a particular employment practice. *See* Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 657 (2005) (“[C]ourts have held that an employer’s ‘passive reliance’ on relational means of exclusion is not subject to disparate impact attack.” (quoting EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 298 (7th Cir. 1991))). There are examples of cases that are more receptive to these claims. In *DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 435 (7th Cir. 2000), the plaintiff challenged an employer’s failure to provide restroom facilities. Although the court failed to find that this constituted sexual harassment, it did suggest that “insofar as absence of restroom facilities deters women . . . but not men from seeking or holding a particular type of job . . . the absence may violate Title VII” under an impact theory. *Id.* at 436.

196. *See* 42 U.S.C. § 2000e-2(k)(1)(A)–(B) (regulating discrimination on the basis of basis of race, color, religion, sex, or national origin).

197. *Id.* § 12116.

198. Unlike the statute, which uses language consistent with disparate impact but does not mention the term, the EEOC regulations expressly reference disparate impact. *See* 29 C.F.R. § 1630.15(c) (2007).

199. This is in contrast to the DOJ’s aggressive disparate impact law development in the early years of Title VII. *See* Rose, *supra* note 126, at 1155–57.

200. *See* Selmi, *Public vs. Private*, *supra* note 73, at 1426 (“[T]esting has proved to be an effective means of documenting discrimination.”); Yelnosky, *supra* note 186, at 413 (“Testing can help to root out discriminatory practices where the disincentives to bring a private suit result in underenforcement.”).

201. *See* Stephen E. Haydon, Comment, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1216–17 (1997) (detailing the successes of testing under the Fair Housing Act); *see also* Yelnosky, *supra* note 186, at 413 (“The use of testers can uncover

persons who apply for employment with the sole purpose of detecting whether discriminatory hiring practices exist, but who do not intend to accept an offer of employment. The testers are matched to appear equally qualified for the job with respect to important hiring factors, including employment history and references.²⁰²

Public enforcement authorities have used and supported testing in limited fashion. Under the Fair Housing Act, the government has developed a testing program that measures levels of housing discrimination and properly allocates enforcement efforts,²⁰³ although the bulk of the government's testing efforts involve various programs to provide financing to local private fair housing groups.²⁰⁴ Under Title VII, the EEOC has recognized the value of testing,²⁰⁵ and its current position is that it will accept charges from testers.²⁰⁶ The EEOC has not formulated its own testing program or engaged in systematic efforts to promote testing programs of private groups, and there is a split of agreement as to whether it is statutorily entitled to do so.²⁰⁷ Although the issue has not yet come up, the EEOC should have greater authority to create a testing program under the ADA because of the agency's rule-making authority under the statute.²⁰⁸

employment discrimination that otherwise is unproveable because of its subtle form.”).

202. Press Release, EEOC, EEOC Issues New Guidance on Legal Standing of Testers (May 24, 1996), available at <http://www.eeoc.gov/press/5-24-96a.html>.

203. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION STUDY 14 tbl.3.3 (1991) (showing that testing data collected by HUD from fair housing organizations discloses that black testers were falsely told that units were not available 17% of the time, and received less favorable treatment than white testers 39% of the time).

204. Selmi, *Public vs. Private*, *supra* note 73, at 1426.

205. See Press Release, EEOC, *supra* note 202 (“Testing, which was recognized as a viable technique to uncover workplace bias more than 25 years ago, has been utilized in various quarters including public accommodations, housing, and employment.”).

206. EEOC Notice No. 915.002, Enforcement Guidance: Whether “Testers” Can File Charges and Litigate Claims of Employment Discrimination (May 22, 1996), available at <http://www.eeoc.gov/policy/docs/testers.html>.

207. See Yelnosky, *supra* note 186, at 459–63 (arguing that while testing is desirable, the EEOC presently lacks statutory authority to conduct testing); see also Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1, 37–46 (1994) (arguing that employment testing is presently within the power of the EEOC).

208. 42 U.S.C. § 12116 (2000).

A testing program in disability cases would be a valuable tool in the public enforcement arsenal, both as an effective innovation in its own right and as a supplement to cases that private lawyers are limited in their ability to bring.²⁰⁹ Although certain to be controversial, public testing avoids one of the most contested issues within testing law: whether private testers have individual standing to sue for various forms of relief.²¹⁰ For disability cases, testing would involve two applicants, one with an obvious physical disability and one without, but similarly situated in terms of job qualifications. This would raise two sets of issues, both of which would be valuable to assess potential litigation. First, are applicants receiving accommodations in the job application process?²¹¹ Second, and more importantly (or at least harder to detect), are bias and stigma limiting opportunities for qualified applicants with disabilities?

Most knowledgeable observers believe they are. The 2004 National Organization on Disability/Harris Survey of Americans with Disabilities found that, as in previous years, the most prevalent form of discrimination against people with disabilities in employment is not being offered a job for which one is qualified.²¹² The second most common is being refused a job interview on the basis of a disability.²¹³ The State Bar of California's Committee on Legal Professionals with Disabilities reported that nearly half of the respondents it surveyed believed that they were denied employment opportunities because of their disabilities.²¹⁴ More anecdotally, in May 2006, the American Bar Association Commission on Mental and Physical Disability convened the first National Conference on the Employ-

209. See Yelnsoky, *supra* note 186, at 429–55 (noting the obstacles private individuals and groups face in testing on their own).

210. See generally Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547 (1995) (discussing the inconsistent fair housing standing decisions by the lower courts).

211. See 42 U.S.C. § 12112(b)(4)–(7) (2000) (requiring reasonable accommodation in the job application process).

212. See NAT'L ORG. ON DISABILITY, 2004 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES 31, 39 (2004).

213. Together, these two variants of discrimination account for 51% of job-related discrimination against people with disabilities. *Id.* at 39.

214. ABA COMM'N ON MENTAL & PHYSICAL DISABILITY, THE NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES: A REPORT FROM THE AMERICAN BAR ASSOCIATION FOR THE LEGAL PROFESSION 10–11 (2006), available at http://www.abanet.org/disability/docs/conf_report_final.pdf. Many respondents also believed that they were denied jobs even though they graduated in the top ten to twenty percent of their law school classes at higher ranked schools than those that received job offers. *Id.* at 11.

ment of Lawyers with Disabilities.²¹⁵ This meeting and subsequent report documented the existence of negative stereotypes about lawyers with disabilities in the legal profession. Many accounts were presented about qualified lawyers with disabilities who were clearly precluded from legal opportunities when interviewers realized they had disabilities.²¹⁶ A testing program is invaluable to detect and craft a litigation response to these types of violations.

2. Physical Access Cases for Privately Owned Places of Public Accommodation

The ADA is unique amongst antidiscrimination statutes in that it seeks to restructure the actual physical environment of places of public accommodation. Although previous antidiscrimination laws like Title II of the Civil Rights Act of 1964 required nondiscrimination in access to public places, the changes required to the physical environment were limited. With disabilities, however, discrimination appears to have been built into the environment. Steps can be just as effective in keeping someone with a wheelchair out of a building as a discriminatory policy is for a racial minority. To create access in privately owned places of public accommodation, Title III of the ADA requires that newly constructed or renovated facilities must be fully accessible,²¹⁷ and that structures that were built before the ADA's enactment must be made accessible where doing so is "readily achievable."²¹⁸ The requirements are similar for public buildings under Title II.²¹⁹

215. *See id.* In the interests of full disclosure, I am a Commissioner of the ABA Commission on Mental and Physical Disability Law.

216. *See id.*; *see also* Ellen Simon, *Job Hunt a Challenge for Disabled: Employers Wary Despite Applicants' Qualifications*, SEATTLE POST-INTELLIGENCER, Apr. 10, 2006, available at http://seattlepi.nwsourc.com/business/266073_disabilities10.html.

217. 42 U.S.C. § 12183(a) (2000).

218. *Id.* § 12182(b)(2)(A)(iv).

219. The regulations interpreting Title II of the ADA provide that regarding existing facilities, "each service, program, or activity [conducted by a public entity] . . . when viewed in its entirety, [must be] readily accessible to and useable by individuals with disabilities." 28 C.F.R. § 35.150(a) (2007). This does not mean that each existing facility must be physically accessible to and useable by individuals with disabilities. *See id.* § 35.105(a)(1). The section of the regulations dealing with new or modified facilities provides that "[e]ach facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities . . ." *See id.* § 35.151(a).

Although there are no long-term systemic studies to date, media reports, testimony from advocates across the country, and other accounts have shown that widespread inaccessibility of physical structures in private and public facilities remains a rampant problem, even in cases where barrier removal would not be difficult.²²⁰ Especially regarding privately owned places of public accommodation, this represents a failure of the ADA's remedial scheme and reliance on private enforcement. Individual litigants can only receive injunctive relief under Title III, and their lawyers' only hope of receiving payment for these cases comes from recovering attorneys' fees, an enterprise that has become more uncertain after the Supreme Court's decision in *Buckhannon*.²²¹ A recent essay by Professor Samuel Bagenstos discusses the paradoxical situation created by a broad statute with limited remedies.²²² Professor Bagenstos notes the media and political attack on serial litigation, which he characterizes as an inevitable (though undesirable) consequence of importing the private attorney general profit motive into civil rights litigation.²²³

There is an enforcement void here that the government is best suited to fill. ADA access cases against privately owned places of accommodations are inherently unattractive for the private bar to bring. In addition to the lack of damage remedy and difficulty obtaining attorneys fees, standing is difficult to

220. See Bagenstos, *supra* note 19, at 3; see also *ADA Notification Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 49 (2000) (statement of Rick A. Sholtz, ADA Consulting Assocs.) (“[P]robably less than one building in 10 that is a public accommodation is compliant with the ADA.”). For an example of ADA compliance problems, see Dan Weikel, *Getting There Is None of the Fun*, L.A. TIMES, Nov. 13, 2006, at B1 (discussing a lack of sidewalk and public right-of-way access in Riverside, California).

221. 532 U.S. 598 (2001); see Albiston & Nielson, *supra* note 19, at 1089. Regarding public buildings, the scenario under Title II is not much better. Plaintiffs can only receive damages for cases involving “deliberate indifference.” *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001). A private plaintiff's ability to sue for damages is also curtailed by the Court's decisions in *Garrett* and *Lane*. See Waterstone, *supra* note 64, at 795, 833–34.

222. See Bagenstos, *supra* note 19, at 3.

223. *Id.* at 25–30. On the additional backlash against ADA access suits, see R. Scott Moxley, *The New Crips; An Ex-Drug Dealer and Burglar Leads a Wheelchair Posse Terrorizing Southern California Businesses. Would You Believe He Has the Law on His Side?*, OC WEEKLY, Oct. 12, 2006. For additional negative media portrayals of ADA litigation, see Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 9–11 (2000).

establish. A plaintiff must meet the continuing violation doctrine, meaning that she must show that there is a risk of the harm happening to her again.²²⁴ A plaintiff's standing is also tied to his or her disability, meaning that a wheelchair user suing a stadium can only obtain an injunction with respect to the parts of the stadium in which he encountered difficulty and cannot seek relief for individuals with vision impairments.²²⁵

Again, the government can avoid most of these structural limitations. Under Title III of the ADA, the government's enforcement powers are substantially broader than private litigants. The attorney general can initiate complaints and commence a civil action if it believes that any person or group of persons is engaged in a pattern or practice of discrimination, or any person or group of persons has been discriminated against and such discrimination raises an issue of general public importance.²²⁶ By suing in the public interest, the government's standing is not tied to any particular plaintiff or his or her disability.²²⁷ Unlike private individuals, the government can seek compensatory damages,²²⁸ and can seek civil penalties (up to \$100,000 for multiple violations) in cases it deems important to "vindicate the public interest."²²⁹

Primarily, however, government enforcement can and should get its power from its unique ability to pursue structural injunctive relief. The attorney general can bring cases solely focused on invoking the courts' injunctive powers to enforce and monitor physical accessibility standards. Unlike private individuals, the government does not have to be overly concerned about financing cases through attorneys' fees and damage

224. *Deck v. Am. Haw. Cruises, Inc.*, 121 F. Supp. 2d 1292, 1297 (D. Haw. 2000) ("[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legal protected interest which is (a) concrete and particularized; and (b) 'actual or imminent', not 'conjectural' or 'hypothetical.'" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992))).

225. *Parr v. L&L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1082–83 (D. Haw. 2000) (denying plaintiff's standing to sue for barriers that do not affect plaintiff's specific disability).

226. 42 U.S.C. § 12188(b)(1)(B) (2000).

227. See Mary Crossley, *Becoming Visible: The ADA's Impact on Health Care for Persons with Disabilities*, 52 ALA. L. REV. 51, 63 (2000) (asserting that actions brought by the DOJ or a United States Attorney are important because they "take the focus away from the harm threatened to a particular individual with a disability and can provide an effective mechanism for compelling a health care provider to conform its practices more broadly to the ADA's auxiliary aids requirements").

228. 42 U.S.C. § 12188(b)(2)(B).

229. *Id.* § 12188(b)(2)(C).

awards. They can also bring broad cases challenging all facets of inaccessibility in public places, rather than being tied to inefficient piecemeal litigation on behalf of individual or discrete classes of plaintiffs.²³⁰

Yet across administrations, the attorney general's office has not pursued this agenda.²³¹ Examining the Title III case law for cases that the DOJ brought under their "general public importance" and "pattern or practice" authority that involve new construction²³² shows that the DOJ's cases have almost all involved movie theater or sports stadium lines-of-access.²³³ While sparse in scope and number,²³⁴ these cases do show the potential of this type of litigation strategy. In *United States v. AMC Entertainment, Inc.*, the DOJ secured a court order that required compliance with ADA access codes in AMC stadium-style theaters across the country.²³⁵ The court kept jurisdiction of the action for five years to enforce the injunction.²³⁶ What is needed is more structural cases like this that create an in-depth look at inaccessible conditions for broad categories of people with disabilities.

These guidelines for when public enforcement officials should devote resources to bringing structural litigation to supplement private enforcement—cases where the profit motive for plaintiffs and private attorneys is low (because of a lack of

230. In a Title VII case in the pre-*Falcon* era, one court commented on this principle. See *McLendon v. M. David Lowe Pers. Servs., Inc.*, No. 75-H-1185, 1977 WL 15, at *3 (S.D. Tex. Apr. 29, 1977) ("[T]his Court must reject the thesis that a named plaintiff must have been the victim of . . . discrimination . . . manifested by an employer. To hold otherwise would be to burden the Courts with a multiplicity of suits . . . This would be plainly an inefficient method of implementing . . . Title VII.").

231. See *Bagenstos*, *supra* note 19, at 35; see also *Milani*, *supra* note 74, at 112–13.

232. 42 U.S.C. § 12183 (2000).

233. The fact that these cases have been consistently brought since the earlier years after the ADA's passage demonstrates the Department's path dependent behavior. See, e.g., *United States v. Cinemark U.S.A.*, 348 F.3d 569, 572 (6th Cir. 2003) (holding that the regulation requiring wheelchair accessibility for public assembly areas meant that theater owners must provide similar viewing angles for all patrons); *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1268–69 (D. Minn. 1997) (holding an architectural firm in violation of the DOJ regulation involving sight lines for sports facilities).

234. For a reading, analysis, and codification of every Title III ADA case at the court of appeals level from 1990–2004, see generally *Waterstone*, *supra* note 61 (examining all eighty-two appellate cases brought under Title III).

235. *United States v. AMC Entm't, Inc.*, No. CV-99-01034-FMC(SHX), 2006 WL 224178, at *3 (C.D. Cal. Jan 10, 2006).

236. *Id.*

damage remedy, limitations on attorneys' fees recovery), non-compliance appears to be systemic, there is an absence of case development, and individual plaintiffs will have standing difficulties challenging various forms of discrimination—certainly also apply to other areas of disability law.²³⁷ In the broader universe of civil rights laws, there is also the potential for a structural approach by public enforcement officials to create meaningful change.²³⁸

237. One area of disability law involves the provisions of the Fair Housing Amendments Act that require all new multifamily housing be designed and constructed with six specified accessibility features. 42 U.S.C. § 3604(f)(3)(C) (2000). Professor Robert Schwemm notes widespread noncompliance with this statutory provision, and discusses the lack of cases despite their potential for success. Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in 'Design and Construction' Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 768–74 (2006). The advantages the DOJ receives from bringing these cases are significant. For example, in cases brought by the Department, the courts have taken a relaxed view of the “continuing violation” doctrine. *Id.* at 845. Another area where this type of vigorous enforcement is at least as important is under the provisions of the Help America Vote Act (HAVA) requiring that voting systems shall “be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” 42 U.S.C. § 15481(a)(3)(A) (Supp. III 2005). Here, public enforcement is crucial, because the only grievance option available to private citizens is an administrative proceeding. *Id.* U.S.C. § 15512. The DOJ has taken the position that individuals do not have a private right of action to enforce this part of HAVA. *See* Federal Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 3, *Taylor v. Onorato*, 428 F. Supp. 2d 384 (W.D. Pa. 2006) (No. 06-481) (arguing that HAVA confers no private right of action); *see also* *Taylor v. Onorato*, 428 F. Supp. 2d 384, 345 (W.D. Pa. 2006) (holding that private plaintiffs have no private right of action under HAVA access provisions). The DOJ does have the ability under HAVA to bring “a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief . . . as may be necessary.” 42 U.S.C. § 15511 (Supp. III 2005). So far, however, despite early evidence of noncompliance, the Department has brought only two cases relating to the disability provisions of HAVA. *See* *United States v. Maine*, No. 06-86-B-W, 2007 WL 1059565 (D. Me. Apr. 4, 2007); Complaint, *United States v. N.Y. State Bd. of Elections*, No. 06-CV-0263 (GLS) (N.D.N.Y. Mar. 1, 2006), available at www.usdoj.gov/crt/voting/hava/ny_hava.htm.

238. Some of the nondisability provisions of the HAVA, for example, fit this description, though the ability of a private plaintiff to bring a lawsuit challenging her ability to cast a provisional ballot is unclear, as the statute itself provides no private right of action. *See* 42 U.S.C. § 15482 (Supp. III 2005) (provisional ballot provision); *cf.* *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 975 (N.D. Ohio 2004) (holding that an individual has standing to sue under this provision pursuant to § 1983). Standing is traditionally difficult to establish in voting cases, and HAVA's provisional ballot provisions have been criticized for being unclear. *See* Rick L. Hasen, *If It Is*

III. NEW GOVERNANCE

Litigation, or the threat of litigation, is a means to an end—narrowing the gap between what laws formally state should happen and what actually does happen. As set forth above, public enforcement officials should engage in a structural litigation campaign to help increase ADA compliance. But the reality is that enforcement agents—whether public or private—will never be able to bring every even potentially meritorious case. To a certain extent, an enforcement gap will probably always exist. For those that tend to take a litigation-centric view of civil rights in general and enforcement in particular,²³⁹ there is a relatively new but expanding body of scholarship that may ultimately challenge the assumption that litigation is the enforcement apparatus of choice.²⁴⁰ Loosely referred to in the literature as “new governance,” this scholarship moves away

Broke, Fix It. Now, RECORDER (S.F.), Nov. 4, 2004, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1099217144168>; Daniel Tokaji, *The 2008 Election: Could It Be a Repeat of 2000?*, FINDLAW WRIT, Nov. 30, 2004, http://writ.news.findlaw.com/commentary/20041130_tokaji.html. Similarly, victims of housing discrimination often may not realize they have been treated unfairly, or even if so, may not want to sue, paralleling the problem of victims of employment discrimination who have not been hired. Schwemm, *supra* note 14, at 380. Development of disparate impact law has also been slow and uneven. See James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348, 356 (1988); see also BROOKS ET AL., *supra* note 3, at 311 (noting that the Supreme Court has not yet decided disparate impact case under the Fair Housing Act). A commitment to public systemic litigation in these areas will help these statutes achieve their respective goals of a fairer voting system and eliminate discrimination in the housing market.

239. I include myself in this category. See Waterstone, *supra* note 61, at 1826–32 (looking at respective rates of litigation across the Titles of the ADA).

240. This coincides with an alternative strain of scholarship that urges a move outside of the traditional legal process altogether to vindicate civil rights. For example, Professors Kevin Johnson and Bill Hing have recently written about a new immigrants' civil rights struggle. See Bill Ong Hing & Kevin R. Johnson, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=951268>. They suggest that with an uncertain Congress and a judiciary unlikely to support social change, immigrant groups should focus their current efforts on building broad political coalitions with other groups. *Id.* (manuscript at 42–43, 47, 67–79). Professor Orly Lobel also recently wrote on perceived limited successes of various civil rights movements and the subsequent shift away from traditional legal reform toward community organizing and grassroots campaigning. Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 971–87 (2007). This is a view that Lobel ultimately rejects. *Id.*

from traditional modes of enforcement and regulation.²⁴¹ Instead, it focuses on collaborative, multiparty, multilevel, adaptive, problem-solving methods of public policy implementation that to varying extents supplement or supplant traditional regulation.

After briefly explaining the basics of new governance for the uninitiated, this Part discusses a potential fit between disability policy as set forth in the ADA and enforcement options that seek to shift the locus of control from courts to networks of interested parties. Although with new governance the line between public and private actors becomes more blurry and less important,²⁴² I will focus primarily on the role public enforcement officials have to play in the constellation of new governance activities. In many ways, public officials have lagged behind private actors in the development of creative enforcement mechanisms, despite many institutional advantages.²⁴³ Although the choice to focus on public enforcement is somewhat limiting, I believe that it is defensible. As set forth above, pub-

241. Karkkainen, *supra* note 12, at 471–78 (explaining that “New Governance” is a new type of legal scholarship that is of growing importance); *see also* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (identifying, discussing, and linking governance scholarship); *cf.* Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 492–98 (stating that new legal theory must develop to fulfill new social demands and discussing the possible impact of the paradigm shift).

242. *See* Lobel, *supra* note 241, at 373 (describing the Renew Deal governance as engaging many actors while giving citizens active roles).

243. Innovation certainly occurs on the private side, even operating loosely within the framework of traditional litigation. The law firm of Goldstein, Demchak, Baller, Borgen & Dardarian, and solo practitioner Lainey Feingold, have developed a method known as structured negotiations. They describe this method as an alternative to litigation that emphasizes “collaboration, relationship-building, solution, and disability community empowerment.” *See* E-mail from Lainey Feingold to ADRC Listserve (Jan. 3, 2007) (on file with author). Structured negotiations aided in successfully negotiating legal agreements on issues including Talking ATMs, accessible websites, tactile point of sale devices, and alternative format systems with various national companies. *See* The International Center for Disability Resources on the Internet, News on Talking ATMs and Other News Dealing with Banks, Retail Locations, and Financial Institutions, http://www.icdri.org/AssistiveTechnology/ATMs/news_on_talking_atms.htm (last visited Nov. 5, 2007) (listing companies such as Wal-Mart, Bank of America, RadioShack, Safeway, Citibank, and Wells Fargo); *see also* Tim Hay, *Negotiating Wins for the Disabled*, DAILY JOURNAL (L.A.), June 21, 2007, at 3 (describing efforts of lawyers Lainey Feingold and Linda Dardarian to get corporations and local governments to improve accommodations for the blind).

lic enforcement authorities have both the constitutional mandate and statutory obligation to vindicate civil rights. They should seek to do so in the most effective way possible, whether this involves litigation or other, less conventional methods. Below, I will demonstrate that as a practical matter, public enforcement authorities are well suited as a matter of presence and resources to play a strong role in new governance-type enforcement options.

Although this is a first step in applying new governance theory to civil rights law (and not an exhaustive treatment on the subject), I make some initial observations about its worth in the disability arena. In particular, I highlight two areas covered by the ADA where public enforcement authorities could actually take steps to decentralize ADA norm elaboration but potentially improve compliance.²⁴⁴

A. FORM AND STRENGTH OF NEW GOVERNANCE

In the fields of labor law and environmental law, amongst others, commentators have challenged the traditional modes of enforcement and regulation, advocating a diversification of the ways that enforcement officials interact with regulated entities.²⁴⁵ Sometimes (though not uniformly) referred to as new governance,²⁴⁶ this body of work challenges the predominance

244. “Norm” is used here the same way Professor Susan Sturm uses it; that is, moving from a general legal statement to a more specific one in which the law is translated into concrete change. Sturm, *supra* note 181, at 522 (“The structural approach to second generation problems calls for a dynamic and reciprocal relationship between judicially elaborated general legal norms and workplace-generated problem-solving approaches, which in turn elaborate and transform the understanding of the general norm.”).

245. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 6–7 (1997) (describing the promise of multistakeholder negotiation in the context of environmental law); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 229–31, 271 (2003) (explaining a new activist movement within school reform); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1231–32 (1995) (discussing an alternative method of environmental regulation). Without using the new governance label, Professor Susan Sturm applies many of the concepts associated with new governance theory to sex-based employment discrimination. See Sturm, *supra* note 181, at 461–63 (addressing increased participation by private actors, “internal problem-solving” within the workplace, and greater tailoring of regulation). To date, however, these principles have not been applied to disability law.

246. See Karkkainen, *supra* note 12, at 472 (using the term “New Governance”); Lobel, *supra* note 241, at 344 (using term “governance” while addressing the new governance model).

of “traditional” regulation, whereby certain enumerated practices are directly prohibited and a centralized enforcement agency implements and enforces the law, usually through adversarial litigation by that entity or by private actors.²⁴⁷ The goal of new governance theory is to get a broad range of stakeholders involved, including regulated entities, private interest groups, government enforcement agencies, and the class of people that the law is intended to benefit. Ideally, these various groups converge on a set of legal norms, and then utilize their collective energy in achieving effective and context-specific solutions.

New governance advocates believe this approach has several strengths. Litigation is adversarial, and any process with less focus on assigning blame is more likely to arrive at a mutually satisfying agreement. This can be particularly effective if the range of stakeholders—the regulated entities, enforcement officials, and the law’s beneficiaries—are all involved in discussing solutions.²⁴⁸ New governance’s premium on information sharing allows reforms and compliance schemes that work well for one actor to be passed on to other interested parties.²⁴⁹ In this way, a broader audience is reached and impacted than might be possible in litigation, and a continuous cycle of learning is created. Public enforcement officials, as well as private actors, can facilitate this process.²⁵⁰ Finally, the norm elaboration and refinement that occurs by multiparty nonadversarial talks can create behavior that pushes the bounds of what the law might otherwise more formally require.²⁵¹

247. In the literature, this is referred to as top down “hierarchy and control” regulation. *See, e.g.*, Lobel, *supra* note 241, at 344 (stating that the new governance model embodies greater participation and collaboration than the New Deal’s hierarchical system).

248. WILLIAM A. SHUTKIN, *THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY* 14–15 (2000); *see also* Lobel, *supra* note 241, at 374 (describing an increase in public and private sector interdependence).

249. *See* DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 232–34 (1992) (examining strategic planning that involves studying a company’s current situation and goals, developing a way to achieve those goals, and then measuring the result); *see also* Lobel, *supra* note 241, at 380–81 (stating that the new governance model creates incentives to share information to enable the comparison of various success levels of methods in similar situations).

250. *See* Sturm, *supra* note 181, at 512–14 (information tracking by private entities); *see also* Lobel, *supra* note 241, at 422–23 (information gathering by public officials).

251. This is the thrust of Professor Sturm’s argument within employment

Professor Orly Lobel's recent work on workplace safety regulation by the Occupational Safety Health Administration (OSHA) illustrates new governance principles, with an emphasis on the role played by public enforcement officials.²⁵² OSHA is responsible for promulgating regulations for workplace safety and for monitoring workplace compliance, primarily through inspections. Yet OSHA has traditionally underenforced its regulations; and to the extent that OSHA enforced its regulations through the traditional adversarial model, these efforts were criticized for punishing good faith efforts to move beyond compliance, and for diminishing the willingness of regulated entities to cooperate and learn.²⁵³ This was partly symptomatic of the fact that OSHA's one-size-fits-all rules did not fit all firms, especially in an era of fast production, small firms, and complex chains of authority.²⁵⁴ Professor Lobel presents recent OSHA initiatives as showing the potential successes of a new governance approach. These initiatives include incentives that offer a decreased chance of inspection for firms that were below the industry injury rate; OSHA partnerships with certain industries that allowed information sharing and steps to eliminate specific risks; and an increased emphasis on training and outreach programs.²⁵⁵ The existing, although incomplete, evidence reviewing these programs suggests that they have been successful. The Government Accounting Office concluded that the new cooperative strategies have improved safety and health practices, and allowed OSHA to play a "collaborative, rather than a policing, role with employers."²⁵⁶ Similarly, OSHA reports show a decrease in workplace injuries for firms partici-

discrimination law; courts, workplaces, employees, lawyers, and mediating organizations can work together to tackle "second-generation" discrimination in a way that courts have not under the operative legal framework of Title VII. See generally Sturm, *supra* note 181, at 461–63, 567–68.

252. See Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1073 (2005) ("[Governance encompasses] a range of innovative policy approaches, integrates cooperation into the core of regulatory relations and sensibly combines both choice and sanction . . . through a formalized structured legal framework.").

253. *Id.* at 1088–90.

254. *Id.* at 1093–95.

255. *Id.* at 1104–08.

256. U.S. GEN. ACCOUNTING OFFICE, WORKPLACE SAFETY AND HEALTH: OSHA'S VOLUNTARY COMPLIANCE STRATEGIES SHOW PROMISING RESULTS, BUT SHOULD BE FULLY EVALUATED BEFORE THEY ARE EXPANDED 43 (2004), available at <http://www.gao.gov/new.items/d04378.pdf>; see also Lobel, *supra* note 252, at 1108.

pating in these programs,²⁵⁷ and interviews with participating workplaces describe increased trust and better relationships with OSHA officials.²⁵⁸

New governance is not without its downside. There is a risk of co-option or exit, whereby the entities being regulated either opt out of the scheme entirely or are able to so influence the process that reforms become pretextual.²⁵⁹ Secondly, there is the problem of voice, which involves making sure that the beneficiaries of regulation sufficiently and meaningfully participate in the norms and rules that will impact them.²⁶⁰ Finally, new governance's reliance on soft law and actual track records in creating reform have been questioned,²⁶¹ although the great weight of new governance scholarship recognizes the value of traditional enforcement and regulation to complement "soft law" approaches.²⁶² Cognizant of these strengths and weaknesses, I now turn to explaining how new governance concepts have been and could be effectively imported into disability law.

B. CONCEPTUAL FIT OF THE ADA WITH NEW GOVERNANCE

In thinking about new governance and disability law, one is confronted with some initial choices. Some new governance thinking involves social situations that occur at a different point in time or space than the current state of disability law—

257. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKPLACE INJURIES AND ILLNESSES IN 2005 (2006).

258. Lobel, *supra* note 252, at 1109–10.

259. See Green, *supra* note 195, at 675 (2005) (describing co-option as a potential drawback of employer self-regulation); see also Lobel, *supra* note 252, at 1075–76 (asking if the state will return as regulator if public-private partnerships are ineffective).

260. Lobel, *supra* note 252, at 1076.

261. See Karkkainen, *supra* note 12, at 476–77 (“[B]y all accounts[,] the actual transition of new governance approaches to public problem solving thus far has been spotty. Innovations occur here and there, discernible within a number of disparate policy domains but dominant in few, and the outcomes of these scattered policy experiments remain ambiguous and contested. Even the most successful experiments have yet to be replicated widely, leaving them vulnerable to skeptics’ charge that their success depends upon factors unique to their own time, place, and fortuitous circumstances.” (citations omitted)); see also Jacqueline Savitz, *Compensating Citizens*, in BEYOND BACKYARD ENVIRONMENTALISM 65–69 (Joshua Cohen & Joel Rogers eds., 2000) (criticizing the softness of new governance); Bagenstos, *Structural Turn*, *supra* note 14, at 27–34.

262. See Karkkainen, *supra* note 12, at 486 (“[M]ost New Governance scholars acknowledge the necessity for some or many forms of ‘hardness’ in law, and would deviate from that, if at all, only by admitting ‘softness’ in one or a few aspects of the legal regime they envision.”).

for example, without a formal comprehensive statute.²⁶³ In this Article, I do not attempt to speculate as to what a world without the ADA might look like in terms of disability policy and regulation, although that would be an interesting thought exercise.

As a consequence of this choice, my primary focus will be on governance options that, while working within the general structure of the ADA, create opportunities to localize, decentralize, and increase the number of stakeholders who have a say in how regulated entities comply with the law. This does not diminish or eliminate the need for ADA litigation, although ADA cases may lose their role as the primary procedural vehicle for establishing and vindicating positive rights. Rather, I will highlight enforcement options that make the courts less of a vehicle to define rights, and instead provide the enforcement apparatus and backbone to more narrowly tailored and context-specific solutions.²⁶⁴

The legal and policy frameworks of the ADA are amenable to such an approach. From a textual perspective, the ADA essentially prohibits behavior by certain regulated entities that “discriminates” on the basis of disability. This prohibition comes in varying degrees of specificity, but there is enough interpretative and regulatory space to generate a fruitful discussion of nonlitigation enforcement alternatives.²⁶⁵ For example, the ADA’s central command prevents discrimination on the ba-

263. See Lobel, *supra* note 242, at 436–38 (describing how new governance principles underlie the legal rules for the internal Internet standard setting).

264. Other scholars use the litigation system to shift the locus of control from courts more directly to stakeholders. Professors Charles Sabel and William Simon, for example, suggest that while structural litigation traditionally focused on “command and control” type consent decrees, the movement is toward “decrees” that emphasize broad “goals and methods of monitoring achievement.” Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1025–26 (2004); see also Green, *supra* note 195, at 678–83 (suggesting, alternatively, doctrinal and administrative options going beyond legal rights to combat work culture discrimination).

265. For example, to the extent that the ADA was merely a laundry list of very specific physical modifications that certain classes of regulated parties had to make, any discussion of how new governance might enforce—as opposed to create—those rules would be somewhat stilted. Either entities comply or face lawsuits by private or public forces seeking to make them perform required statutory changes. Generally speaking, however, the ADA is not this binary. See *infra* notes 266–72 and accompanying text.

sis of disability.²⁶⁶ Within the statute, however, there is flexibility in executing this role. For example, even within employment law (which is one of the most detailed parts of the statute), an employer must reasonably accommodate a qualified employee with a disability.²⁶⁷ How an employer internally manages that process, however, is largely left up to that employer. To a significant extent, employers and employees must discern for themselves what constitutes a “reasonable accommodation,” or invoke the power of the courts to decide the issue for them.²⁶⁸ Similarly, while public entities must meet the program access standard, meaning that programs, services, and activities must be accessible when viewed in their entirety,²⁶⁹ it is largely up to the public entity to determine how to do so.²⁷⁰ Finally, under Title III of the ADA, all new construction must conform to the United States Access Board’s ADA Accessibility Guidelines.²⁷¹ But these guidelines contain a provision allowing departure from the technical requirements “where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility.”²⁷² All of this creates the opportunity for more flexible, context-specific solutions that can be arrived at through collaborative

266. See 42 U.S.C. § 12112(a) (2000) (“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”); see also *id.* § 12132 (“Subject to the provisions of this subchapter, 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.”); *id.* § 12182 (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

267. *Id.* § 12112(b)(5)(A).

268. See 29 C.F.R. § 1630.2(o)(2) (2007) (suggesting that “reasonable accommodation may include” altering facilities so that they may be used, changing job opportunities, and engaging the employee to determine his or her limitations). Even the employer’s “interactive process” engagement with the employee is a creation of administrative regulation. *Id.*

269. 28 C.F.R. § 35.150(a) (2007).

270. *Id.* § 35.105 (requiring every public entity to complete a self-evaluation of their services, programs, and practices, and develop a transition plan to make any necessary modifications).

271. See 42 U.S.C. § 12183(a)(1) (2000); see also 28 C.F.R. pt. 36, app. A, § 4.1.3 (2007) (“Accessible Buildings: New Construction”).

272. 28 C.F.R. pt. 36, app. A, § 2.2 (2007) (“Equivalent Facilitation”).

problem solving, even within the context of traditional litigation.

There are additional reasons that disability law would be supported by a move away from courts and lawsuits. In all of its forms, litigation under antidiscrimination law is primarily a search for blameworthy actors.²⁷³ Yet the ADA, perhaps to a unique extent in antidiscrimination law, can be seen as incorporating a vision of distributive justice.²⁷⁴ In all of its titles, the ADA assigns costs to public and private actors who may harbor no animus toward people with disabilities. The cost of accommodating these individuals and creating access where before there was none is statutorily designed to be borne by a broad range of actors, including private employers, owners of privately owned places of public accommodation, or individual state and local governments. Forms of regulation that focus less on blame may be better suited to distributive goals than litigation.²⁷⁵

Finally, many of the criticisms of traditional “command and control” top-down regulation apply to ADA enforcement. In other fields, new governance scholars have criticized public regulation as creating both over- and underregulation and enforcement.²⁷⁶ The problem of ADA underenforcement has been discussed above: there is very little real risk of employers or businesses being sued for violating the ADA, and even less of a chance such a lawsuit would be brought by a public enforcement official.²⁷⁷ Yet there is also at least perceived overen-

273. See Julie Chi-Hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 420–23 (stating that blameworthiness is included as an element in the Supreme Court’s finding of discrimination).

274. *Id.* at 426–27. Although Professor Suk only discusses reasonable accommodation under Title I of the ADA, the basic concept can and should be applied to the ADA more globally. All three of the ADA’s titles move beyond traditional conceptions of “equal treatment” and include reasonable accommodations requirements. See 28 C.F.R. § 35.130(b)(7) (2007) (reasonable modification under Title II); see also 42 U.S.C. § 12182(b)(2)(A)(ii) (2000) (reasonable modification under Title III).

275. See Suk, *supra* note 273, at 473 (arguing that administrative regulation is better suited to distributive goals than litigation because it can be more nuanced and is less focused on traditional concepts of blameworthiness of individual actors).

276. See Lobel, *supra* note 252, at 1086–92 (arguing that OSHA’s regulatory and enforcement causes practice under regulation and enforcement).

277. In 2006, for example, the EEOC received 15,575 disability charges. See EEOC, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES FY 1997–FY 2006, <http://www.eeoc.gov/stats/ada-charges.html> (last visited Nov. 5, 2007). They litigated forty-two ADA cases in 2006. See EEOC, EEOC Litiga-

forcement, evidenced by the business community's complaints about overly technical and difficult-to-understand architectural requirements.²⁷⁸ New governance theorists also criticize the traditional regulatory model as bogged down in ossified regulations and unresponsive to fast-moving market realities.²⁷⁹ Within disability law, Title I of the ADA has been criticized for having limited success in attacking "second-generation" subconscious discrimination.²⁸⁰ Similarly, the job security that the ADA is supposed to provide is of limited usefulness "in a world of reduced job security for everyone."²⁸¹

C. PRACTICAL APPLICATIONS

This Section first highlights several existing public-level programs that stress collaboration, information sharing, and flexibility. The Section then offers some critiques from new governance theory. Finally this Section proposes and discusses two somewhat more ambitious alternatives, both offered with an eye toward increasing the range of actors involved in and effectiveness of norm generation: (1) expanding administrative programs under the DOJ; and (2) applying doctrinal approaches from sexual harassment law to reasonable accommodation claims.

There are already some facets of the disability law and policy system that stress collaboration, cooperative interactions,

tion Statistics, FY 1997–FY 2006, <http://www.eeoc.gov/stats/litigation.html> (last visited Nov. 5, 2007). This might not be quite as extreme as the case of OSHA regulation. See *OSHA Reform: AFL-CIO Delegates Urge Congress to Act on Legislation to Amend Workplace Safety Law*, 23 O.S.H. Rep. (BNA) No. 20, at 527 (Oct. 13, 1993) (statement of John Sweeney) ("[I]n the 23 years [since] the OSHA law was passed, only one employer has gone to jail for willfully violating OSHA law and killing a worker. In the last 10 years, seven people have gone to jail for harassing wild burros on federal land."). It does show, however, that there is very little risk of an employer being sued for disability discrimination by the EEOC.

278. See Moxley, *supra* note 223, (criticizing a lawsuit for an improperly mounted bathroom mirror); see also Marjie Lundstrom & Sam Stanton, *Visionary Law's Litigious Legacy*, SACRAMENTO BEE, Nov. 12, 2006, at A1 (criticizing lawsuits for colors and wording of signs).

279. See Lobel, *supra* note 241, at 405 tbl.2 (characterizing the traditional regulatory model as "ossified," with a "rigid and fixed" view of the nature of law).

280. Travis, *supra* note 15, at 5–6; see also Sturm, *supra* note 181, at 468–74.

281. Samuel R. Bagenstos, *US Airways v. Barnett and the Limit of Disability Accommodation*, in *CIVIL RIGHTS STORIES* (Myriam Gilles & Risa Goluboff eds., forthcoming 2007), available at <http://ssrn.com/abstract=953759>.

and information sharing. The various ADA regulations, for example, were written with input from the disability law and business communities.²⁸² This process ensures that an array of stakeholders have a voice, if not an ultimate say, in regulations that will impact them. Public agencies have also attempted to distill the law's requirements into various user-friendly guides. The EEOC and DOJ all have helpful information on their websites that provides visitors with nonbinding suggestions for how to comply with the ADA.²⁸³ The EEOC has also made an effort to increase its outreach and training activities.²⁸⁴

The ADA also offers at least one concrete incentive for collaboration. The law provides that state and local governments can have their building codes certified by the DOJ as meeting or exceeding minimum accessibility guidelines.²⁸⁵ If they do, such governments receive a rebuttable presumption of compliance in any ADA Title III litigation.²⁸⁶ This increases the opportunity for collaboration and effective ex ante compliance. There have also been some efforts for public enforcement officials to serve as a clearinghouse for information. The EEOC

282. See Equal Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,726 (July 26, 1991) (to be codified at 29 C.F.R. pt. 1630) (noting that 2400 disability rights representative participated in the rulemaking process, and that various employer groups, individuals, and disability rights representatives submitted 138 comments to the EEOC); Press Release, United States Access Board, Access Board Issues New Guidelines for Accessible Design (July 23, 2004), available at <http://www.access-board.gov/news/ada-aba.htm> (explaining that the participation of a "cross section of stakeholders, including representatives from disability groups, the design profession, and building codes organizations" helped create a "historic level of harmonization" during the review of the ADA regulations).

283. ADA Home Page, <http://www.ada.gov/> (last visited Nov. 5, 2007); EEOC, Disability Discrimination, <http://www.eeoc.gov/types/ada.html> (last visited Nov. 5, 2007). Among other subjects, the EEOC handbooks discuss how attorneys, small businesses, and food service companies may provide reasonable accommodations for individuals with disabilities. See *id.* The DOJ's handbooks cover topics ranging from achieving van-accessible parking to providing disability accommodations in polling places. See ADA Home Page, *supra*.

284. See EEOC, Outreach, Education and Technical Assistance, <http://www.eeoc.gov/outreach/index.html> (last visited Nov. 5, 2007) (detailing the EEOC's training and outreach efforts).

285. 42 U.S.C. § 12188(b)(1)(A)(ii) (2000).

286. See *id.* The DOJ reports that it has certified codes in Texas, Maine, Florida, Maryland, and North Carolina, and has requests pending from California, Indiana, New Jersey, and Utah. U.S. Dep't of Justice, Additional Information on the Certification Process, <http://www.usdoj.gov/crt/ada/certinfo.htm> (last visited Nov. 5, 2007).

has stated a commitment to create stakeholder networks,²⁸⁷ including advocacy groups and community organizations, although it is unclear how extensive or effective these efforts have been. As part of his New Freedom initiative, President George W. Bush issued an executive order directing federal agencies to work with states to help them assess their compliance with the ADA.²⁸⁸ The result was DisabilityInfo.gov, which bills itself as “the federal government’s one-stop Web site for people with disabilities, their families, employers, veterans and service members, and many others.”²⁸⁹ Through its Program to Monitor ADA Litigation, the DOJ has recently made more of an effort to serve as a point of centralization for ADA litigation.²⁹⁰

Perhaps the best example of a sustained and effective collaborative approach to ADA enforcement is the DOJ’s Project Civic Access program under Title II.²⁹¹ Under this program, the DOJ identifies state and local governments and conducts compliance reviews. The DOJ has developed technical assistance materials to help communities come into compliance with Title II, and ultimately enters into settlement agreements to ensure such compliance. As of September 2007, the DOJ has entered into 155 settlement agreements with 144 localities in all 50 states.²⁹² This program serves as a repository of information gathering, and has allowed the DOJ to build a body of expertise in identifying and offering solutions for common problems with Title II compliance. Also, by negotiating with individual state and local governments, the DOJ can impact more communities than it could by using more expensive and time-consuming litigation. Further, the DOJ can tailor consent decrees that make sense for individual communities. Nevertheless, cities and towns are not lining up to participate; the state and local governments that participate in Project Civic Access are chosen by

287. See EEOC, PRIORITY CHARGE HANDLING TASK FORCE app. c (1998), available at http://www.eeoc.gov/aoubeeoc/task_reports/pch-lit.html.

288. Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 18, 2001).

289. Welcome to DisabilityInfo.gov, <http://www.disabilityinfo.gov/> (last visited Nov. 5, 2007).

290. See United States Dep’t of Justice, Program to Monitor ADA Litigation, <http://www.ada.gov/litmon.htm> (last visited Nov. 5, 2007).

291. See United States Dep’t of Justice, Project Civil Access Fact Sheet, <http://www.ada.gov/civicfac.htm> (last visited Nov. 5, 2007).

292. *Id.*

the DOJ, and not the other way around.²⁹³ Moreover, the consent decrees negotiated under Project Civic Access do not go beyond a bare minimum of statutory compliance.²⁹⁴ This is despite the fact that the program defines the ADA's goals more broadly than antidiscrimination, which seems to open the door for a broader dialogue.²⁹⁵

Ultimately, these developments trend in the direction of new governance without taking large steps. Two more aggressive approaches, both issue areas within the ADA, (1) offer little in the way of precise statutory guidance except for high level guarantees of protection from discriminatory behavior; (2) could benefit from individualized and contextualized solutions that would be more accepted by stakeholders than those that courts have been able to provide; (3) like many other areas of the ADA, are currently underenforced; and (4) are places where public enforcement authorities are uniquely positioned to provide leadership on nontraditional enforcement options.

The first alternative is Title II's broad mandate that public entities not discriminate on the basis of disability in the programs, services, and activities that they offer.²⁹⁶ This rather sparse statutory provision offers a unique opportunity for new governance principles to work. The law sets broad aspirations at a fairly general level, but leaves room for norm elaboration and defining.²⁹⁷ Yet the current system of underenforcement

293. *See id.* ("In most of these matters, the compliance reviews were undertaken on the Department's own initiative under the authority of Title II and, in many cases, section 504 of the Rehabilitation Act of 1973 because the governments receive financial assistance from the Department and are prohibited by the Act from discriminating on the basis of disability.")

294. They may even stop short of that. *See id.* ("During the investigations, staff of the Disability Rights Section reviewed compliance with *most* ADA requirements." (emphasis added)).

295. *See id.* ("The key goals of the ADA are to ensure that all people with disabilities have equality of opportunity, economic self-sufficiency, full participation in American life, and independent living.")

296. *See* 42 U.S.C. § 12132 (2000) ("Subject to the provisions of this subchapter, 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.")

297. The statute provides that the Attorney General will promulgate regulations to "implement" Title II, *see* 42 U.S.C. § 12134(a) (2000), which the DOJ has done, *see* 28 C.F.R. §§ 35.101–35.190 (2007). These regulations, while somewhat more specific than the actual statute, still leave ample room for specific norm generation. *See, e.g., id.* § 35.130(b)(1) ("[Public entities shall not] deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service.")

leaves too many states and counties free to essentially opt out of any meaningful reform.²⁹⁸ Some steps are needed to jump start reform and ensure accountability.

One option would be expanding the basic idea that is offered in the DOJ's Project Civic Access program. The DOJ could require public entities covered by Title II to submit self-evaluations and plans, demonstrating what modifications to accessibility they have already made and what they are planning to make.²⁹⁹ Rather than focusing on selected cities, the DOJ would essentially require public entities to more formally engage in the process. There is precedent for public enforcement authorities playing this type of screening and information-gathering role. The EEOC, for example, collects disability-related information from employers in its EEO-1 surveys.³⁰⁰ And the structure of § 5 of the Voting Rights Act involved states having to "pre-clear" changes to their voting systems with the DOJ.³⁰¹

The challenge would be to find the proper balance between using these reports to create opportunities for similar entities to learn from each other's decisions and progress, yet also still vesting ultimate coercive power with the DOJ if the plans reveal deficiencies. These plans need to be public, so as to create a centralized source of knowledge from which other public entities may learn. The value of this endeavor would be compromised if the risk of litigation was so great as to discourage hon-

298. See, e.g., Waterstone, *supra* note 61, at 1857–59 (describing how states exhibit "significant noncompliance" with Title II of the ADA).

299. This idea would be easy to implement. Since 2003, the DOJ's Title II regulations have required that public entities must complete self-evaluations of their services, policies, and practices, and develop a transition plan to make any necessary modifications. See 28 C.F.R. § 35.105a. Yet the opportunity for this exercise to stimulate discussion, reform, and learning was largely lost. Though the fact that these plans had to be publicly available for three years after they were written, *see id.*, there was no visible effort by the DOJ to use these plans as a basis for information sharing and dialogue, despite the Department's statutory mandate to "implement" Title II. See 42 U.S.C. § 12134 (2000).

300. The EEOC has been criticized for not systematically analyzing or sharing that information. See *supra* note 185; *see also* Sturm, *supra* note 181, at 551.

301. See 42 U.S.C. § 1973b (1970). True, this part of the Voting Rights Act has triggered contentious federalism objections. But what I am describing for ADA purposes is far less intrusive on state sovereignty; whereas section 5 of the Voting Rights Act requires states to actively petition the federal government before they make changes (to avoid incurring legal liability), state and local governments merely have to report on what they have done and are planning to do. *See id.*

est reporting and good faith efforts at innovation. It would also be harmful if, based on empty promises of future reform, derelict public entities were allowed complete amnesty when no progress was being made. In striking this balance, the guideposts should be process as well as outcome oriented. In preparing these plans, are public entities involved in meaningful discussions with different constituencies, including seeking the input of the disability community? Knowing that the ADA does not require absolute and perfect access to every facet of every governmental endeavor, have the parties made appropriate choices about priorities and direction? Do all parties seem satisfied (or equally unsatisfied) with the outcome and plan?

This proposal attempts to shift the locus of control from courts deciding what is or is not “discrimination,” an undertaking for which their capacity in the Title II context has been rightly criticized as inconsistent and insufficiently flexible.³⁰² Instead, the power is ideally put in the hands of stakeholders, allowing them the space to create solutions that are meaningful and acceptable to them. The DOJ—and the courts if necessary—serve as facilitators in this process and enforcers if need be. However, like others who express trepidation at the “softness” in new governance,³⁰³ one would be loathe to abandon the ultimate coercive authority of either the private or public attorney general. Without it, flexible enforcement options start to look more like opt out provisions.³⁰⁴

The second area where new governance theory could have a helpful impact on creating change involves reasonable accommodation claims. Here, the law provides a somewhat more

302. Compare *Am. Ass’n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226, 1236 (M.D. Fla. 2004) (holding that Florida Supervisor of Elections violated the regulations promulgated under the ADA by purchasing a voting system that was not readily accessible to people with disabilities without third-party assistance), with *Am. Ass’n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1126 (C.D. Cal. 2004) (“Nothing in the Americans with Disabilities Act or its Regulations reflects an intention on the part of Congress to require secret, independent voting.”).

303. See *supra* note 261 and accompanying text.

304. Within campaign finance law, for example, commentators have acknowledged some successes of the Federal Election Commission’s attempts to use new enforcement techniques, including conciliation, while noting that the Commission has maintained the ability to litigate if need be. See Bradley A. Smith & Stephen M. Hoerding, *A Toothless Anaconda: Innovation, Impotence, and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145, 146–51 (2002); see also Todd Lochner, *Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet Letter Approach to Campaign Finance Violations*, 2 ELECTION L.J. 23, 25–32 (2003).

definitive backdrop. The ADA explicitly confers a positive right on individuals with disabilities to a reasonable accommodation to allow them to perform their jobs.³⁰⁵ But the ADA is silent on what separates a reasonable accommodation from an unreasonable one.³⁰⁶ The doctrinal result is a rather inconsistent set of cases where judges attempt to delineate an imprecise line,³⁰⁷ despite having a limited set of statutory and policy tools for doing so.³⁰⁸ This uncertainty is further exacerbated by the fact that most ADA cases do not even make it to the point where a judge or jury will make a pronouncement as to a requested accommodation's reasonableness; rather, most cases are dismissed at the earlier summary judgment phase, often because a plaintiff cannot meet the statute's definition of disability.³⁰⁹

This state of affairs provides insufficient guidance or norm elaboration for the vast majority of accommodation request situations that never get anywhere near the courthouse.³¹⁰ This is an unsatisfying outcome, and one that fails to sufficiently tap into the law's transformative potential. How can the positive,

305. See 42 U.S.C. § 12112(b)(5)(a) (2000) (defining discrimination as the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").

306. See *id.* Congress specifically considered—and rejected—a more precise formula. See Burgdorf, *supra* note 85, at 518. Although this has been criticized as a weakness of the statute, see Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 390, 397 (1995), it allows for this type of norm-shifting from courts to a range of stakeholders.

307. Compare *Huber v. Wal-Mart Stores*, 487 F.3d 480, 484 (8th Cir. 2007) (holding that an employee with a disability must be reassigned to a vacant position as an accommodation only if the employee is the most qualified applicant for that position), with *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167 (10th Cir. 1999) (holding that reassignment under the ADA results in automatically awarding a position to a qualified disabled employee regardless of whether other, better-qualified applicants are available).

308. See Jeffrey O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 TUL. L. REV. 1207, 1217–24 (2000) (describing the limits of statutory interpretation in ADA cases).

309. Amy L. Allbright, *2005 Employment Decisions Under the ADA Title I—Survey Update*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 492, 492 (showing that in 2005, in 288 out of 401 Title I cases, employers won on motions for summary judgment or to dismiss due to plaintiff employee's failure to meet the requirements of a prima facie case of discrimination).

310. See Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 664–65 (arguing that antidiscrimination law is "seldom used by people who perceive themselves to be the target of workplace discrimination").

though imprecise guarantees in the ADA be more effectively utilized?

Under contemporary notions of class action litigation, reasonable accommodation cases are often viewed as so individualized that litigating them on a systemic basis has not proven effective.³¹¹ One answer, then, may lie in borrowing from doctrinal moves urged in sexual harassment law, and increasingly focusing on process in the reasonable accommodation context.³¹² Liability could be imposed on employers who do not have a fair and legitimate process for assessing the reasonableness of any requested accommodation. There is regulatory and case law support for such an approach. The EEOC's regulations already come down strongly on the side of making the reasonable accommodation request an "interactive process,"³¹³ and at least one circuit court has held that an employer who does not engage in the interactive process may be precluded from obtaining summary judgment on an ADA failure-to-accommodate claim.³¹⁴ If a court was called to do so, it could ultimately pass judgment on the reasonableness of a requested accommodation, but placing a doctrinal premium on the process could force employers to more seriously respond to requests for accommodation.

A more administrative-type proposal would involve employers submitting reports to the EEOC detailing their reasonable accommodation practices, including past responses to re-

311. See Stein & Waterstone, *supra* note 15, at 879–85 (explaining that under group-based discrimination theories, disability-based employment suits have proceeded on a largely individualized basis).

312. An employer may raise an internal antiharassment policy as a defense to a sexual harassment claim. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Some circuits have expressed this as a presumption that an employer has exercised reasonable care to prevent and correct sexual harassment. See, e.g., *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 268 (4th Cir. 2001). Finally, demonstration of good faith efforts to comply with Title VII is a defense to punitive damages. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999).

313. 29 C.F.R. § 1630.2(o)(3) (2007) (explaining that the interactive process should "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations").

314. See, e.g., *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000) (en banc), *vacated and remanded on other grounds sub. nom.* *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). Justice Stevens specifically noted that the Ninth Circuit "correctly held that there was a triable issue of fact precluding the entry of summary judgment with respect to whether [an employer violates the ADA] by failing to engage in an interactive process." *Barnett*, 535 U.S. at 407 (2002) (Stevens, J., concurring).

quests for accommodation and procedures for handling such requests. The template for this already exists; it would essentially be a more detailed version of the EEO-1 form that large employers are already required to file with the EEOC.³¹⁵ Like the Title II discussion above, there will be an issue regarding the level of coerciveness of these reports. Should they be voluntary, with perks (like a rebuttable presumption in the employer's favor in litigation) offered to employers that demonstrate innovative internal processes for dealing with disability at the hiring and reasonable accommodation stages (ideally arrived at with consultations with specialists like the Job Accommodation Network and/or disability community),³¹⁶ or have a demonstrated and constituent record of hiring employees with disabilities? Or should they be mandatory, with penalties or risk of litigation for deficient practices?

In any event, the focus of both the doctrinal and administrative approaches attempts to use the shadow of litigation to influence behavior outside of court in a way that stresses problem solving and bringing various stakeholders to the table. The goal is to move reasonable accommodation cases away from courts, where they tend to become zero-sum gain contests between adversaries, toward networks of employers, employees, and specialists who have the incentives to arrive at mutually agreeable *ex ante* solutions. In so doing, the hope would be that the conversation could be transformed from litigating highly individualized contentious cases toward efforts to create more disability-friendly workplaces.³¹⁷

315. See *supra* notes 185 & 300 and accompanying text.

316. The Job Accommodation Network is a free consulting service designed to "increase the employability of people with disabilities by: 1) providing individualized worksite accommodations solutions, 2) providing technical assistance regarding the ADA and other disability related legislation, and 3) educating callers about self-employment options." Job Accommodation Network, <http://www.jan.wvu.edu> (last visited Nov. 5, 2007).

317. Because the number of actual employees who will even file a claim with the EEOC, let alone bring a lawsuit, is so miniscule, the hope is that this self evaluation will benefit far more employees than could ever be impacted except through the mechanism of class and systemic litigation. See Nielsen & Nelson, *supra* note 310, at 664–65. For alternative solutions, see Green, *supra* note 195, at 679 (suggesting that individual claim for harassment could trigger "diagnostic investigation into the possibility that a broader discriminatory work culture" may exist); and Stein & Waterstone, *supra* note 15 (offering a litigation-based system for transforming individualized claims for accommodation into larger workplace reevaluations).

CONCLUSION

It is my hope that this Article will expand the dialogue on the enforcement of civil rights and antidiscrimination laws. Rights without remedies benefit no one, and laws that are systematically underenforced create a “hollow hope” that can impede other forms of social change. The existing discussion has focused on the limits of the private attorney general to enforce civil rights laws. The importance of private enforcement cannot be disputed, and it is imperative that judicial opinions limiting the ability of the private civil rights bar to sue acting in the public interest are reversed. But until that happens, and even thereafter, public enforcement should not be let off the hook so easily. In the past, public enforcement played a more important role in the enforcement of civil rights; and it is my hope that this can happen in the future.

To that end, I have focused on what a more effective public enforcement scheme should look like. Within the context of the ADA, this will vary across contexts. The first and most important piece is a public commitment to systemic litigation. The criteria for identifying areas where this should occur are where the profit motive for plaintiffs and private attorneys is low, noncompliance appears to be systemic, there is an absence of case development, and individual plaintiffs will have standing difficulties in challenging various forms of discrimination. Within disability law, I have presented two categories of cases—failure-to-hire and physical access cases—that fit this description. Outside of disability law, there are certainly others.

New governance also provides a theoretical foundation for evaluating other types of enforcement activity. Enforcement options that stress creative individualized solutions, collaborative problem solving with a diverse range of stakeholders, and effective information strategies deserve support. There are areas within the ADA that would benefit from more diverse yet localized norm elaboration. Ultimately, however, these more flexible alternatives need to be coupled with a consistent and clear commitment to systemic public litigation. The two parts of this paper should be understood as functioning together to improve public enforcement. In this way, the ADA can take its place amongst other civil rights statutes as having created opportunity and access for a previously excluded group.